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RAILWAY DECISIONS.

EMBRACING
*ALL THE CASES FROM THE EARLIEST PERIOD OF RAILWAY
LITIGATION TO THE PRESENT TIME*
IN THE
UNITED STATES, ENGLAND AND CANADA.

BY
STEWART RAPALJE
AND
WILLIAM MACK.

VOLUME VI.

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RAILWAY DECISIONS.

I

INTERSTATE COMMERCE.

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I. POWER OF CONGRESS TO REGULATE.

1. Power, generally.—The power to regulate commerce between the state extends, not only to the control of the navigable waters of the country and the lands under them for the purpose of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient. *Stockton v. Baltimore & N. Y. R. Co.*, 32 *Fed. Rep.* 9, 1 *Int. Com. Rep.* 411.

In carrying on foreign and interstate commerce, corporations, equally with individ-

uals, are within the protection of the commercial power of congress, and cannot be molested in another state by state burdens or impediments. *Stockton v. Baltimore & N. Y. R. Co.*, 32 *Fed. Rep.* 9, 1 *Int. Com. Rep.* 411.

Under the constitutional power of congress to regulate commerce among the states, the means of communication by land, as well as by water, are embraced, whenever the states fail to provide such means of communication, or when, in the opinion of congress, additional facilities for interstate communication are demanded. *Stockton v. Baltimore & N. Y. R. Co.*, 32 *Fed. Rep.* 9, 1 *Int. Com. Rep.* 411.

The power of congress to regulate commerce between the states is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws. In this matter the country is one, and the work to be accomplished is national; and state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states. *Stockton v. Baltimore & N. Y. R. Co.*, 32 *Fed. Rep.* 9, 1 *Int. Com. Rep.* 411.

The constitutional grant to congress of the power to regulate commerce among the states is not restricted or made subject to any condition whatever; and it is therefore full and complete, and any state action that would limit or hamper it is obviously an encroachment upon federal authority. *Leonard v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 599, 3 *Int. Com. Rep.* 241.

State regulations of local commerce are not binding rules for the regulation of interstate commerce. State action will always be treated with deference and respect, but cannot be allowed to control within the exclusive federal jurisdiction. *Leonard v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 599, 3 *Int. Com. Rep.* 241.

The constitution of the United States places the regulation of interstate commerce under federal jurisdiction, and the rates on interstate traffic may be regulated by federal authority with reference to trade conditions and the circumstances of localities, without infringing any of its rights or immunities under the constitution. *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 *Int. Com. Rep.* 400, 4 *Int. Com. Rep.* 417.

The absolute power to regulate such commerce is in congress and the only freedom

of commerce is the freedom from burdens and regulations other than those imposed by congress, or pursuant to its authority. *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 *Int. Com. Rep.* 400, 4 *Int. Com. Rep.* 417.

2. Power to authorize interstate railroads.—Congress has authority, in the exercise of its power, to regulate commerce among the several states, to construct, or authorize individual corporations to construct, railroads across the states and territories of the United States. *California v. Central Pac. R. Co.*, 33 *Am. & Eng. R. Cas.* 451, 127 *U. S.* 1, 8 *Sup. Ct. Rep.* 1073.—FOLLOWING *Pacific R. Removal Case*, 115 *U. S.* 1.—QUOTED IN *Cherokee Nation v. Southern Kan. R. Co.*, 44 *Am. & Eng. R. Cas.* 26, 135 *U. S.* 641. REVIEWED IN *United States v. Southern Pac. R. Co.*, 14 *Sawyer (U. S.)* 620.

3. How far the national power is exclusive.—The fact that congress has not seen fit to prescribe any specific rules to control or regulate the transportation of goods from a place in one state to a place in another—interstate commerce—does not empower the states of the Union to regulate such commerce. Its inaction on the subject, when considered with reference to its other legislation, is equivalent to a declaration that interstate commerce shall be free and untrammelled. *Hardy v. Atchison, T. & S. F. R. Co.*, 18 *Am. & Eng. R. Cas.* 432, 32 *Kan.* 698, 5 *Pac. Rep.* 6.—COMMENTING ON *Peik v. Chicago & N. W. R. Co.*, 94 *U. S.* 164; *Munn v. Illinois*, 94 *U. S.* 138; *Chicago, B. & Q. R. Co. v. Iowa*, 94 *U. S.* 155. CRITICISING *People v. Wabash, St. L. & P. R. Co.*, 104 *Ill.* 476. QUOTING *Welton v. Missouri*, 91 *U. S.* 275; *Hannibal & St. J. R. Co. v. Husen*, 95 *U. S.* 465; *Hall v. De Cuir*, 95 *U. S.* 485; *Western Union Tel. Co. v. Texas*, 105 *U. S.* 460; *Pacific Coast Steam-Ship Co. v. Board of Railroad Com'rs*, 18 *Fed. Rep.* 10.

The states have the right to decide as to how best to improve highways, whether land or water, subject to the control of congress when they become the means of interstate commerce. *Huse v. Glover*, 119 *U. S.* 543, 7 *Sup. Ct. Rep.* 313.—FOLLOWED IN *Rhea v. Newport News & M. V. R. Co.*, 52 *Am. & Eng. R. Cas.* 657, 50 *Fed. Rep.* 16. REVIEWED IN *Stockton v. Powell*, 29 *Fla. I.*

The power of congress over interstate commerce is exclusive only when its subjects

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are national in character. *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 *Sup. Ct. Rep.* 592.—QUOTED IN *State v. Woodruff S. & P. Coach Co.*, 33 Am. & Eng. R. Cas. 476, 114 Ind. 155.

II. WHAT IS DEEMED INTERSTATE COMMERCE.*

4. Generally.—Where property has lawfully commenced to move as an article of commerce from one state to another, that moment it becomes the subject of interstate commerce, and as such is subject only to national regulation. *Bennett v. American Exp. Co.*, 49 Am. & Eng. R. Cas. 64, 83 *Me.* 236, 22 *Atl. Rep.* 159.

The same is true in relation to whatever agency may be used as the means of transporting such commodities as may lawfully become the subject of purchase, sale, or exchange, under the commerce clause of the constitution of the United States. *Bennett v. American Exp. Co.*, 49 Am. & Eng. R. Cas. 64, 83 *Me.* 236, 22 *Atl. Rep.* 159.

5. Transportation of freight from one state to another.—A transportation of freight from the interior of Illinois to a point in New York, under one contract, and by one voyage, is "commerce among the states," even as to that part of the voyage which lies wholly in Illinois. *Wabash, St. L. & P. R. Co. v. Illinois*, 26 Am. & Eng. R. Cas. 1, 118 U. S. 557, 7 *Sup. Ct. Rep.* 4.—REVIEWING *Munn v. Illinois*, 94 U. S. 133; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164.—APPROVED IN *Com. v. Housatonic R. Co.*, 27 Am. & Eng. R. Cas. 31, 143 *Mass.* 264. DISTINGUISHED IN *Louisville, N. O. & T. R. Co. v. Mississippi*, 41 Am. & Eng. R. Cas. 36, 133 U. S. 587, 10 *Sup. Ct. Rep.* 348; *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 *Miss.* 662, 6 *So. Rep.* 203. FOLLOWED IN *Fargo v. Michigan*, 121 U. S. 230; *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 *Fed. Rep.* 16. QUOTED IN *Wigton v. Pennsylvania R. Co.*, 20 *Phila. (Pa.)* 184; *Norfolk & W. R. Co. v. Com.*, 88 *Va.* 95.—*Ex parte Koehler*, 30 Am. & Eng. R. Cas. 71, 12 *Sav. y.* 341, 30 *Fed. Rep.* 867, *Baird v. St. Louis, I. M. & S. R. Co.*, 42 Am. & Eng. R. Cas. 281, 41 *Fed. Rep.* 592, *Sweatt v. Boston, H. & E. R. Co.*, 3 *Cliff. (U. S.)* 339.

* What constitutes interstate commerce, see note, 45 Am. & Eng. R. Cas. 14; 49 *Id.* 60.

The statute making it unlawful to kill or to have in one's possession deer and other game at certain seasons of the year does not apply to a railroad company which receives such game as a common carrier; and where such game is received by the carrier to be carried to a point in another state it becomes interstate commerce, and subject only to national regulation, and not to the police power of the state. *Bennett v. American Exp. Co.*, 49 Am. & Eng. R. Cas. 56, 83 *Me.* 236, 22 *Atl. Rep.* 159.

6. Property carried on through bills on ocean vessel between ports of same state.—Congress has power to regulate the liability of owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between places in the same state, where such vessel is but one of connecting carriers, and is carrying goods on through bills of lading, destined for other states or foreign countries. *Lord v. Goodall, N. & P. Steamship Co.*, 4 *Sawy. (U. S.)* 292; *affirmed in 102 U. S.* 541.

A party using, for the transportation of his goods, an instrument of commerce, which is subject to the regulating power of congress, must use it subject to all the limitations imposed upon its use by congress. *Lord v. Goodall, N. & P. Steamship Co.*, 4 *Sawy. (U. S.)* 292; *affirmed in 102 U. S.* 541.

7. One of connecting carriers.—A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state into other states, is engaged in the business of interstate commerce. *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114, 10 *Sup. Ct. Rep.* 958.

8. Temporary detention of interstate freight.—Where fruit growers ship to their agent in the same state for re-shipment, and the fruit is immediately forwarded to other states, it is interstate commerce and not subject to state control. *Cutting v. Florida R. & N. Co.*, 46 *Fed. Rep.* 641.—FOLLOWING *The Daniel Ball*, 10 *Wall. (U. S.)* 557.

Where coal destined for a point outside the state is temporarily detained at a point within the state, such detention does not so interrupt the transit as to make the transportation of such coal local and not interstate commerce. *Delaware & H. Canal*

Co. v. Com., (Pa.) 37 *Am. & Eng. R. Cas.* 359, 17 *Atl. Rep.* 175.

It was attempted to subject a steamer to federal control which was engaged in shipping goods marked for other states; but it was objected that the vessel transportation was entirely within the limits of the state, and that it did not run in connection with, or in continuation of, any line of vessels or railway leading to other states, and is therefore engaged in domestic commerce. *Held*, that so far as the vessel was employed in transporting goods destined for other states, or goods brought from without the state and destined to places within it, it was interstate commerce. The fact that the goods stopped at either end of the route until taken up by an independent carrier made no difference. *The Daniel Ball*, 10 *Wall. (U. S.)* 557.

9. Telegraph business between states.—Telegraph business between states is interstate commerce and cannot be regulated by the states. *Western Union Tel. Co. v. Pendleton*, 122 *U. S.* 347, 7 *Sup. Ct. Rep.* 1126.—*REVIEWED IN Bagg v. Wilmington, C. & A. R. Co.*, 109 *N. Car.* 279.

10. Freights between points in same state, but passing through another state.*—Where the point of shipping and the point of destination are both in the same state it is domestic commerce, though the goods may pass en route through another state, and are therefore subject to state taxation or control. *Lehigh Valley R. Co. v. Pennsylvania*, 53 *Am. & Eng. R. Cas.* 679, 145 *U. S.* 192, 12 *Sup. Ct. Rep.* 806.—*EXPLAINING* *Coe v. Errol*, 116 *U. S.* 517; *Lord v. Goodall, N. & P. Steamship Co.*, 102 *U. S.* 541.—*Campbell v. Chicago, M. & St. P. R. Co.*, 86 *Iowa* 587, 53 *N. W. Rep.* 351.—*FOLLOWING* *Lehigh Valley R. Co. v. Pennsylvania*, 145 *U. S.* 192, 12 *Sup. Ct. Rep.* 806. *QUOTING* *Welton v. Missouri*, 91 *U. S.* 280; *Mobile County v. Kimball*, 102 *U. S.* 702; *Gibbons v. Ogden*, 9 *Wheat. (U. S.)* 189.—*Com. v. Lehigh Valley R. Co.*, (Pa.) 17 *Atl. Rep.* 179. *Com. v. Lehigh Valley R. Co.*, 129 *Pa. St.* 308, 18 *Atl. Rep.* 125.

But for a decision by the interstate com-

* As to whether a shipment between points in the same state, but passing through another state, is interstate commerce, see note, 17 *L. R. A.* 443.

Power of commissioners to fix charges on railroads crossing and recrossing state line, see 55 *AM. & ENG. R. CAS.* 547. *abstr.*

merce commission that such shipment is interstate commerce, see *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

Whether joint rates affecting only traffic between cities of the same state, but involving the transportation of freight from one city to the other by a railroad company organized under the laws of the state, whose route lies partly in another state, and which, in the course of such transportation, carries the merchandise within the jurisdiction of the other state, would be a regulation of interstate commerce, *quere. Burlington, C. R. & N. R. Co. v. Dey*, 45 *Am. & Eng. R. Cas.* 391, 82 *Iowa* 312, 48 *N. W. Rep.* 98.—*REFERRING TO* *Com. v. Lehigh Valley R. Co.*, (Pa.) 17 *Atl. Rep.* 179; *State v. Chicago, St. P., M. & O. R. Co.*, 40 *Minn.* 267, 41 *N. W. Rep.* 1047.

Where the shipment of live stock is between two points in the state, the fact that the yards where the cattle are unloaded extend into another state, and the office of the consignee where the cattle are unloading is in the other state, does not convert the transaction into interstate commerce. *Scammon v. Kansas City, St. J. & C. B. R. Co.*, 41 *Mo. App.* 194.

III. THE INTERSTATE COMMERCE ACT.

1. General Rules for Construction of.

11. Construction of act, generally.*—The commission created by the interstate commerce act has no power to construe or apply the act except upon an actual violation of its provisions by a carrier subject thereto. *In re Order of Railway Conductors*, 1 *Int. Com. Rep.* 18. *Holbrook v. St. Paul, M. & M. R. Co.*, 1 *Int. Com. Rep.* 323.

And where a complaint of violation is made and the company appears and declares its purpose to comply with the law, the commission will assume that it will do so, and act accordingly until it has evidence to the contrary. *Holbrook v. St. Paul, M. & M. R. Co.*, 1 *Int. Com. Rep.* 323.

The commission has not been given a general dispensing power to relieve hardships under the law, but its power in that

* Annotated interstate commerce act, see note, 27 *AM. & ENG. R. CAS.*, *app'x.*

Various provisions of interstate commerce act construed, see note, 2 *L. R. A.* 444.

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regard is strictly and carefully limited. *In re Iowa Barb Steel Wire Co.*, 1 *Int. Com. Rep.* 605, 1 *Int. Com. Com.* 17.

Rates on interstate traffic may be regulated by federal authority, with reference to trade conditions and circumstances of localities. *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 *Int. Com. Rep.* 400, 4 *Int. Com. Com.* 417.

12. Orders for suspension of operation of act.—The provision of section 4 of the act to the effect that the commission may, "in special cases, after investigation," authorize carriers to charge less for longer than for shorter distances, is only intended to apply to exceptional cases, and where only general reasons operate, the general law should be left to its general course, however serious may be the consequences in particular cases, and to particular roads and interests. *Jurisdiction of Commission*, 1 *Int. Com. Rep.* 73.

The incidental injuries that may arise from enforcing the above provision must be borne for the public good, until congress provides a remedy. *Jurisdiction of Commission*, 1 *Int. Com. Rep.* 73.

The mere probability, or even certainty, that injury will result to corporations or to individuals is not in itself ground for suspension of the ordinary operations of the provision. *Jurisdiction of Commission*, 1 *Int. Com. Rep.* 73.

The above provision, allowing the commission to suspend the ordinary operations of the statute, is to be closely restricted, and the suspension should only be based on an investigation which would satisfy the commission that the case is, in fact, exceptional and fairly within the intent of the statute. *Jurisdiction of Commission*, 1 *Int. Com. Rep.* 73.

13. When construction of English act adopted.—The act, having adopted substantially the English Railway Traffic Acts of 1854 and 1845, §§ 2 and 90, the settled construction which the English courts had given to their terms and provisions must be received and incorporated into the American statute. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 *Fed. Rep.* 37; affirmed in 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844.—FOLLOWING McDonald *v. Hovey*, 110 *U. S.* 619, 4 *Sup. Ct. Rep.* 142.

So the term "undue preference" occurring in both statutes, and having been defined

by English decisions, before the adoption of the American statute, the expression in the American statute must be understood as defined by the English decisions. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 *Fed. Rep.* 37; affirmed in 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844.

2. Powers and Duties of Commission.

14. Power of congress to create.—There is no valid ground for questioning the authority of congress, under its sovereign and exclusive power to regulate commerce among the states, to create commissions for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *Int. Com. Rep.* 351, 2 *L. R. A.* 289.

And the same reason that would support the power of the states to create commissions for the control of commerce, which is entirely subject to their jurisdiction, would support the power of the United States to create a like commission for the control of commerce, which comes within its exclusive authority. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *Int. Com. Rep.* 351, 2 *L. R. A.* 289.

15. May institute investigations without formal complaint.—Under section 13 of the act, giving the commission power to institute an inquiry on its own motion, it has authority to institute investigations and to deal with violations of the law independently of a formal complaint, or of direct damage to a complainant. *In re Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 496, 3 *Int. Com. Com.* 89.

16. Power over rates, generally.*—The act does not confer upon the commission the power to make rates generally, but to determine only whether rates imposed by railroads are in conflict with the statute. *Thatcher v. Fitchburg R. Co.*, 1 *Int. Com. Rep.* 356.

The commission has no power to order carriers, not parties to the proceeding, to raise their rate to overcome a deficiency in the cost of production of an article now existing, against the petitioner. *Poughkeepsie Iron Co. v. New York C. & H. R. R. Co.*, 3 *Int. Com. Rep.* 248, 4 *Int. Com. Com.* 195.

* Jurisdiction and power of interstate commerce commission, see note, 2 *L. R. A.* 416.

Where a miner and shipper of coal complains of a railroad company that is also a miner and carrier of coal, the commission cannot compel the company to keep separate accounts of what it costs for the transportation of its coal, so as to prevent unjust discrimination against the individual. *Haddock v. Delaware, L. & W. R. Co.*, 3 *Int. Com. Rep.* 302, 4 *Int. Com. Com.* 296.

17. Power to compel use of cars of a certain kind.—The act does not give the commission jurisdiction to order the carrier to furnish any particular equipment of cars, or in fact any cars at all. The latter part of section 3 only applies to furnishing proper facilities for the interchange of traffic between connecting lines. *Scofield v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 67, 2 *Int. Com. Com.* 90. *Rice v. Cincinnati, W. & B. R. Co.*, 3 *Int. Com. R. p.* 841, 5 *Int. Com. Com.* 193.—ADHERING TO *Schofield v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 67, 2 *Int. Com. Com.* 116.

The provision of section 3 does not intend to give the commission power to compel railroad companies to receive and run the cars of a private car company over its line, or to contract with the owners of such cars for the use thereof. *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 792, 3 *Int. Com. Com.* 577.

A company may acquire cars by construction, by purchase, or by contract for their use, and no one has the power to compel a company to select among these several modes or to contract with all newcomers. *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 792, 3 *Int. Com. Com.* 577.

The public is only interested in whether passenger cars belong to the carrier or are obtained from a car company in so far as the cars are safe, comfortable, furnished at reasonable rates alike to all, and without unjust discrimination. The law-making power has not undertaken to divide the responsibility with a carrier in the selection of cars, nor has it clothed the commission or any other tribunal with such power. *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 792, 3 *Int. Com. Com.* 577.

Perhaps nothing would be more opposed to the rights and safety of the traveling public, as well as of the railroad company, than that the line of the carrier should become an arena over which it should be com-

pelled to make a contract of some sort with every car company or inventor of cars, and transport the public in trains of which such cars were part. *Worcester Excursion Car Co. v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 792, 3 *Int. Com. Com.* 577.

18. Power to order through routes or rates.—A court of equity has no power, either at common law or under the interstate commerce act, to compel a railroad company to enter into a contract with another company for a joint through rate and joint through routing of freight and passengers. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 42 *Am. & Eng. R. Cas.* 490, 41 *Fed. Rep.* 559.—FOLLOWING *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 3 *Int. Com. Com.* 1.—QUOTED IN *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 56 *Fed. Rep.* 925.

The act does not require connecting interstate carriers to issue through tickets or through bills of lading in the absence of such arrangements between the companies. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.—APPLYING *Chicago & A. R. Co. v. Pennsylvania R. Co.*, 1 *Int. Com. Rep.* 294. FOLLOWING *Union Pac. R. Co. v. United States*, 117 *U. S.* 355, 6 *Sup. Ct. Rep.* 772.—*Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 2 *Int. Com. Rep.* 454, 3 *Int. Com. Com.* 1.—FOLLOWED IN *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.*, 42 *Am. & Eng. R. Cas.* 490, 41 *Fed. Rep.* 559. REVIEWED IN *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 47 *Fed. Rep.* 771.—*Mattingly v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 806, 3 *Int. Com. Com.* 592. *Capehart v. Louisville & N. R. Co.*, 3 *Int. Com. Rep.* 278, 4 *Int. Com. Com.* 265.

The commission cannot compel a rail carrier to receive freight from, or deliver it to, a steamboat with which it has refused to make a through rate and to do through billing, upon the prepayment of charges for an estimated proportion of a through rate, equal in amount to that which the rail carrier receives from a steamboat line with which it has an arrangement for through rates and through billing. *Capehart v. Louisville & N. R. Co.*, 3 *Int. Com. Rep.* 278, 4 *Int. Com. Com.* 265.

Carriers by water are not in terms brought under the regulation of the interstate com-

merce act, to which carriers by rail are subjected, except "when both are used under a common control, management, or arrangement for a continuous carriage or shipment"; therefore the commission is not empowered to compel a railroad company to enter into arrangements with carriers by water for through carriage at through rates. *In re Joint Water & Rail Lines*, 2 Int. Com. Rep. 486, 2 Int. Com. Com. 645.

The fact that a carrier by rail has made an arrangement for through rates on one of its branches with a carrier by water, does not subject it to a charge of unjust discrimination if it refuses to make such arrangement on other parts of its road, especially where it appears that it already has an arrangement for a more direct route at the same rates. *In re Joint Water & Rail Lines*, 2 Int. Com. Rep. 486, 2 Int. Com. Com. 645.

Where several railroads each cross or touch a navigable river, leaving a large territory along and near the river and between their lines that can be served only by steamboats, and in connection with steamboats these rail carriers carry freight to and receive it from this territory at points where they touch or cross the river respectively, they may make through rates with only one line of steamboats, and refuse to make such through rates with other steamboats, on the river, and this is neither unjust discrimination nor unlawful preference. *Capehart v. Louisville & N. R. Co.*, 3 Int. Com. Rep. 278, 4 Int. Com. Com. 265.

19. Power over transactions before passage of the act.—The act does not afford a remedy for transactions occurring before it took effect. *Ottinger v. Southern Pac. R. Co.*, 1 Int. Com. Rep. 607, 1 Int. Com. Com. 144.

The commission has no power to enforce a contract. So it cannot assume control of an alleged violation of the terms of a contract entered into before the commission was created, between a traders' and travelers' association and the carrier, by which the members of the association secured certain rights in the transmission of baggage. *Traders & T. Union v. Philadelphia & R. R. Co.*, 1 Int. Com. Rep. 371, 1 Int. Com. Com. 122.

The commission has no power to compel a carrier to answer for a wrong committed before the adoption of the act. *Holbrook v.*

St. Paul, M. & M. R. Co., 1 Int. Com. Rep. 323.

A complaint is fatally defective which charges a railroad company with a wrong prior to the passage of the act, but fails to state any violation of the law after its passage. *White v. Michigan C. R. Co.*, 2 Int. Com. Rep. 641, 3 Int. Com. Com. 281.

20. Power over pre-existing contracts — Constitutionality of act.—The interstate commerce act is a police regulation, and the fact that it might prevent the enforcement of pre-existing contracts does not affect its validity, or make it, in a constitutional sense, a law impairing the obligation of contracts. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 Int. Com. Rep. 102, 2 Int. Com. Com. 162. *Bullard v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 234, 10 Mont. 168, 25 Pac. Rep. 120.

The provision prohibiting discrimination is applicable to contracts made prior to its enactment. And a contract made by an interstate carrier prior to the passage of the act is invalid, if it provides for lower rates for the transportation of property than those made to the public generally for like services. *Southern Wire Co. v. St. Louis B. & T. R. Co.*, 38 Mo. App. 191.—QUOTING *Reichschild v. Wabash R. Co.*, 15 Mo. App. 242. REVIEWING *Christie v. Missouri Pac. R. Co.*, 94 Mo. 453.

Under the provisions prohibiting unjust discrimination by common carriers, a contract made prior to the passage thereof for the transportation of freight under terms and at rates contrary to the provisions of the law, cannot be enforced against the carrier to recover rebates due upon freight carried after the law had taken effect. *Bullard v. Northern Pac. R. Co.*, 45 Am. & Eng. R. Cas. 234, 10 Mont. 168, 25 Pac. Rep. 120.—QUOTING *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 34 Am. & Eng. R. Cas. 630, 1 Int. Com. Rep. 703; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1.

3. Carriers Subject to.

21. Generally.—The act is intended to regulate all the commerce subject to the exclusive jurisdiction of congress, including the agents and instrumentalities employed and the commodities carried, with only the limitations found in the act itself. *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. Com. 592.

Goods shipped from one state to another are interstate traffic, and all the roads forming a part of the line over which they are carried are subject to the act. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 *Int. Com. Rep.* 682, 4 *Int. Com. Com.* 744.

A railroad company whose line is entirely within one state becomes subject to the act where it issues through bills of lading over connecting lines to points in other states, and makes through rates. *In re Annapolis, W. & B. R. Co.*, 1 *Int. Com. Rep.* 315.

A short road entirely in one state, but used as a means of conducting interstate traffic by connecting interstate roads, is subject to the act. *Heck v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Rep.* 775, 1 *Int. Com. Com.* 495.

When a carrier in one state engages in interstate commerce, it becomes a national agency and subjects itself to the provisions of the interstate commerce act for all the legitimate purposes of such commerce, and must accept and forward the traffic offered indifferently, without unjust discrimination or undue preference. *Mattingly v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 806, 3 *Int. Com. Com.* 592.

22. Carriers under "a common control, management, or arrangement."—The act does not include or apply to all carriers engaged in interstate commerce, but only such as use a railway, or a railway and water craft, "under common control, management, or arrangement for a continuous carriage or shipment" of property from one state to another; nor does it apply to the carriage of property by rail wholly within the state, although shipped from or destined to a place without the state, so that such place is not in a foreign country. *Ex parte Koehler*, 30 *Am. & Eng. R. Cas.* 71, 30 *Fed. Rep.* 867, 12 *Sawyer. (U. S.)* 341.

To come within the meaning of the words "common control, management, or arrangement for a continuous carriage or shipment," as used in section 1 of the act, there need not be a control of the through line centred in a single source of authority, but if the different carriers have invited interstate traffic over their roads, which is intended to be continuous, and have arranged their business so that the continuity of the shipment shall be preserved, and have combined their several lines, and by preparatory

measures have provided for the reception, carriage, and delivery of the traffic, it comes within the statute. *Boston F. & P. Exch. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 493, 4 *Int. Com. Com.* 664.

So where an initial carrier furnishes a shipper with a car specially fitted up for carrying fruit, and it is transported over the different lines without breaking the bulk of the car-load, and through time-tables are adopted so as to hasten the transit, and a single freight charge is made, but divided between the carriers according to contract between themselves, the shipment is within the meaning of the above section. *Boston F. & P. Exch. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 493, 4 *Int. Com. Com.* 664.

The phrase "common control, management, or arrangement for continuous carriage or shipment" in the first section of the act is intended to cover all interstate traffic carried through over all rail or part water and part rail lines. *Georgia R. Commission v. Clyde Steamship Co.*, 5 *Int. Com. Com.* 324.

The total rate for through carriage over two or more lines, whether made by the addition of established locals, or of through and local rates, or upon a less proportionate basis, is the through rate that is subject to scrutiny by the regulating authority; how the rate is made is only material as bearing upon the legality of the aggregate charge, and how any reduction may be accomplished is a matter for the carriers to determine among themselves. *Georgia R. Commission v. Clyde Steamship Co.*, 5 *Int. Com. Com.* 324.

The "arrangement," within the meaning of the above section, for the continuous carriage or shipment is complete whenever the carriers have arranged for delivering and receiving through traffic to and from each other, and such arrangement is necessarily "common." *Georgia R. Commission v. Clyde Steamship Co.*, 5 *Int. Com. Com.* 324.

Where the last of connecting carriers requests the preceding carriers that, in issuing bills of lading for intermediate stations on its road, no rates shall be inserted, and there is no agreement for a joint through rate to its local stations, but where it collects and retains the full local rate on all freights so shipped, there is no arrangement for a "continuous carriage or shipment" under "a common control, management, or arrangement," within the meaning of sec-

tion 1 of the Interstate Commerce Act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. Rep. 925.

The fact that such carrier receives freights from other roads which have been shipped on through bills of lading on the quoted through rates, does not bring the carrier within the above provision, where it appears that the through rate quoted is the full local rate on the last road. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 56 Fed. Rep. 925.

23. Express companies.*—Companies that are organized to do an express business only are not subject to the provisions of the Interstate Commerce Act. *United States v. Morsman*, 42 Fed. Rep. 448. —FOLLOWING *In re Express Companies*, 1 Int. Com. Com. 349, 1 Int. Com. Rep. 677.

So an indictment which charges that an express company is "a corporation and common carrier engaged in the transportation of property by railroad from one state to other states," does not bring the company within the provisions of the statute, unless it appears further that the express business is carried on as a part of a railroad business. *United States v. Morsman*, 42 Fed. Rep. 448.

Where the business of express companies is interstate they are subject to the operation of the act. *In re Express Companies*, 1 Int. Com. Rep. 22.

Independent express companies are not included among the common carriers subject to the act; but it is otherwise if the express business is carried on by a railroad company. *In re Express Companies*, 1 Int. Com. Rep. 677, 1 Int. Com. Com. 349.—APPLIED IN *Pacific Exp. Co. v. Seibert*, 44 Fed. Rep. 310. FOLLOWED IN *United States v. Morsman*, 42 Fed. Rep. 448.

24. Northern Pacific Railroad.—The provisions of the charter of the Northern Pacific R. Co., that its directors "shall, from time to time, fix, determine, and regulate fares, tolls, and charges," except that they shall be "subject to such regulations as congress may impose, restricting the charges for government transportation," does not give the directors exclusive control over all rates and fares, except for government transportation, so as to prevent

regulation by the commission. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

Neither does the fact that the road was built, and the company's bonds sold under the faith of the permanency of such provision in the charter, constitute such a contract that would prevent congress from subsequently making it subject to government regulation through the commission, where the right is reserved to "add to, alter, amend, or repeal" the charter. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

25. Act does not extend to immigrants arriving at port of New York.

—The reception of immigrants at the port of New York is so far under the control of the state board of commissioners of emigration, acting with the federal government, that the commission has no authority to interfere with their regulations touching the sale of railroad tickets for their further transportation from New York to interior points in the United States. *Savery v. New York C. & H. R. R. Co.*, 2 Int. Com. Rep. 210, 2 Int. Com. Com. 338.

And where the commission has not authority to interfere directly with the emigration commissioners, it cannot interfere to prevent the carrying out of any arrangement made between such commissioners and railroad companies for the transportation of immigrants. *Savery v. New York C. & H. R. R. Co.*, 2 Int. Com. Rep. 210, 2 Int. Com. Com. 338.

26. — nor to goods between port of entry and a foreign country.—Congress does not undertake to regulate transportation on the high seas nor at the foreign ports of shipment, nor in the foreign country adjacent to the United States; but as soon as that commerce is brought through a port of entry in the United States, upon a through bill of lading, destined to a place in the United States, by a carrier either by land or water, for transportation to its place of destination, it then becomes subject to regulation under the statute. *New York Board of Trade & Transp. v. Pennsylvania R. Co.*, 3 Int. Com. Rep. 417, 4 Int. Com. Com. 447.

27. Bridges.—A bridge company which merely owns a bridge on which tracks are laid, but which solicits freights and loads them in cars furnished by the railroad companies, and runs them across the bridge, but

* Express companies not subject to provisions of Interstate Commerce Act, see 45 AM. & ENG. R. CAS. 247, *abstr.*

makes no charge except the regular bridge toll, is not a common carrier, so as to be subject to regulation. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

Neither does a franchise to such company giving it the power to build, maintain, and operate a bridge with approaches, on which tracks are laid and freight cars moved, constitute such company a common carrier, as such franchise does not give it the right to charge compensation for transporting freight or passengers. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

Where railroad companies acquire the right by contract to have their cars transported across such a bridge, they are deemed the owners and operators of the bridge, within the meaning of the Interstate Commerce Act, section 1, so as to make them subject to regulation, and not the company owning the bridge. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Int. Com. Rep. 351.

The paramount authority of congress, under the commerce clause of the constitution, over all navigable waters of the United States is well established; but until congress exercises its superior right of control and regulation, the states or state within whose territorial limits such waters are located may authorize the erection of bridges across the same, and such structures are not unlawful until so declared by congress. *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

In respect to bridges over navigable waters within the limits of a state, non-action by congress is not a declaration that such waters must remain free and unobstructed; but the state's authority over the same may be exercised to the extent, at least, of permitting and authorizing the establishment of ferries and bridges over the same, necessary or convenient for either local or interstate commerce. *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

Navigable waters lying within the limits of a state are both state and national in their character, with a paramount right of control or regulation in the general government, when congress chooses to exercise the authority over the same; but until such

authority is exercised the jurisdiction and power of the state to authorize and regulate bridges over the same is clear; and the fact that the water is an interstate stream does not alter the rule. *Rhea v. Newport News & M. V. R. Co.*, 52 Am. & Eng. R. Cas. 657, 50 Fed. Rep. 16.

28. Grain elevators.—A contract by which an elevator company agrees to erect a building for receiving, storing, and delivering all grain that shall be received by a railroad company, and by which the railroad company agrees that the elevator company shall handle all through grain at a fixed compensation per bushel, is not repugnant to the commercial power of congress, nor in contravention of public policy. *Dubugue & S. C. R. Co. v. Richmond*, 19 Wall. (U. S.) 584, 7 Am. Ry. Rep. 235.

29. Carriers whose duties begin and terminate in same state.*—Where the initial carrier does not extend beyond the state and he has nothing to do in transporting goods beyond the state, the fact that they are intended for an ultimate destination beyond the state does not make the shipment interstate so as to subject the initial carrier to regulation. *Missouri & I. R. T. & L. Co. v. Cape Girardeau & S. W. R. Co.*, 1 Int. Com. Rep. 607, 1 Int. Com. Com. 30.

The provision to section 1 "that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country from or to any state or territory as aforesaid," only excludes from regulation the purely internal commerce of a state, that which is confined within its limits, which originates and ends in the same state. *Mattingly v. Pennsylvania Co.*, 2 Int. Com. Rep. 806, 3 Int. Com. Com. 592.

Traffic destined to another state is not interstate if the delivery by the carrier is made in the same state where the rates were made and the traffic originated. *So held*, where goods were shipped in New Jersey for New York city, but delivered by the carrier in New Jersey opposite the city. *New Jersey Fruit Exch. v. Central R. Co.*, 2 Int. Com. Rep. 84, 2 Int. Com. Com. 142.

*A carrier confined to one state, but acting as a link in through carriage, not subject to state regulation, see note, 17 L. R. A. 643.

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4. Just and Reasonable Charges.

30. Charges at common law.—Prior to the enactment of the Interstate Commerce Law railway traffic was regulated by the principles of the common law, which demanded little more than that the carriers should carry for all persons who applied, in the order in which the goods were delivered, and that the charges for transportation should be reasonable. Many authorities held that they were not bound to make the same charge to all persons for the same service. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. Rep. 844. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 28 Am. & Eng. R. Cas. 1, 30 Fed. Rep. 2.

31. Reasonableness of charges, generally.*—All charges must be reasonable and just; and no discrimination can be made in rates, charges, or facilities. *Cutting v. Florida R. & N. Co.*, 30 Fed. Rep. 663.

It is not a sufficient compliance with the statute that rates are reasonable in themselves, but they must be so relatively reasonable as to protect communities and business from unjust discrimination. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 Int. Com. Rep. 608, 1 Int. Com. Com. 215.

When circumstances will fairly admit of it, charges to all points for like services should be made relatively equal. *Crews v. Richmond & D. R. Co.*, 1 Int. Com. Rep. 703, 1 Int. Com. Com. 401.

Under the statute, it is not necessary, to render a preference in rates unlawful, that it should be accomplished by any "device." *Scofield v. Lake Shore & M. S. R. Co.*, 2 Int. Com. Rep. 67, 2 Int. Com. Com. 90.

Where an advance is made in rates which have long been maintained, and the evidence shows that the traffic affected is large, important, and constantly increasing, the advance will be held unjust, unless it is satisfactorily explained. *Railroad Commission v. Savannah, F. & W. R. Co.*, 3 Int. Com. Rep. 688, 5 Int. Com. Com. 13.

The latter part of section 2 of the act expressly requires that charges shall be "reasonable and just," and empowers the commission to enforce its provisions. *Perry v. Florida C. & P. R. Co.*, 3 Int. Com. Rep. 740, 5 Int. Com. Com. 97.

* Charges under Interstate Commerce Act must be reasonable and fairly adjusted, see note, 2 L. R. A. 444.

Rates should bear a fair and reasonable relation to the antecedent cost of the traffic as delivered to the carrier and to the commercial value of such traffic; but it is incumbent on parties to make satisfactory proof as to such antecedent cost and commercial value. *Loud v. South Carolina R. Co.*, 5 Int. Com. Com. 529.

A reduction in rates is not in itself an acknowledgment that the former rates were unreasonable, as such reduction may be accounted for because of a decrease in cost of transportation and an increase in the volume of the traffic. *Loud v. South Carolina R. Co.*, 5 Int. Com. Com. 529.

32. Rules for determining whether charges are reasonable or not.—A variety of considerations of a very practical nature must always enter into the making of freight rates by railroad companies, and should go very far in determining the question of whether such rates are reasonable or unreasonable. *Evans v. Oregon R. & N. Co.*, 1 Int. Com. Rep. 641, 1 Int. Com. Com. 325.

Theory and conjecture merely are not enough; a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation. *Howell v. New York, L. E. & W. R. Co.*, 2 Int. Com. Rep. 162, 2 Int. Com. Com. 272.

In making through rates, questions whether the road passes through a sparsely or well settled country the amount of local freights, the character of the freight as affecting the cost of handling it, the fluctuation during the year, and other circumstances, must be considered in fixing the rates. *Evans v. Oregon R. & N. Co.*, 1 Int. Com. Rep. 641, 1 Int. Com. Com. 325.

The fact that an article cannot be shipped at a named rate is not conclusive evidence that the rate is unreasonable. Distance, proximity of other producers of the same article, necessary expenses of transportation, competing water routes, and other causes may make a reasonable rate too high to make the shipment of a certain article profitable. *Riddle v. New York, L. E. & W. R. Co.*, 1 Int. Com. Rep. 787, 1 Int. Com. Com. 594.

The value of the article shipped should be taken into account in fixing a rate, as the liability of the carrier is greater accord-

ing to the value of the articles shipped. *Howell v. New York, L. E. & W. R. Co.*, 2 *Int. Com. Rep.* 162, 2 *Int. Com. Com.* 272.

Evidence that the rates for carrying a certain article are higher in certain cases than certain other rates, and that they produce a large revenue to the carrier, is not *prima-facie* evidence that they are unreasonable. The reasonableness of the rate must be determined by reference to all of the attending circumstances and relations. *Howell v. New York, L. E. & W. R. Co.*, 2 *Int. Com. Rep.* 162, 2 *Int. Com. Com.* 272.

The New Orleans cotton exchange complained of a falling off in the amount of cotton annually received in that city, and alleged as a cause that defendant railroad company discriminated in rates against the city, which diverted cotton to other markets. *Held*, that in considering the question, the recent construction of several all rail lines, from points that formerly shipped through New Orleans, to eastern ports and markets, must be considered. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

Whether railroad companies combine or act separately in making rates and charges is not so important; the essential requirement is that, however made, they shall be reasonable of themselves, and so fairly adjusted as to be reasonable in their relations to each other and in their results. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

The fact that a road earns little more than operating expenses is not to be overlooked in fixing rates; but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business at fair rates will remunerate they must rely upon future earnings for the return of investments and profits. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

When the reasonableness or relative reasonableness of charges is challenged, every material consideration which enters into the making of such charges is pertinent to the inquiry; which would include the proportion paid to connecting lines. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612.

And the question whether the rates afford the carrier a proper return for the ser-

vice rendered is to be considered, as well as the result of the business to the shipper or producer of the traffic. *Loud v. South Carolina R. Co.*, 5 *Int. Com. Com.* 529.

33. Charges that were held reasonable.—Rates that are just and reasonable from selected manufacturing points, through the entire territory east of Missouri river and west of the Atlantic seaboard, are *prima facie* just and reasonable from all other points in the same territory. *In re Tariffs of the Transcontinental Lines*, 2 *Int. Com. Rep.* 203, 2 *Int. Com. Com.* 324.

The sum of 23½ cents per 100 pounds, or \$4.70 per ton, on wheat transported by rail from Walla Walla, Wash., to Portland, Oreg., a distance of 246 miles, was fixed as reasonable. *Evans v. Oregon R. & N. Co.*, 1 *Int. Com. Rep.* 641, 1 *Int. Com. Com.* 325.

To be reasonable, the rate on compressed cotton from Meridian, Miss., to New Orleans, a distance of 196 miles, should not exceed \$1.50 per bale. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

A rate of 50 cents on wheat and 56 cents on barley, per hundred pounds, from a point in Washington to St. Paul, Minn., a distance of 1576 miles, is deemed reasonable, where it appears that the amount of shipments is comparatively small. *Buchanan v. Northern Pac. R. Co.*, 3 *Int. Com. Rep.* 655, 5 *Int. Com. Com.* 7.

34. When not reasonable.—A rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, constitutes a preference and is undue and unreasonable, unless justified upon some sound and substantial ground. *In re Tariffs of the Transcontinental Lines*, 2 *Int. Com. Com.* 324, 2 *Int. Com. Rep.* 203.

A rate on a particular class of goods, such as cheap, unfinished bedroom sets, which is unreasonable in itself, is not justifiable on the ground that the same rate is given a competitive class of goods, such as higher priced, finished sets, which is found liberal and advantageous. *Potter Mfg. Co. v. Chicago & G. T. R. Co.*, 5 *Int. Com. Com.* 514.

Rates obtained by combination, which produce a lower rate than the tariff calls for, are unjust, because they enable an intelligent shipper to obtain an advantage over one who has less information; and they are illegal because they show two rates to the same point, over the same line, at the

same time. The tariff rates should not exceed the combination rates in any case. *Martin v. Southern Pac. Co.*, 2 *Int. Com. Com.* 1, 2 *Int. Com. Rep.* 1.

Complainants manufactured soap which was officially classed in the fifth class when shipped in car-load lots, and the defendant carriers had for a long time carried the soap as fifth-class, charging only for the net weight, but afterward charged for the gross weight, which was one sixth more. It appeared that the former charge for the net weight was reasonable and satisfactory to the shippers. *Held*, that the increase was unreasonable. *Proctor v. Cincinnati, H. & D. R. Co.*, 3 *Int. Com. Rep.* 131, 4 *Int. Com. Com.* 87.

35. Competition as affecting rates.

—Whether a rate to a section where there is no competition is just or not cannot be determined by comparing the rate with another point where an exceptionally low rate is made to meet competition. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.—*QUOTING La Crosse M. & J. Union v. Chicago, M. & St. P. R. Co.*, 2 *Int. Com. Rep.* 9.

If a railroad company, in establishing charges on the different branches and divisions of its road, so adjust them as to divert trade to one locality which would naturally go to another, such adjustment is unlawful, and is not excused on the ground that some of the rates are to meet competition. Only such advantage can be given to places on the main line of the road as are reasonable. *Raymond v. Chicago, M. & St. P. R. Co.*, 1 *Int. Com. Rep.* 627, 1 *Int. Com. Com.* 230.

In fixing relative rates upon strictly competitive articles, the proper relation should be determined from the cost of the service, and not from a purely commercial standpoint. *Squire v. Michigan C. R. Co.*, 3 *Int. Com. Rep.* 515, 4 *Int. Com. Com.* 611.

The fact that one carrier has violated the rules that should govern in fixing relative rates on competitive articles does not justify a competing carrier in similar violations. *Squire v. Michigan C. R. Co.*, 3 *Int. Com. Rep.* 515, 4 *Int. Com. Com.* 611.

Where it is shown that oranges may be transported from Florida to New York and other northeastern cities by either rail or water, but that strawberries require quick transportation, and can only be shipped by

rail, the fact of the water competition may be considered in fixing the rates on oranges, but does not authorize companies to take advantage of the situation and charge unreasonable rates on strawberries. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

In determining the reasonableness of rates in transcontinental shipments to seaports on the Pacific coast, and to another point near the coast, but not a seaport, the fact that traffic to the seaports is affected by water competition must be considered. *Merchants' Union v. Northern Pac. R. Co.*, 5 *Int. Com. Com.* 478, 4 *Int. Com. Rep.* 183.

The only justification for a through rate less than the intermediate rate on the same article, is the compulsion of the rail carriers to accept the reduced rate or suffer ocean rivals to do the service. Where the pressure of this alternative is not felt there is no ground upon which the lower terminal charge can be excused. *Merchants' Union v. Northern Pac. R. Co.*, 5 *Int. Com. Com.* 478, 4 *Int. Com. Rep.* 183.

Nothing but stress of unavoidable competition can legalize the inequality resulting from higher rates for shorter than for longer hauls. No article should be carried to terminal points at commodity rates which, if the class rates were imposed, would still seek rail rather than water transportation. *Merchants' Union v. Northern Pac. R. Co.*, 4 *Int. Com. Rep.* 183, 5 *Int. Com. Com.* 478.

Where a carrier sets up water competition as justifying established rates, the carrier must show by clear, affirmative evidence that the competition is such as to be a controlling factor. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612, 4 *Int. Com. Rep.* 274.

The "drive" of shingle logs down rivers which flow past the place of cut in Maine to a seaport in Canada where shingle mills are located, and from which the product may go by sea to market ports, affects shingle traffic from competing mills located along these rivers at a place in Canada and a place in Maine, but operates with less force at the latter point. The rail rate from the Canadian mill to market being fixed with especial reference to the effect of the log drive to, and water competition for, shingle traffic from the seaport, the rate from the Maine mill should be made upon the same basis. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612, 4 *Int. Com. Rep.* 274.

36. Local and through rates, generally.*—It is only required that local rates shall be reasonable when compared with through rates, but not necessarily relatively equal, as there are many influences affecting local rates which do not apply to through rates; or if they apply, in a less degree. *Lippman v. Illinois C. R. Co.*, 2 *Int. Com. Com.* 584, 2 *Int. Com. Rep.* 414.

Where freight is to pass over more than one road, and the shipper directs the agent of the initial carrier as to the route by which it shall go, it is the duty of the agent to make proper notes on the way bill, so as to secure the shipment by the designated route; and if he fails to do so, the initial carrier must refund any overcharge caused thereby. *Pankey v. Richmond & D. R. Co.*, 3 *Int. Com. Rep.* 33, 3 *Int. Com. Com.* 658.

But where the shipper gives no directions as to the particular route by which the freight is to be shipped, it is the duty of the freight agent to forward it by the best and cheapest route. *Pankey v. Richmond & D. R. Co.*, 3 *Int. Com. Rep.* 33, 3 *Int. Com. Com.* 658.

Where freight is shipped for a destination that requires it to pass over more than one road, if no joint rates have been established over the several roads, the freight charge should equal the established local rates over the several roads. *Lehmann v. Texas & P. R. Co.*, 3 *Int. Com. Rep.* 706, 5 *Int. Com. Com.* 44.

If a passenger ticket is applied for to a point beyond the initial carrier's line, and no joint rate has been established, it is competent to name a through rate made up of the local rate on each road; or if a through rate is established for a part of the distance, then the ticket should be sold for the amount of such through rate plus the local rates for the remainder of the journey. *In re Passenger Tariffs*, 2 *Int. Com. Rep.* 445, 2 *Int. Com. Com.* 649.

Minneapolis and Duluth, both in the state of Minnesota, competed in the shipment of grain, and both enjoyed certain advantages, from their location, over certain lines of shipment. The distance between the two cities varies from 153 miles to 237 miles, according to distances over different roads. *Held*, that one should not have a reduction on the local rate connect-

ing the two, so as to overcome the natural advantages of the other. *Chamber of Commerce v. Great Northern R. Co.*, 5 *Int. Com. Com.* 571.

37. Duty of connecting lines to give through rates.—Through carriage implies through rates, which must be reasonable. *Brady v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 78, 2 *Int. Com. Com.* 131.

When railroad companies make a through line and offer it to the public for continuous carriage, and bill and haul freight over the through line, they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their line. *Brady v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 78, 2 *Int. Com. Com.* 131.

Where a company owns a part of a through line, and owns a controlling interest in the capital stock of the company by which the other part is operated, the former cannot free itself from the responsibility of excessive through rates by setting up the separate corporate existence of the other company. *Brady v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 78, 2 *Int. Com. Com.* 131.

The apportionment of rates between companies owning different parts of a through line does not determine what the charge to the public should be, but it may be significant in determining the question of reasonableness of the rates for the whole distance. *Brady v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 78, 2 *Int. Com. Com.* 131.

The danger of fire from transporting oil through a city like Pittsburgh, and near large manufacturing plants and other buildings, is not so important as to be considered in fixing the rate thereon. *Brady v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 78, 2 *Int. Com. Com.* 131.

38. When higher rate on perishable freights justifiable.*—In fixing the rate on shipments of fruit, the fact that the service is special throughout, with quicker time, special time-tables providing for close connections, the cost of specially fitting up the cars, and returning the baskets free, must all be considered. *Boston F. & P. Exch. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 493, 4 *Int. Com. Com.* 664.

Where perishable freight, such as fruit, is shipped, which requires quick transporta-

* Local traffic rates must be reasonable, see note, 12 L. R. A. 436.

* Difference in rates, when justified under the act, see note, 2 L. R. A. 444.

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tion, prompt delivery, cars fitted up especially for the freight, and other expenses, a higher rate may be charged, and will be deemed reasonable and just. *Delaware State Grange v. New York, P. & N. R. Co.*, 3 *Int. Com. Rep.* 554, 4 *Int. Com. Com.* 588; *rehearing denied in* 5 *Int. Com. Com.* 161.

But such higher rate should bear a reasonable relation to the value of the service to the traffic. The business should not be rendered valueless to the shipper on account of the charges, if they may be reasonably reduced. *Delaware State Grange v. New York, P. & N. R. Co.*, 3 *Int. Com. Rep.* 554, 4 *Int. Com. Com.* 588; *rehearing denied in* 5 *Int. Com. Com.* 161.

The provision of the statute that rates shall be "reasonable and just" implies that both the business of shipping and carrying may be successfully carried on, if practicable. The spirit of the law requires that in the handling of such freight both the transportation interest and the interest of producers and shippers must be considered. *Delaware State Grange v. New York, P. & N. R. Co.*, 3 *Int. Com. Rep.* 554, 4 *Int. Com. Com.* 588; *rehearing denied in* 5 *Int. Com. Com.* 161.

39. Rates on food products.—Rates for transportation of staple articles, such as food products, cannot always be so limited that the shipper may, in all cases, receive actual cost of production. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 93, 4 *Int. Com. Com.* 48.

But the charges on such freights should be adjusted with reference to the cost of production, and to the value of the service to the producer and shipper, but not so low as to impose a burden on other traffic. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 93, 4 *Int. Com. Com.* 48.

In the carriage of great staples, which supply an enormous business, and which in market value and actual cost of transportation are among the cheapest articles of commerce, rates yielding only moderate profit to the carrier are both necessary and justifiable. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 93, 4 *Int. Com. Com.* 48.

In fixing the rates on food products, it is proper to consider the operating expenses of the road, interest on bonded debt, dividends on the stock, and other necessary expenses; but a claim that a rate cannot be so low that it will not yield revenue sufficient

to pay all these cannot always be taken as the standard, without reference to whether the bonded debt, or other obligations of the carrier, are real. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 93, 4 *Int. Com. Com.* 48.

40. Rates that are unreasonably low.—The provision of the statute that all rates "shall be reasonable and just" does not authorize the commission to compel a railroad company to increase its rates, which are supposed to be so low as to be ruinous. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

The above provision of the statute was inserted for the protection of the general public, and not for the protection of carriers against the action of their own officers, or of rivals. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

41. Equal mileage rates.—The commission has no power to require the adoption of rates on an equal and uniform mileage basis. *La Crosse M. & J. Union v. Chicago, M. & St. P. R. Co.*, 2 *Int. Com. Rep.* 9, 1 *Int. Com. Com.* 629.

And rates not established on a mileage basis are not necessarily illegal. *La Crosse M. & J. Union v. Chicago, M. & St. P. R. Co.*, 2 *Int. Com. Rep.* 9, 1 *Int. Com. Com.* 629.—QUOTED IN *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.

A departure from equal mileage rates on different branches or divisions of a road is not conclusive that the rates are unlawful; but places the burden on the company to show them to be reasonable. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612, 4 *Int. Com. Rep.* 274.

42. Rates as affected by distance, and other causes.*—Charges on long through lines cannot offer a just basis for comparison with local rates for relatively short distances. *Crews v. Richmond & D. R. Co.*, 1 *Int. Com. Rep.* 703, 1 *Int. Com. Com.* 401.

It is a familiar rule in the transportation of freight by railroads that, while the aggregate charge is continually increasing the further the freight is carried, yet the rate

* Distance as an element in adjusting railway rates. see note, 21 AM. & ENG. R. CAS. 61.

Freight rates as affected by distance and competing lines, see 34 AM. & ENG. R. CAS. 590, *abstr.*

per ton per mile is constantly growing less, unless there be exceptional conditions modifying the rule. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.—QUOTING *Farrar v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Com.* 487, 1 *Int. Com. Rep.* 764.

But the rule that the rate per ton per mile must be less for the greater distance is only one of the tests by which the rates can be determined, as to whether they are reasonable or not. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.

In determining whether a certain rate is reasonable, not only the rights of the shipper, but all the surrounding circumstances and conditions must be taken into consideration. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.

But in determining whether a rate is reasonable or not, it is no criterion to compare it with the rates of other roads existing under different and dissimilar circumstances and conditions. *Business Men's Assoc. v. Chicago, St. P., M. & O. R. Co.*, 2 *Int. Com. Rep.* 41, 2 *Int. Com. Com.* 52.

The principle that the ratio of freight rates decreases with the increase of distance is true only when the rates are based upon distance and cost alone, and are not affected by other modifying conditions. The extent of traffic carried, and the character of the country traversed, are to be considered. Also the fact that the road is intersected by a shorter line, and is subjected to water competition. *Lincoln Board of Trade v. Burlington & M. R. R. Co.*, 2 *Int. Com. Rep.* 95, 2 *Int. Com. Com.* 147.

The rule that cost of carriage is in inverse ratio to distance, and that therefore the charge per ton per mile should diminish with distance, is not a rule required by statute, and is subject to qualifications and exceptions. *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.*, 3 *Int. Com. Rep.* 115, 4 *Int. Com. Com.* 79.

The above rule is usually applied in cases of continuous carriage over long through routes, but even then special conditions, such as volume of business, character of route, and necessary revenue from the business done, may materially qualify it. *Manufacturers' & J. Union v. Minneapolis & St. L. R. Co.*, 3 *Int. Com. Rep.* 115, 4 *Int. Com. Com.* 79.

43. Rates when carrier does not own cars.—A carrier may obtain cars from the shipper, but in doing so the rate charged should be the regular rate after deducting the established rate for the rent of the cars. *Scofield v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 67, 2 *Int. Com. Com.* 90.

Where the carrier uses cars that belong to the shipper or to third parties, such arrangement must be made as not to discriminate between shippers; and any secret arrangement, such as paying the shipper an unreasonable rent for the cars, is unlawful. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

44. Classification of freights.—The act recognizes the right to classify freights as a valuable convenience both to shippers and carriers; and such classification is therefore lawful. *Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

But in classifying freights both the interests of the carrier and shipper must be considered, so that the rate may be relatively just and equal. *Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

The proper classification of an article is determined by reference to similar articles of the same general character and quality. *Myers v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 403, 2 *Int. Com. Com.* 573.

It is often necessary to consider the classification and rates upon other articles of similar value, bulk, and expense of handling; and in making such comparison it is not necessary that the articles be competitive. *Harvard Co. v. Pennsylvania Co.*, 3 *Int. Com. Rep.* 257, 4 *Int. Com. Com.* 212.

So where the question of the proper classification of "Hostettters Bitters," a fluid preparation, put up in bottles and sold as medicine, is in question, it should be determined by reference to the classification of such articles as cider, coffee, condensed drugs, medicines, ink, liquors, liquids, etc. *Myers v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 403, 2 *Int. Com. Com.* 573.

A former rate on such "bitters" existing before the commission was created, and shown to be a special preferred rate, is no test of the reasonableness of a rate fixed by the commission. *Myers v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 403, 2 *Int. Com. Com.* 573.

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The difference in the rate of transportation of compressed and uncompressed cotton by rail carriers should be the actual and necessary cost of compressing, where the compressing is done by the carrier before shipping. *New Orleans Cotton Exch. v. Illinois C. R. Co.*, 2 *Int. Com. Rep.* 777, 3 *Int. Com. Com.* 534.

45. Car-load rates.—Lower rates on car-load lots than on quantities less than car-loads are not unlawful. *Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

But if the difference be so great as to destroy competition between large and small dealers they will be deemed unlawful, especially upon articles that are necessary, and in general use, and furnish a large volume of business. *Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

Other things being equal, a higher charge in the aggregate should be made per car-load of large tonnage than for one of less tonnage; but the rate per hundred pounds should be less on the heavy tonnage than on the other. *Murphy v. Wabash R. Co.*, 3 *Int. Com. Rep.* 725, 5 *Int. Com. Com.* 122.

Where carriers have been in the habit of charging a fixed amount for a car-load of live stock, irrespective of the weight, it is not unlawful to make a change by prescribing a car-load rate at a minimum weight, and then to charge so much a hundred for anything above the minimum weight. *Leonard v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 599, 3 *Int. Com. Com.* 241.

The fact that shippers experience some difficulty in weighing live stock so as to ascertain the exact weight of the stock placed in a car is not a reason for abolishing the new practice. *Leonard v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 599, 3 *Int. Com. Com.* 241.

Neither will the fact that certain state railroad commissioners have permitted a uniform rate per car, without reference to the weight of the stock shipped, be reason for refusing to adopt the new plan, where the course of such commissioners does not seem to be most just and politic. *Leonard v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 599, 3 *Int. Com. Com.* 241.

46. Rates as affected by cost of carrying.—The cost of service in carrying freight is entitled to fair consideration, but should not be controlling. The value of

the service to the property carried should be recognized also. *Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

In determining what is a just and reasonable rate on a short local line, doing but a small business when the cost of service is great, owing to steep grades, such circumstances should have much weight. *So held*, where a road existing under such conditions was charged with unjust rates in shipping oil, as compared with the cost of piping it to the same point. *Rice v. Western N. Y. & P. R. Co.*, 2 *Int. Com. Rep.* 298, 2 *Int. Com. Com.* 389.

47. Rates for immigrants—Suitable cars.—It is lawful for carriers to make a class rate for immigrants, and to decline to give the same rate to others for whom different accommodations are provided. *Savery v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 210, 2 *Int. Com. Com.* 338.

But a company carrying immigrants must provide fit cars for the purpose; and the commission will make a personal inspection, where deemed necessary, to ascertain their fitness. *Savery v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 210, 2 *Int. Com. Com.* 338.

48. Rates on anthracite coal.—Where a company carries coal, and also owns the capital stock of a company which owns coal lands, mines, buys, sells, and ships coal over the railroad, the only power that the commission has is to insist that the rates be reasonable. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

For more than two years before the passage of the act a company had carried anthracite coal; but, after the passage of the act, advanced the rate and placed it higher than the rate on iron ore, pig iron, or other low grade freights, and higher than on general freights, the cost of carrying which was much greater. *Held*, that the advanced rate was unreasonable. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

The statute confers upon the commission the power of determining what are reasonable and what are unreasonable rates, and the power of enforcing the provisions of the statute requiring rates to be reasonable. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

Where a company has maintained for a considerable time a scale of rates upon an-

thracite coal, which is shown to be sufficient, in connection with other revenues, to meet all the obligations of the road, including dividends on stock, a new scale of charges largely in excess of the former will be deemed unlawful. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

40. Group rates.—The practice of making a group rate on the daily shipments of milk from all points within 200 miles of New York city does not constitute unjust discrimination in favor of the more distant shippers as against those who reside nearer the city. *Howell v. New York, L. E. & W. R. Co.*, 2 *Int. Com. Rep.* 162, 2 *Int. Com. Com.* 272.

The habit of making group rates is not in itself unlawful, but becomes so only where illegal results flow from it, to the injury of some one. *Howell v. New York, L. E. & W. R. Co.*, 2 *Int. Com. Rep.* 162, 2 *Int. Com. Com.* 272. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.*, 2 *Int. Com. Rep.* 436, 2 *Int. Com. Com.* 618.

Group rates on coal for a large district extending across two or three states may be made, where the commercial necessities are substantially the same for all, and the distance from each part of the group by same route of shipment is a fair equivalent of the distance from other points. *Rend v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 313, 2 *Int. Com. Com.* 540.

Where such rates have been fixed, and are not unreasonable in themselves, a clear right for a reduction must be shown, where its effect would be to cause confusion of rates over a large section. *Rend v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 313, 2 *Int. Com. Com.* 540.

50. Unjust rates not justified by contracts with individuals.—The fact that parties have made investments and entered into business on the faith of assurances from carriers that they should have a special rate is no ground for continuing such rate, where it is shown to be unjust, though injury may result to the parties who have been thus favored. *Potter Mfg. Co. v. Chicago & G. T. R. Co.*, 5 *Int. Com. Com.* 514. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

51. Rates to manufacturers.—A carrier has no right to arbitrarily give what is called a "Manufacturer's rate." *In re*

Louisville & N. R. Co., 5 *Int. Com. Com.* 466.

Manufacturing industries should not be deprived, through a carrier's adjustment of relative rates, of advantages resulting from their favorable location in respect of cost of raw material supplied from a common source, or of distance to the common market for the finished product. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612.

Where no discrimination is alleged between points of production tributary to the same market, or on account of disproportionate rates on different kinds of traffic similar in character and volume, it must affirmatively appear that charges assailed as unreasonable are so and ought to be reduced. *Lincoln Creamery v. Union Pac. R. Co.*, 3 *Int. Com. Rep.* 794, 5 *Int. Com. Com.* 156.

Where the rate in itself is just, the advantage derived by one shipper from combining the rate with enterprise and an outlay of money, is legitimate, of which the shipper should not be deprived. *Potter Mfg. Co. v. Chicago & G. T. R. Co.*, 5 *Int. Com. Com.* 514, 4 *Int. Com. Rep.* 223.

In determining the difference in the rates upon unfinished and finished cheap bedroom sets, the rate on the unfinished sets between Lansing, Mich., and Oakland, Cal., should not exceed 85 per cent. of the rate adopted for the finished sets. *Potter Mfg. Co. v. Chicago & G. T. R. Co.*, 5 *Int. Com. Com.* 514, 4 *Int. Com. Rep.* 223.

52. Necessary parties.—Where a through rate is in controversy, all of the carriers responsible for it should be made defendants. *Allen v. Louisville, N. A. & C. R. Co.*, 1 *Int. Com. Rep.* 621, 1 *Int. Com. Com.* 199. *Michigan Congress Water Co. v. Chicago & G. T. R. Co.*, 2 *Int. Com. Rep.* 428, 2 *Int. Com. Com.* 594.

The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 *Int. Com. Rep.* 289, 2 *Int. Com. Com.* 375.

The commission will not undertake to decide the question of a rate that will affect two carriers, where only one of them is a party. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 *Int. Com. Rep.* 102, 2 *Int. Com. Com.* 162.

A change of rates on connecting lines should not be made unless based upon adequate grounds, where the owners of such

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Where it is charged that a local rate is unreasonable, but it appears that the local rate is but a part of a through rate, the complaint should be directed against the aggregate through rate, and all of the carriers should be made parties. *Chamber of Commerce v. Great Northern R. Co.*, 5 *Int. Com. Com.* 571.

5. Unjust Discrimination.*

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53. In general.—Rates established by a common carrier under a desire to keep on its line a material for which the road itself has use, such as ties, or to keep the price thereof low for its own advantage, is unlawful. *Reynolds v. Western N. Y. & P. R. Co.*, 1 *Int. Com. Rep.* 685, 1 *Int. Com. Com.* 393.

Every party who produces such a material is entitled to sell it when he wishes, in the best available market, and the carrier has no right to prevent his doing so by unreasonable rates. *Reynolds v. Western N. Y. & P. R. Co.*, 1 *Int. Com. Rep.* 685, 1 *Int. Com. Com.* 393.

Where it is charged that a carrier has discriminated in favor of a certain shipper, it is sufficient to show the rates actually charged him, and how far they differ from the public schedule; and a large number of shipments running back many years is immaterial. *Rice v. Cincinnati, W. & B. R. Co.*, 2 *Int. Com. Rep.* 584, 3 *Int. Com. Com.* 186.

When rates on their face are relatively unequal and disproportionate, the burden is on the carrier to justify them. *McMorran v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 604, 3 *Int. Com. Com.* 252.

Charges are required to be relatively reasonable as well as reasonable in themselves, to prevent unjust discrimination between localities. *Manufacturers & J. Union v. Minneapolis & St. L. R. Co.*, 3 *Int. Com. Rep.* 115, 4 *Int. Com. Com.* 79.

A railroad cannot discriminate against a town which it does not reach and in whose carrying trade it does not participate. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 5 *Int. Com. Com.* 264, 4 *Int. Com. Rep.* 65.

* Unjust discrimination under Interstate Commerce Act, § 2, see 37 AM. & ENG. R. CAS. 625, *abstr.*

54. As between carriers.—The fact that one company owns an interest in the stock of another is no excuse for discriminating in favor of such road as against other roads. *New York & N. E. R. Co. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 542, 4 *Int. Com. Com.* 702.—**DISTINGUISHED** IN *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 47 *Fed. Rep.* 771.

A company, which is the owner of a road between two points and extending far beyond one of such points, may prefer itself over a competing company owning a line terminating at such points; and such company may refuse to through route with such competing company, to points on its own road not reached by the competitor's road, or to recognize tickets issued by the competing road or others over its road to such points, and other roads are not at fault in yielding to its refusal to recognize such tickets. Such conduct does not constitute "discrimination" against the competing road under the act. It is not the case of a road preferring unjustly and unreasonably one of two other equally adequate carriers from a given point to a given point, but the case of a competitor or rival so conducting its business and using its powers of ownership as to divert travel from its rival to itself. *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 49 *Am. & Eng. R. Cas.* 23, 47 *Fed. Rep.* 771.—**APPROVING** Express Cases, 117 U. S. 29, 6 Sup. Ct. Rep. 542. **DISTINGUISHING** *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. Rep. 185; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567; *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 3 *Int. Com. Rep.* 205; *New York & N. R. Co. v. New York & N. E. R. Co.*, 4 *Int. Com. Rep.* 116. **REVIEWING** *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 3 *Int. Com. Com.* 10.

A company may prefer a connecting road with through facilities to one with only local facilities—a road that goes all the way to a certain point, to one going only part of the way; and the Interstate Commerce Act does not forbid such a preference. *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 49 *Am. & Eng. R. Cas.* 23, 47 *Fed. Rep.* 771.

55. Boycott by railroad employees against connecting road.—Rule 12 of an association of locomotive engineers, styled the "Brotherhood of Locomotive

Engineers," which provides "that hereafter, when an issue has been sustained by the grand chief, and carried into effect by the Brotherhood of Locomotive Engineers, it shall be recognized as a violation of obligations if a member of the Brotherhood of Locomotive Engineers who may be employed on a railroad run in connection with, or adjacent to, said road, to handle the property belonging to said railroad or system that may benefit said company with which the Brotherhood of Locomotive Engineers are at issue, until the grievances or issues or differences of any nature or kind have been amicably settled," is plainly a rule or agreement in restraint of trade or commerce, and a violation of section 1 of the Act of Congress of July 2, 1890. *Waterhouse v. Comer*, 53 Am. & Eng. R. Cas. 329, 55 Fed. Rep. 149.

Construing several clauses of the Interstate Commerce Law recited in the opinion with section 5440 of the Revised Statutes, it follows that a combination of persons, without regard to their occupation, which will have the effect to defeat the provisions of the Interstate Commerce Law inhibiting discriminations in the transportation of freight and passengers, and further to restrain the trade or commerce of the country, will be obnoxious to the penalties therein prescribed. *Waterhouse v. Comer*, 53 Am. & Eng. R. Cas. 329, 55 Fed. Rep. 149.

50. Duty to furnish safe and suitable cars.*—It is the duty of companies to furnish their roads with suitable cars for the traffic they undertake to handle, and to furnish them alike to all. *Rice v. Western N. Y. & P. R. Co.*, 3 Int. Com. Rep. 162, 4 Int. Com. Com. 131.

Plaintiff applied to a depot agent for a certain tank car, and the agent answered him so as to imply that the car was in good condition, and fit to run out on the track. The car had just returned from a long journey, and it was not the duty of the station agent to examine it; and after it was loaded, the car inspector found it unfit again to be sent out. *Held*, that what the agent may have said was not binding on the company, and it might refuse to send it out again. *Michigan Congress Water Co. v. Chicago & G. T. R. Co.*, 2 Int. Com. Rep. 428, 2 Int. Com. Com. 594.

* Discrimination in furnishing cars. Regular patrons not entitled to preference, see 33 Am. & Eng. R. Cas. 646, *abstr.*

And in such case, where it appears that such car belonged to the shipper, it was his duty to make it safe before insisting on sending it out again. *Michigan Congress Water Co. v. Chicago & G. T. R. Co.*, 2 Int. Com. Rep. 428, 2 Int. Com. Com. 594.

57. Requiring shipper to clean cars.—Where cars are run on a side track to be loaded at a mill, a rule requiring the shippers to clean the cars is unreasonable. *Hazel Milling Co. v. St. Louis, A. & T. H. R. Co.*, 3 Int. Com. Rep. 701, 5 Int. Com. Com. 57.

58. In favor of immigrants.—A special rate for carrying a certain class of persons to certain points on a railroad, which is less than one half the amount charged to the public generally, is unjust discrimination. *Elvey v. Illinois C. R. Co.*, 2 Int. Com. Rep. 804, 3 Int. Com. Com. 652.

And such discrimination cannot be justified on the ground that the special rate is offered to immigrants to induce them to go to a section which is sparsely settled, in order to build up business along the line of the road. *Elvey v. Illinois C. R. Co.*, 2 Int. Com. Rep. 804, 3 Int. Com. Com. 652.

59. In the collection and delivery of freights.—The fact that a company has for some time paid the cost of hauling plaintiff's coal from a wharf to the railroad station, for the purpose of encouraging the business, creates no obligations to continue the same. *Providence Coal Co. v. Providence & W. R. Co.*, 1 Int. Com. Rep. 363, 1 Int. Com. Com. 107.

Free cartage for the collection and delivery of freight furnished by a carrier amounts to a rebate from the schedule rates, and is unlawful. *Stone v. Detroit, G. H. & M. R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. Com. 613.

If free cartage at a station has the effect of reducing the cost of carriage below the cost of carriage to a point nearer the place of shipment, it is unlawful, as a violation of the long and short haul clause of the statute. *Stone v. Detroit, G. H. & M. R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. Com. 513.

It is no justification for a carrier furnishing free cartage at one station and not at another to show that the business had been carried on in that way for many years before the statute was passed. *Stone v. Detroit, G. H. & M. R. Co.*, 3 Int. Com. Rep. 60, 3 Int. Com. Com. 613.

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plaintiff's flour from his mill, he cannot complain that the company bears a part of the cost of carting the flour of other persons to the station. *Hezel Milling Co. v. St. Louis, A. & T. H. R. Co.*, 3 *Int. Com. Rep.* 701, 5 *Int. Com. Com.* 57.

For the carrier to pay the larger expense of the transportation of a remote shipper's merchandise to the station, and not to pay the less expense of such transportation of the nearer shipper's merchandise, would be the equivalent of a rebate to the former, the railroad service proper being the same to each and at the same rate; nor would it be treating all patrons with statutable equality to bear a part of the cartage expense for one shipper and not bear a part of it for another. *Hezel Milling Co. v. St. Louis, A. & T. H. R. Co.*, 3 *Int. Com. Rep.* 701, 5 *Int. Com. Com.* 57.

60. In refusing to deliver freights.

—Plaintiff is a coal dealer with yards near the junction of two roads. He received a car-load of coal over defendant's road and asked that it be switched on the other road for delivery at his yards, which defendant refused to do, unless he would promise in advance to pay any demurrage charge that might be made on the car. Plaintiff's financial ability was not questioned. *Held*, that the refusal was unreasonable, though plaintiff had previously refused to pay such charges. *Macloon v. Chicago & N. W. R. Co.*, 3 *Int. Com. Rep.* 711, 5 *Int. Com. Com.* 84.

61. Rebates and discounts.*—The

act will not render a bill of lading to shippers invalid because of the allowance of a rebate, and will therefore not defeat the right of insurance companies, who have paid a loss, to be subrogated to the rights of the insured against the company. *Merchants' C. P. & S. Co. v. Insurance Co. of N. A.*, 151 *U. S.* 368, 14 *Sup. Ct. Rep.* 367. —DISTINGUISHING *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263.

It is a violation of the act for an international road to carry coal from the United States to certain points in Canada at the published tariff rate, but to allow a rebate of a certain sum per ton in favor of certain

consignees. *In re Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 496, 3 *Int. Com. Com.* 89.

An arrangement by which shippers of live stock are allowed to furnish improved stock cars for their own exclusive use, and to receive an extraordinary mileage from the carrier for their use, amounts to giving a rebate, and is unjust discrimination as against competitive shippers. *Shamberg v. Delaware, L. & W. R. Co.*, 3 *Int. Com. Rep.* 502, 4 *Int. Com. Com.* 630.

The act is not violated by an agreement by a railroad with a stock yard company to pay a customer an annual sum, although a large portion of the stock received at its yards is shipped from, and reshipped to, other states, where such payment has no relation to the railway charges, which are uniform, and no rebate is made thereon. *Willoughby v. Chicago J. R. & U. S. Co.*, 50 *N. J. Eq.* 656, 25 *Atl. Rep.* 277.

A railway company advertised to give a discount of ten per cent. from schedule prices to all persons who might receive consignments of 30,000 tons or more of coal in any one year. The company claimed that this regulation was reasonable, and it was offered to secure "quick dispatch in unloading its cars." *Held*, that this amounted to unjust discrimination, and that "quick dispatch" was not material. *Providence Coal Co. v. Providence & W. R. Co.*, 1 *Int. Com. Rep.* 363, 1 *Int. Com. Com.* 107.

62. Municipal subscription to road does not justify discrimination.—The fact that one place has given municipal aid toward the building of a railroad is no reason for discriminating in its favor. All points, without reference to such things, are entitled to equal rates. *Lincoln Board of Trade v. Burlington & M. R. R. Co.*, 2 *Int. Com. Rep.* 95, 2 *Int. Com. Com.* 147.

b. Effect of Competition.*

63. Generally.—The act was not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction does not operate as an unjust discrimination against other persons traveling over the same road. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145

* Agreement for payment of rebates illegal. When railway officials not criminally liable for agreement for payment of rebates, see 45 *AM. & ENG. R. CAS.* 245, *abstr.*

* Discrimination in rates. Undue preference. Effect of competition, see note, 51 *AM. & ENG. R. CAS.* 37.

U. S. 263, 12 Sup. Ct. Rep. 844; affirming 43 Fed. Rep. 37.

There may be cases in which a carrier legitimately engaged in serving some territory is compelled by some new and aggressive competition to reduce reasonable rates to retain business on its line, and where corresponding reductions at points not affected, or less affected, by such competition, might be unreasonable. *Manufacturers' & J. Union v. Minneapolis & St. L. R. Co.*, 3 *Int. Com. Rep.* 115, 4 *Int. Com. Com.* 79.

But when a carrier voluntarily enters a field of competition where, by reason of a disadvantageous route, or the rigor of competitive conditions, remunerative rates cannot be charged, and its service to a portion of its patrons is unprofitable, it is under legal obligation to make its service impartial to all who sustain similar relations to the traffic, and for whom the service itself is not substantially dissimilar. *Manufacturers' & J. Union v. Minneapolis & St. L. R. Co.*, 3 *Int. Com. Rep.* 115, 4 *Int. Com. Com.* 79.

A carrier that secures a consolidation of competing lines that have formerly carried the same article to the same market has no right to deprive the public of fair competition, nor to give oppressive discrimination to further its own interest. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Board of Trade v. East Tenn., V. & G. R. Co.*, 5 *Int. Com. Com.* 546, 4 *Int. Com. Rep.* 213.

64. Water competition.—A transportation company operating connecting railroad and steamship lines is not required by the act to allow the steamboats of a competing line to land at its wharf, since the steamboat and railroad lines belonging to the said company cannot be construed as connecting lines under the said act. *Ithaca R. & N. Co. v. Oregon S. L. & U. N. R. Co.*, 56 *Am. & Eng. R. Cas.* 1, 57 *Fed. Rep.* 673.

The fact that traffic from New Orleans to San Francisco is subject to water competition will not justify all rail carriers in charging from three to four times as much

on traffic secured from New Orleans or vicinity as it does on the like traffic which comes to New Orleans from foreign ports, and is thence carried by rail; and this is so though it appeared that the foreign traffic cannot be secured on other rates. *Interstate Commerce Commission v. Texas & P. R. Co.*, 57 *Fed. Rep.* 948; *affirming* 32 *Fed. Rep.* 187.

The fact that railroads are subject to water competition will not justify them in violating the long and short haul clause of the statute by charging less for a long distance than for a shorter one. *Harwell v. Columbus & W. R. Co.*, 1 *Int. Com. Rep.* 631, 1 *Int. Com. Com.* 236.

The circumstances and conditions in the carriage of flour to New York are substantially different at Boston and Readfield, an interior town about eight miles from Boston, on the line of the all rail carriers, where no competition exists between the all rail carriers and the water lines, and justifies the all rail carriers in meeting the water rate at Boston by a joint through rate which is less from New York to Boston than the combined local rates to Readfield. *King v. New York, N. H. & H. R. Co.*, 3 *Int. Com. Rep.* 272, 4 *Int. Com. Com.* 251.

Plaintiffs were engaged in milling in Indianapolis, Ind., but found the principal market for their mill products in the east, and complained of unjust discrimination on the part of carriers in giving a lower rate on grain to the east than on grain products which give millers in the east advantage over them. The carriers attempted to justify it on account of water competition by way of the lakes from Chicago and other points. The evidence showed that Indianapolis is from 154 to 327 miles from the different lake shipping points, and that most of the grain that is shipped by the lakes comes from points west of plaintiff's city. *Held*, that such water competition, under the circumstances, will not justify such discrimination. *Bates v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 715, 3 *Int. Com. Com.* 435.

65. Water competition as affecting rates on oil.—Competition between all rail and all water lines between New York and San Francisco and other points on the Pacific coast must be considered in fixing the rate for railroad transportation of oil and its products. *Rice v. Atchison, T. &*

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And the competition that arises from shipping oil from the Pennsylvania oil fields by rail or by pipe line to New York, and thence to points on the Pacific coast by water, must be considered in fixing rates on all rail transportation. *Rice v. Atchison, T. & S. F. R. Co.*, 3 *Int. Com. Rep.* 263, 4 *Int. Com. Com.* 228.

c. Local and Through Rates.

66. Generally.—Where a carrier receives goods for a point beyond its line and merely names a rate in connection with its own, it is not thereby made responsible for the rate on the connecting road. *Crews v. Richmond & D. R. Co.*, 1 *Int. Com. Rep.* 703, 1 *Int. Com. Com.* 401.

Where a carrier refuses a through rate to all points alike it cannot be charged as unjust discrimination because the refusal operates in favor of one place and against another. *Crews v. Richmond & D. R. Co.*, 1 *Int. Com. Rep.* 703, 1 *Int. Com. Com.* 401.

When making a decision upon a question purely of fact in respect to traffic in one section of the country, the commission is not to be understood as laying down a principle which must be applied in other sections of the country, where the peculiarities of the traffic may be so different as to require altogether different rulings. *In re Relative T. & B. Rates on Oil*, 2 *Int. Com. Rep.* 245, 2 *Int. Com. Com.* 365.

Where a complaint has been made as to local and through rates, and the commission has heard it after full proofs and investigation, and no party to the proceeding has applied for a rehearing, an application for a rehearing will not be granted to persons who were not parties. *In re Toledo Produce Exch.*, 2 *Int. Com. Rep.* 412, 2 *Int. Com. Com.* 588.

The practice which prevails in the territory covered by the Southern Railway & Steamship Association of making rates by adding locals to the established rate to what are termed "basing points" is unlawful. *Hamilton v. Chattanooga, R. & C. R. Co.*, 3 *Int. Com. Rep.* 482, 4 *Int. Com. Com.* 686.

The inherent defect in making these rates is that the railroad companies treat traffic intended to be continuous between points as consisting of two kinds of service, independent of each other; the one to the basing point on a through rate, and the other

from the basing point to an intermediate point on a local rate. *Hamilton v. Chattanooga, R. & C. R. Co.*, 3 *Int. Com. Rep.* 482, 4 *Int. Com. Com.* 686.

Divisions of a through rate need not be considered on the question of the way in which the through rate is affected by an arbitrary differential. *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.*, 3 *Int. Com. Rep.* 830, 5 *Int. Com. Com.* 166.

Where all the distances brought into comparison are considerable and the difference between them relatively small, there should be substantial similarity in the respective rates unless other modifying circumstances justify disparity. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 5 *Int. Com. Com.* 264, 4 *Int. Com. Rep.* 65.

The doctrine that transportation charges should be in proportion to the distances between points, where those distances are greatly dissimilar, has never been advocated by railroads nor recommended by the commission. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 5 *Int. Com. Com.* 264, 4 *Int. Com. Rep.* 65.

To fix rates in inverse proportion to the natural advantages of competing towns with the view of equalization, what is termed "commercial conditions" is neither just nor lawful. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 5 *Int. Com. Com.* 264, 4 *Int. Com. Rep.* 65.

67. Through rates, how made and construed.*—A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a way bill showing the route over which it is to pass, with the percentages of all the other lines set forth on the way bill, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.*, 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

Where a rate has every essential constituent of a through rate it is immaterial whether it be quoted as a through rate or not. *Milwaukee Chamber of Commerce v.*

* Through traffic arrangements under Interstate Commerce Act, see note, 12 L. R. A. 437.

Unjust discrimination; through and local rates; services for different parties, see 40 AM. & ENG. R. CAS. 41, *abstr.*

Flint & P. M. R. Co., 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

Through rates, like any other agreements that parties competent to contract may make, admit of very great variety in the forms they assume; and such rates, when reasonable and fairly adjusted in their relations to local business, are greatly favored in the law because they furnish cheapened rates and greater facilities to the public, while at the same time they give increased employment and earnings to a larger number of carriers. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.*, 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

The difference between proportions of through rates along the same lines should be fairly reasonable in amount and properly regarded in their application, and not such as to injure or suppress business in one locality in order that it may be stimulated and built up in another. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.*, 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

Where a rate is in itself a through rate, and made up of percentages to an intermediate point on a long haul, the circumstances and conditions of transportation must be rarely exceptional indeed to be of such controlling force as to warrant any considerable excess of such rate in amount over a percentage of a through rate for an equal distance, along the same line, by way of the same point to a more distant point. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.*, 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co.*, 2 *Int. Com. Rep.* 393, 2 *Int. Com. Com.* 553.

A railroad company is under obligation to give reasonable rates to its local business. If it does that it is not illegal for it to accept business from other carriers on through rates which, when divided between them, will give to any one of them less for its division than its own local rates. *Lippman v. Illinois C. R. Co.*, 2 *Int. Com. Rep.* 414, 2 *Int. Com. Com.* 584.

But the above rule is subject to the condition that the through rate is not in itself illegal, either because of being less than some one of the locals or being unjustly

discriminating against individuals or localities; or so low as to burden other business with some part of the cost of the business on which it is imposed. *Lippman v. Illinois C. R. Co.*, 2 *Int. Com. Rep.* 414, 2 *Int. Com. Com.* 584.

The act favors through rates, and the rate should be adjusted with reference to the through distance and not the distance over the separate lines. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

68. As affected by distance.—A railroad company is under special obligation to give reasonable rates for its local business; but there are many influences which may affect through rates while not bearing upon local rates at all, or, if at all, in less degree. *Lippman v. Illinois C. R. Co.*, 2 *Int. Com. Rep.* 414, 2 *Int. Com. Com.* 584.

Much weight should be given to distance in establishing rates, but it is not an unconditional right to have them so fixed, from which a departure may not be justified by other conditions. The public benefits, the greater volume of business warranting lower rates, and competition, furnish reasons which sometimes outweigh the mere consideration of distance. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.*, 2 *Int. Com. Rep.* 436, 2 *Int. Com. Com.* 618. *McMorran v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 604, 3 *Int. Com. Com.* 252.

To fix a rate for a thousand miles at twice the sum prescribed for half the distance, under all circumstances, would be too arbitrary. *Eau Claire Board of Trade v. Chicago, M. & St. P. R. Co.*, 5 *Int. Com. Com.* 264, 4 *Int. Com. Rep.* 65.

The claim that an estimated portion of the through rate must not be less according to the distance than the local rate from an intermediate point to another point named in the line covered by the through rate is not just, nor in harmony with previous findings of the commission. *Poughkeepsie Iron Co. v. New York C. & H. R. Co.*, 3 *Int. Com. Rep.* 248, 4 *Int. Com. Com.* 195.

69. Duty of one carrier to pay charges to next preceding carrier.—Through rates are the subject of agreement, and depend upon agreement alone for their existence; but one of the features of such rates is usually that each carrier receiving the freight pays the charges on it to the carrier delivering it. *In re Clark*, 2 *Int. Com. Rep.* 797, 3 *Int. Com. Com.* 649.

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But connecting carriers are not obliged to pay antecedent charges of connecting lines when no agreement for a through rate exists. *In re Clark*, 2 *Int. Com. Rep.* 797, 3 *Int. Com. Com.* 649.

70. Rates from western points to New York and Boston.—Whether the joint through rates from Chicago and other western points to Boston are disproportionately higher than the joint through rates to New York must be determined by reference to circumstances and conditions, such as cost of service, volume of business, competition by rail or water, terminal facilities, storage capacity, etc. *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.*, 1 *Int. Com. Rep.* 754, 1 *Int. Com. Com.* 436.

Complaint was made of discrimination in rates from Chicago and other western points to Boston, caused by adding to the New York rates what was termed a "differential" of from five to ten cents, according to the class of goods. *Held*, that such differential was improper, and in its stead a certain percentage should be substituted. *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.*, 3 *Int. Com. Rep.* 830, 5 *Int. Com. Com.* 166.

Several railroads reaching Boston and having western connections petitioned for the privilege of delivering western grain at Boston at the same rate that it is delivered at New York, when intended for export, the distance to Boston being somewhat greater; or that they be allowed to give a rebate, which would make the actual rate the same. The commission refused to make any order in the matter, but allowed the complainants to withdraw their petitions. *In re Export Trade of Boston*, 1 *Int. Com. Rep.* 25, 1 *Int. Com. Com.* 24.

71. Rates on branch and parallel lines.—Where several railways combine to form a through line, they may maintain the same rate at an intermediate and a terminal point, and a higher rate may be maintained to a branch point off the direct through line without being guilty of unjust discrimination. *Lehmann v. Texas & P. R. Co.*, 3 *Int. Com. Rep.* 706, 5 *Int. Com. Com.* 44.

The fact that one company controls parallel lines affords no warrant for giving superior advantages to the patrons of one line and denying similar advantages to those of the other line. It may not be essen-

tial that the rates on the two lines should be identical. Some difference on account of distance and increased operating expense and the conditions affecting the traffic may be permissible. The rates on the two lines should be relatively reasonable in view of their relations to each other and their effect upon the public. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 *Int. Com. Rep.* 608, 1 *Int. Com. Com.* 215.

A short road altogether in one state, but used and operated by interstate roads for the purpose of forming a connection, is subject to regulation, and cannot be used for the purpose of discriminating between different shippers of coal on the line. *Heck v. East Tenn. V. & G. R. Co.*, 1 *Int. Com. Rep.* 775, 1 *Int. Com. Com.* 495.

d. Classification of Freights.

72. Generally.*—The act recognizes, but does not enjoin, freight classification. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

A classification of freights is unlawful, if it be used as a device to affect unjust discrimination, or as the means of violating other provisions of the statute. *Coxe v. Lehigh Valley R. Co.*, 3 *Int. Com. Rep.* 460, 4 *Int. Com. Com.* 535.

Where an existing class rate does not give undue advantage to shippers, or injure carriers, a change should not be made that would materially injure an important industry at the point where parties have built up the industry, relying upon the maintenance of a previous classification which had long existed. *Bates v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 715, 3 *Int. Com. Com.* 435.

A "like kind of traffic," as used in the act (section 2) does not mean traffic that is identical, but that of a like kind with other freight, similar in character and cost of transportation. *New York Board of Trade & Transp. Co. v. Pennsylvania R. Co.*, 3 *Int. Com. Rep.* 417, 4 *Int. Com. Com.* 447.

Freights are usually classified according to expense of carriage, bulk, value, risk, competition, and other considerations affecting the cost and value of transportation service. *New York Board of Trade & Transp. Co. v. Pennsylvania R. Co.*, 3 *Int. Com. Rep.* 417, 4 *Int. Com. Com.* 447.

Interstate carriers may make commodity

* Fixed rates for certain classes of goods under the act, see note, 2 L. R. A. 445.

class rates and special class rates, so long as they do not violate the conditions of the statute. *New York Board of Trade & Transp. Co. v. Pennsylvania R. Co.*, 3 *Int. Com. Rep.* 417, 4 *Int. Com. Com.* 447.

73. Burton stock cars.—A stock car company which charges and receives from the public two and a half cents per mile for the use of its cars is not entitled to demand an additional payment of three quarters of a cent per mile from the carrier, upon the ground that carriers pay that sum to each other upon exchanging cars. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.

And the fact that carriers exchange cars with one another in the manner and on the terms above stated does not entitle the complainant, a stock car company, to claim that it is unjustly discriminated against by a refusal to pay the same rate which carriers adopt for the use of cars received from each other. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.

The expense of hauling complainant's cars in one direction unloaded, as compared with the greater ability to load back the ordinary cattle cars, and the fact that a large percentage of the ordinary cattle cars are back-loaded upon long hauls, is sufficient to justify a difference in charge against shippers of live stock, who prefer to hire the improved cars. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.

The fact that the cattle are transported in better condition and with less shrinkage in the improved cars, and for that reason are worth more at the end of the journey, is not a reason which the carriers can use as justifying an increased charge. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.

Nor is the fact that these special stock cars are chiefly used for higher grades of stock a proper ground for an additional charge, based upon the ground of care employed in the service. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.

74. Car-loads or less.—Ordinarily no adequate reason exists for a difference in rates for a car-load quantity of like traffic to the same destination, whether from one consignor to one consignee, or from several consignors to several consignees; and a dis-

crepancy between the rates for car-loads and less than car-loads upon groceries is unreasonable when both go to one destination. **Thurber v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 742, 3 *Int. Com. Com.* 473.

When an article moves in sufficient volume and the demands of commerce will be better served, it is reasonable to give a lower classification for car-loads than that which is applied to less than car-load quantities, but the difference in such classification should not be so wide as to be destructive to competition between large and small dealers. *Brownell v. Columbus & C. M. R. Co.*, 4 *Int. Com. Rep.* 285, 5 *Int. Com. Com.* 638.

Proof of lower classification of articles widely dissimilar in weight, bulk, value, risk, and general character, is not sufficient to establish unjust classification; but to determine whether an article is properly classed it must be compared with the classification of analogous articles. *Brownell v. Columbus & C. M. R. Co.*, 5 *Int. Com. Com.* 638, 4 *Int. Com. Rep.* 285.

Where a car-load shipper complains of unjust discrimination in giving equal rates to those who ship in car-loads, or less than car-loads, the burden is on him to sustain the charge. *Brownell v. Columbus & C. M. R. Co.*, 5 *Int. Com. Com.* 638, 4 *Int. Com. Rep.* 285.

75. Dried fruits and raisins.—Dried fruits and raisins, all the product of the same state, should be in the same class and at the same rate. *Martin v. Southern Pac. Co.*, 2 *Int. Com. Rep.* 1, 2 *Int. Com. Com.* 1.

The circumstances and conditions of carrying such fruit from San Francisco to Denver, Colo., are not so different from those attending the traffic from San Francisco to the Missouri river, a longer distance, as to justify charging a greater sum for the short distance. *Martin v. Southern Pac. Co.*, 2 *Int. Com. Rep.* 1, 2 *Int. Com. Com.* 1.

76. Grain and grain products.—Grain and grain products belong to the same class, and are *prima facie* entitled to be carried at the same rate; and if a carrier makes a difference, the burden is on it to sustain it by satisfactory evidence. *McMorran v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 604, 3 *Int. Com. Com.* 252.

A discrimination between the rate on corn and its direct products is a violation

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of section 3, where it is not founded on the character or condition of the traffic, and is without necessity or advantage to the carrier, notwithstanding the fact that the rate on corn is open to all alike. *Bates v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 715, 3 *Int. Com. Com.* 435.

Assuming that as a rule wheat and wheat flour should have the same classification and rate, a differential in favor of the wheat is a discrimination, but under particular circumstances and conditions it may not be unlawful. *Kauffman Milling Co. v. Missouri Pac. R. Co.*, 3 *Int. Com. Rep.* 400, 4 *Int. Com. Com.* 417.

Millers in St. Louis complained of what is known as "milling in transit," which gives millers at Minneapolis an advantage in the shipment of grain to Chicago or other points over St. Louis; but it appeared that at the time of the complaint a large number of the "transits" were out, which could be used at any time. *Held*, that the commission could not correct the evil by authorizing special rates to the St. Louis millers. *In re St. Louis Millers' Assoc.*, 1 *Int. Com. Com.* 20, 1 *Int. Com. Rep.* 22.

77. Oil shipped in tanks, or in barrels.—Oil and its products belong to the same class, and the rates thereon should correspond, without reference to the manner of carrying in barrels or tanks. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

A carrier that transports oil both in tank cars and by barrels in common cars is not relieved from the duty of making equal rates, irrespective of the mode of carriage. Where the difference in the method of carriage is the carrier's own creation it cannot be used to justify the difference in rates. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

Where a carrier transports oil in tank cars and only charges for the amount of the oil, the same method must be applied to the carriage of oil in barrels and placed in ordinary cars. It is error to make an additional charge for the weight of the barrels. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

The method of charging only for the weight of the oil when carried in tanks, but charging both for the oil and the weight of the barrels when barreled and carried in common cars, amounts to unjust discrimination, within the meaning of the statute,

and is unlawful. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

And the fact that a carrier does not own tank cars, but uses cars belonging to individuals, cannot be considered in determining the rates. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.

A habit of allowing tank shippers to bill their oil at the full capacity of the tank, and receive pay for 42 gallons more than the quantity upon which they pay rates to the carrier, is unjust discrimination and prohibited. Such allowance cannot be made on the ground of leakage or waste, where the same allowance is not made to shippers in barrels. *Rice v. Western N. Y. & P. R. Co.*, 3 *Int. Com. Rep.* 162, 4 *Int. Com. Com.* 131.—ADHERED TO IN *Rice v. Cincinnati, W. & B. R. Co.*, 3 *Int. Com. Rep.* 841, 5 *Int. Com. Com.* 193.

In a complaint for discrimination as between shippers of oil and its products in tank cars and in barrels, the evidence showed that shipment by barrel was more dangerous and that there was greater chance of a return load where the shipment was by tank, but that the difference charged was very considerable. *Held*, that the commission would equalize the difference, but still allow a charge for the weight of the barrels. *In re Relative T. & B. Rates on Oil*, 2 *Int. Com. Rep.* 245, 2 *Int. Com. Com.* 365.

But the above decision is based upon the facts relating to the particular district served by the carriers in question, and will not justify a carrier in a different district to include a charge for the weight of the barrels, where it appears that the difference affecting rates is the very reverse. *In re Relative T. & B. Rates on Oil*, 2 *Int. Com. Rep.* 245, 2 *Int. Com. Com.* 365.

78. When the shipper owns the tanks.—If a carrier is unable to supply rolling stock and the shipper supplies it for himself, it must be on such terms, as between the shipper and carrier, as not to put others to a disadvantage. *Rice v. Louisville & N. R. Co.*, 1 *Int. Com. Rep.* 722, 1 *Int. Com. Com.* 503.

A charge of unjust discrimination in shipping oil in tank cars owned by the shipper, and returning freights at low rates in the same cars, is not sustained, unless there be proof of the payment of excessive mileage,

or evidence of mutuality of interest of the two classes of shippers. *Rice v. Cincinnati, W. & B. R. Co.*, 3 *Int. Com. Rep.* 841, 5 *Int. Com. Com.* 193.

79. Rates on must be equal.—Ordinarily an individual who owns a car which he hires to a carrier is not entitled to the exclusive use of it; but if he has a right to contract for such exclusive use, it must be on such terms as not unjustly to discriminate against shippers in cars furnished by the carrier. *Independent Refiners' Assoc. v. Western N. Y. & P. R. Co.*, 5 *Int. Com. Com.* 415, 4 *Int. Com. Rep.* 162.

Where a company transports oil both in barrels and in tanks, which are furnished by certain shippers, the rates to each class of shippers should be the same. *Independent Refiners' Assoc. v. Western N. Y. & P. R. Co.*, 5 *Int. Com. Com.* 415, 4 *Int. Com. Rep.* 162.

80. Meat products.—The Chicago board of trade complained of unjust discrimination in charging a higher rate for transporting live hogs from various points in Iowa, Missouri, and Kansas than was charged for the transportation of meat products. *Held*, that such discrimination could not be justified on the ground that trains carrying live hogs had the right of way over freight trains carrying meat products, and would therefore run at a higher rate of speed, requiring shorter time for the transportation. *Chicago Board of Trade v. Chicago & A. R. Co.*, 4 *Int. Com. Com.* 158, 3 *Int. Com. Rep.* 233.

Neither does the evidence show that such discrimination is justifiable on the ground that live hogs are more expensive to the carrier to haul live hogs than packing house products.

Chicago Board of Trade v. Chicago & A. R. Co., 4 *Int. Com. Com.* 158, 3 *Int. Com. Rep.* 233.

Neither can such discrimination be justified on the ground that but few of the roads west of Chicago are provided with double-deck cars, which are often employed in carrying live hogs, and add to the number or weight that could be carried in a car. *Chicago Board of Trade v. Chicago & A. R. Co.*, 4 *Int. Com. Com.* 158, 3 *Int. Com. Rep.* 233.

It was also claimed that such discrimination was justified on the ground that, counting coal, cooperage, salt, and ice used in packing pork, the carrying of the hogs in and the product out, the slaughtering of

hogs in the states named furnished the carriers more tonnage than if the hogs were carried to Chicago alive. *Held*, that this was no ground for such discrimination. *Chicago Board of Trade v. Chicago & A. R. Co.*, 4 *Int. Com. Com.* 158, 3 *Int. Com. Rep.* 233.

81. Patent medicines.—The value of an article to a manufacturer is the price it commands, and it is but reasonable that carriers should take into account the market value as one of the considerations in arranging a classification and fixing the rates that should be paid for the shipment of the article. *Warner v. New York C. & H. R. R. Co.*, 3 *Int. Com. Rep.* 74, 4 *Int. Com. Com.* 32.

And in arranging such classification and rates not only the market value of the article, but the representations of the shipper may be taken into consideration. *So held*, where a shipper of patent medicines claimed that it did not have a greater intrinsic value than ale, beer, and mineral waters, and therefore should not be charged a higher rate; but where he represented it to the public as much more valuable and sold it in the market at a much higher price. *Warner v. New York C. & H. R. R. Co.*, 3 *Int. Com. Rep.* 74, 4 *Int. Com. Com.* 32.

And the volume of business furnished to carriers by a particular article is a proper element to be considered in determining its classification and rates. So where ale, beer, and mineral waters are shipped in very much greater quantities than complainant's medicines, it is a reason for giving a different classification. *Warner v. New York C. & H. R. R. Co.*, 3 *Int. Com. Rep.* 74, 4 *Int. Com. Com.* 32.

The fact that a lower classification was given to complainant's medicines under some other classifications existing prior to the creation of the commission is in no way controlling. *Warner v. New York C. & H. R. R. Co.*, 3 *Int. Com. Rep.* 74, 4 *Int. Com. Com.* 32.

82. Railroad ties.—Railroad ties should be classed the same as lumber; and the classification of such ties differently is unjust discrimination. *Reynolds v. Western N. Y. & P. R. Co.*, 1 *Int. Com. Rep.* 685, 1 *Int. Com. Com.* 393.

83. Salt.—Salt is an article which requires and gets a commodity rate lower than class rates, and the general rule applicable thereto seems properly to be that if it be

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placed at commodity, or lower than class rates, the only limitation upon the carriers should be that the commodity should not be carried at entirely unremunerative rates, so as to impose burdens upon other articles of transportation to recoup loss incurred in carrying the salt. *Anthony Salt Co. v. Missouri Pac. R. Co.*, 5 *Int. Com. Com.* 299, 4 *Int. Com. Rep.* 33.

In determining whether there is a discrimination in the rates for carrying salt from the Michigan salt works west, and for carrying salt from the Kansas salt works north and east, the fact that there is part water transportation from the Michigan district, and that it is easier to get empty cars from a distributing point like Chicago west than it is to get empty ones from the Kansas district east, especially during the season when the roads are carrying grain to market, must be considered. *Anthony Salt Co. v. Missouri Pac. R. Co.*, 5 *Int. Com. Com.* 299, 4 *Int. Com. Rep.* 33.

84. Soaps.—Where a manufacturer of soap describes it to the public as a toilet soap, such description may be taken by carriers for the purpose of classification and rates. *Andrews Soap Co. v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 77, 4 *Int. Com. Com.* 41.—**DISTINGUISHED IN BEAVER** *v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 564, 4 *Int. Com. Com.* 733.

In such cases carriers are not required to analyze the freight shipped to ascertain whether it is in fact inferior to the description given by the manufacturers and shippers to the public, in order to secure for it a lower classification and rate. *Andrews Soap Co. v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 77, 4 *Int. Com. Com.* 41.

Where two kinds of soap are advertised and held out to the public as suitable for like purposes, and they are so used, they should receive the same classification and rates. *Beaver v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 564, 4 *Int. Com. Com.* 733.—**DISTINGUISHING** *Andrews Soap Co. v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 77.

What are known as "Grandpa's Wonder Soap" and "Ivory Soap" are each suitable for laundry and for toilet purposes, and fall within the above rule, and should therefore receive the same classification and rates. *Beaver v. Pittsburgh, C. & St. L. R. Co.*, 3 *Int. Com. Rep.* 564, 4 *Int. Com. Com.* 733.

The Southern Railway & Steamship Asso-

ciation, of which defendant is a member, placed the soap known as "Pearline" in the fourth class, with a rate of 73 cents per hundred between New York and Atlanta, Ga., and common soap is placed in the sixth class, at 49 cents, but a special rate is given on common soap of 33 cents. The evidence showed that Pearline was competitive with common soap. *Held*, that Pearline should be placed in the fifth class, and that the relative difference in the rates must not exceed the difference of 60 cents per hundred on Pearline and 33 cents on common soap. *Pyle v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Rep.* 767, 1 *Int. Com. Com.* 465.

85. Sugar in barrels.—Where a carrier transports two barrels of sugar to one person, and carries one barrel for another person two days later, between the same points and in the same direction, it is "a like service," within the meaning of section 2. The fact that the shipper of two barrels furnishes the road much more traffic than the shipper of the other barrel does not make the circumstances and conditions so dissimilar as not to come within the meaning of the statute. *United States v. Tozer*, 39 *Fed. Rep.* 369.

But where the carrier receives the two barrels of sugar from a connecting carrier, the fact that its proportion of a through rate would be 12 cents per hundred less than the rate on the other barrel carried over its road alone would not in itself make the difference unlawful, as the carriage is under substantially dissimilar circumstances and conditions. *United States v. Tozer*, 39 *Fed. Rep.* 369.

But in such case, whether a difference of 12 cents per hundred pounds was so disproportionate as to amount to undue and unreasonable preference in favor of the through shipper, and to be in violation of section 3, is a question for the jury. *United States v. Tozer*, 39 *Fed. Rep.* 369.

86. Underbilling—Wrong billing.—Common carriers must act equally in serving the public, and should be held responsible for exact weights and classifications, and in turn should require the same of all their agents. *In re Underbilling*, 1 *Int. Com. Rep.* 813, 1 *Int. Com. Com.* 633.

Unjust discrimination may result from underbilling where the favored shipper pays less than is charged to others for the same service. *In re Underbilling*, 1 *Int. Com. Rep.* 813, 1 *Int. Com. Com.* 633.

And billing freight to a certain point at a lower rate, if it is to be reshipped beyond the point of destination, is unlawful. *Northwestern Iowa G. & S. Shippers Assoc. v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 431, 2 *Int. Com. Com.* 604.

e. Carriage of Passengers.

87. Party-rate tickets.*—Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" for not less than ten persons, at two cents a mile, where such tickets are offered to the public generally. Such tickets do not amount to undue or unreasonable preference or advantage, within the meaning of the Interstate Commerce Act, §§ 2, 3. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; *affirming* 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.—FOLLOWED IN *Foster v. Cleveland, C. & St. L. R. Co.*, 56 *Fed. Rep.* 434.

In order to constitute unjust discrimination under section 2 of the act, the carrier must charge or receive directly from one person a greater or less compensation than from another; or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for "a like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; *affirming* 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.

To bring the present case within the words of the above section it must be presumed that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, which, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, is impossible. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; *affirming* 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.

There is nothing in the objection that

* Interstate Commerce Act as to "party-rate tickets" construed, see 45 *AM. & ENG. R. CAS.* 246, *abstr.*

party-rate tickets afford facilities for speculation, and that they will be used by ticket brokers or scalpers for the purpose of evading the law, as such tickets would be much less available or easily handled by brokers than a ticket for the transportation of a single person; but if such tickets should be made a pretext for evading the law, the courts would have no difficulty in applying the proper remedy. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; *affirming* 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.

Both car-load rates to passengers and party rates, lower than for a single passenger, are illegal. *In re Passenger Tariffs*, 2 *Int. Com. Rep.* 445, 2 *Int. Com. Com.* 649.

Party-rate tickets and commutation tickets are not the same; and when a party-rate ticket is sold for less than the fare for a single passenger it is illegal. *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.*, 2 *Int. Com. Rep.* 729, 3 *Int. Com. Com.* 465.

88. Special rates to commercial travelers.—The sale of mileage tickets to commercial travelers, and a refusal to sell to other travelers at the same rate, is unjust discrimination, within the meaning of section 2 of the act. *Larrison v. Chicago & G. T. R. Co.*, 1 *Int. Com. Rep.* 369, 1 *Int. Com. Com.* 147. *Associate Wholesale Grocers v. Missouri Pac. R. Co.*, 1 *Int. Com. Rep.* 393, 1 *Int. Com. Com.* 156.

And the facts that commercial travelers release the carriers from liability, and that they may influence business in favor of the carriers, are not sufficient to justify such discrimination. *Larrison v. Chicago & G. T. R. Co.*, 1 *Int. Com. Rep.* 369, 1 *Int. Com. Com.* 147.

89. Selling tickets at reduced rates through brokers.—The placing of passengers tickets in the hands of brokers or scalpers to be disposed of at reduced rates, under the pretense of paying a commission, is a violation of the statute. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

Any rates lower than those established by the regular tariff are illegal, whether sold directly or through others. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

And the unjust discrimination which the statute denounces is accomplished in any case where a ticket broker sells tickets for

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a less sum than they can be bought at the carrier's office. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

90. Granting free passes.—The offense, under section 2, of giving free transportation to an individual, consists in charging, demanding, collecting, or receiving by the carrier from some other person, or persons, a compensation for a like service when none is contemporaneously charged or received from the person thus transported free. *Griffie v. Burlington & M. R. R. Co.*, 2 *Int. Com. Rep.* 194, 2 *Int. Com. Com.* 301.

Where a free pass is given to a discharged employé of a company on the assumption that he might still be regarded as an employé, but it affirmatively appears that it was never used, and that it expired in the hands of the party to whom it was issued, by limitation contained on its face, and was produced before the commission as an unused instrument in a proceeding in which a complaint of its issue was made, it was held that the facts did not show that a breach of section 2 of the act had been committed, no free transportation having been charged, and the party being entitled to none according to the terms of the instrument as it then was. *Griffie v. Burlington & M. R. R. Co.*, 2 *Int. Com. Rep.* 194, 2 *Int. Com. Com.* 301.

In cases of wilful violation of the law it may become the duty of the commission to lay the facts before the proper United States district attorney; but it will refuse to do so where the complaint is made for the avowed purpose of retaliation, because the carrier has revoked a pass which the complainant held. *Slater v. Northern Pac. R. Co.*, 2 *Int. Com. Rep.* 243, 2 *Int. Com. Com.* 359.

Under the statute railroad companies can only issue free transportation to persons who are in its regular service as employés; and a person who receives no compensation except free transportation over the road "for throwing what business he conveniently can in their way" is not within the provision of the statute. *Slater v. Northern Pac. R. Co.*, 2 *Int. Com. Rep.* 243, 2 *Int. Com. Com.* 359.

To grant free transportation to city officials, on account of their official positions, is unjust discrimination within the meaning of section 2. *Harvey v. Louisville*

& N. R. Co., 3 *Int. Com. Rep.* 793, 5 *Int. Com. Com.* 153.

91. Limited and unlimited tickets.

—A company advertised for sale two kinds of tickets between designated places; one termed an unlimited ticket, sold for \$11.50, and the other, a limited ticket, sold for \$7. These two classes of tickets were accessible to every one who chose to buy them. Held, that the sale of the lower price ticket, which did not give the holder the right to stop over at intermediate stations, was not unlawful, because it was not dated or punched so as to limit the time of using it, in the absence of anything by the commission or the carrier defining exactly what was meant by limited and unlimited tickets. *United States v. Egan*, 47 *Fed. Rep.* 112.

6. Preference or Advantage.

92. Generally.*—Naming a rate from one place lower than that named from a neighboring place amounts to a preference, where the circumstances are the same; and when a shipper is damaged thereby it becomes undue and unreasonable preference, unless it can be justified. *In re Tariffs of the Transcontinental Lines*, 2 *Int. Com. Rep.* 203, 2 *Int. Com. Com.* 324.

A conviction for the violation of the "undue preferences" clause of the act cannot be sustained where the criminality of the act is made to depend on whether the jury think a preference reasonable or unreasonable. To constitute a crime, the act must be one the criminality of which the party is able to know in advance. *Toser v. United States*, 53 *Am. & Eng. R. Cas.* 14, 52 *Fed. Rep.* 917.—*QUOTING Chicago & N. W. R. Co. v. Dey*, 35 *Fed. Rep.* 866.

93. In furnishing cars.—In the absence of a custom or rule requiring a carrier to notify a shipper when cars can be obtained, it is not the duty of the carrier to give such notice, but it is the duty of the shipper to make reasonable inquiry; but the obligation of the company in this regard may be changed by contract. *Riddle v. Baltimore & O. R. Co.*, 1 *Int. Com. Rep.* 778, 1 *Int. Com. Com.* 608.

* "Undue preference" clause of Interstate Commerce Act construed, see 55 *AM. & ENG. R. CAS.* 578, *abstr.*

† A failure to furnish cars owing to inability, no violation of the act. Duty to furnish cars ratably. Undue preference, see 32 *AM. & ENG. R. CAS.* 612, *abstr.*

Where a carrier is charged with unjust discrimination as against a certain shipper, it is competent for it to show that during a long course of business neither the company nor any of its agents had ever manifested any unfriendly feeling toward the shipper, but on the other hand, just before the matter complained of, it had made extra exertions, in good faith, to serve the shipper in procuring cars from a connecting line. *Riddle v. Baltimore & O. R. Co.*, 1 *Int. Com. Rep.* 778, 1 *Int. Com. Com.* 608.

The public must be justly and equally served in the furnishing of cars; and at the time of unusual pressure of business, regular patrons of the road are not entitled to preference. *Riddle v. New York, L. E. & W. R. Co.*, 1 *Int. Com. Rep.* 787, 1 *Int. Com. Com.* 594.

Where a particular kind of cars are not equal to the demand, other cars should be appropriated. *Riddle v. New York, L. E. & W. R. Co.*, 1 *Int. Com. Rep.* 787, 1 *Int. Com. Com.* 594.

And a carrier is not justified in refusing cars for a certain kind of traffic, such as coal, on the ground that it cannot furnish cars for all of its business at the time, and that it can make more money in using the cars for other purposes. *Riddle v. New York, L. E. & W. R. Co.*, 1 *Int. Com. Rep.* 787, 1 *Int. Com. Com.* 594.

A charge of undue preference in furnishing cars to a certain line of shippers, in that the company did not require the cars to be unloaded and returned promptly, is not sustained, where the evidence shows that only slight delays had been made, and then against the instructions of the company, and that it had even imposed demurrage charges. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 688, 1 *Int. Com. Com.* 374.

Where an emergency occurs that temporarily prevents a carrier from furnishing cars as fast as desired, it is its duty to furnish them ratably to all shippers. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 688, 1 *Int. Com. Com.* 374.

A carrier does not violate the statute by refusing to allow cars to be sent off its road when its own business keeps the cars fully occupied. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 688, 1 *Int. Com. Com.* 374.

94. As between carriers.—Where a railroad company has provided proper and equal facilities for the interchange of traffic

at an established yard or depot, a refusal to exchange traffic with a new road at another point where no such facilities exist, does not constitute discrimination, or undue or unreasonable preference or advantage. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.—DISTINGUISHED IN *Little Rock & M. R. Co. v. East Tenn., V. & G. R. Co.*, 47 *Fed. Rep.* 771. QUOTED IN *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.

The act (section 3) does not mean, when a company provides for the interchange of business with connecting roads at one place, that it is bound to provide like facilities at other points, where other roads may make connections; but it simply means that when a company has provided such facilities at one place it must furnish them alike to all. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

95. As between localities.*—Rates must be relatively fair and reasonable as between localities in essential respects similarly situated, not according to any rule of mathematical precision, but in substance and in fact, having regard to the geographical and relative positions of the localities, so that one will not be favored to the unjust prejudice of the other. *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 199, 2 *Int. Com. Com.* 315.

Where a number of carriers unite in a system of through rates covering an extended territory, which seem reasonable in themselves, and relatively fair, the commission will not direct them to be changed at one point where the effect would be to make other changes at many other points necessary, and thus unsettle values, unless substantial justice requires it. *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 199, 2 *Int. Com. Com.* 315.

Where a carrier gives a through rate on cotton it is not a violation of sections 2 and 3 to give the same through rate with the privilege of having the cotton stopped at an intermediate point, where it is compressed at the expense of the carrier, where the rate is open to all alike. *Cowan v. Bond*, 39 *Fed. Rep.* 54, 2 *Int. Com. Rep.* 542.

* Preference as to localities, see note, 2 *L. R. A.* 445.

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The board of trade of the city of Detroit complained that that city was unjustly discriminated against in making rates on shipments originating at or destined to that city, 78 per cent. of the Chicago rate on east as well as west bound freights, when it was claimed that, taking into consideration the distance and the geographical position of Detroit, the percentage should be 70 per cent. of the Chicago rate. *Held*, that a claim made under this complaint that the through rate must be proportioned to distance, could not be sustained. *Detroit Board of Trade v. Grand Trunk R. Co.*, 2 *Int. Com. Rep.* 199, 2 *Int. Com. Com.* 315.

96. In preferring trade centres.*—Large commercial places which are designated as trade centres are not, as a matter of right, entitled to more favorable rates than smaller places which are generally supplied from the trade centres; and it is not unlawful to give the smaller places as favorable rates as the large ones. *Martin v. Chicago, B. & Q. R. Co.*, 2 *Int. Com. Rep.* 32, 2 *Int. Com. Com.* 25.

But where the rates are impartial in themselves as between different trade centres, the fact that one has an advantage over another in supplying the small places does not make out a case of undue preference under the statute. Impartial rates are not rendered illegal by their effect upon different localities. *Martin v. Chicago, B. & Q. R. Co.*, 2 *Int. Com. Rep.* 32, 2 *Int. Com. Com.* 25.

Such distributing centres have no right to demand that the rates to more distant and smaller places shall be made up of the rate to the large place, plus the rate from there to the smaller places. Rates may be made directly to the small places less than the two rates. *Martin v. Chicago, B. & Q. R. Co.*, 2 *Int. Com. Rep.* 32, 2 *Int. Com. Com.* 25.

97. In preferring one shipper or class of goods.—A carrier has no right to refuse less desirable freights because more can be made in carrying another kind. *Riddle v. New York, L. E. & W. R. Co.*, 1 *Int. Com. Rep.* 787, 1 *Int. Com. Com.* 594.

It is not necessary for a shipper to make a special contract with a common carrier in order to entitle him to transportation for his goods. A common carrier, by virtue of his assuming that position, thereby becoming

entitled to the privileges, liens, and protections given by statute and the common law, becomes bound to carry the merchandise of all for a reasonable reward, whenever tendered in the usual way. *Riddle v. New York, L. E. & W. R. Co.*, 1 *Int. Com. Rep.* 787, 1 *Int. Com. Com.* 594.

98. In making a joint through rate.—A joint through tariff agreed upon by two connecting lines, or the share of it which either line takes, is not the standard by which to determine whether either line, by its local rates, grants undue preferences. *Tozer v. United States*, 53 *Am. & Eng. R. Cas.* 14, 52 *Fed. Rep.* 917.—**FOLLOWING** Chicago & N. W. R. Co. v. Osborne, 52 *Fed. Rep.* 912.

Divisions of a joint rate among the carriers are sometimes inquired into for the purpose of ascertaining, from the divisions, whether a rate unreasonable in itself may not be traced to the inequality of such divisions. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

7. Facilities for the Interchange of Traffic.

99. Equal facilities, generally.*—A railroad company complaining of discrimination by a connecting road, charged in its petition that the defendant company deprived complainant "of equal facilities with a competing line for interchange of traffic, a discrimination in rates, the withdrawal of a joint through traffic, and a threat to close a through route" by way of complainant's road. *Held*, that the complaint charged both a discrimination in rates and a failure to provide equal facilities for the interchange of traffic, within the meaning of section 3, as amended in 1889. *New York & N. R. Co. v. New York & N. E. R. Co.*, 53 *Am. & Eng. R. Cas.* 7, 50 *Fed. Rep.* 867.

Where the commission has found that defendant company has deprived plaintiff company "of equal facilities for the interchange of traffic," and a proceeding is instituted in a federal court to enforce the order of the commission, it may be shown that defendant so arranged the running of its trains as to deprive plaintiff of equal facilities for the interchange of traffic, though no question as to the hours of running trains

* Distributing trade centres are not entitled to preference, see note, 2 *L. R. A.* 446.

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* Duty of carriers to receive from each other under the act, see 35 *AM. & ENG. R. CAS.* 650, *abstr.*

was made before the commission. *New York & N. R. Co. v. New York & N. E. R. Co.*, 53 *Am. & Eng. R. Cas.* 7, 50 *Fed. Rep.* 867.

In such case the defendant company claimed that it had a traffic contract with another company, which formed an extension of its road, and that it had a right therefore to divert traffic to such road as against plaintiff's road. The evidence showed that defendant was a separate corporation, owning no stock in the favored corporation, neither having built, bought, leased, nor having any contract for the management of its business. *Held*, that the claim could not be sustained. *New York & N. R. Co. v. New York & N. E. R. Co.*, 53 *Am. & Eng. R. Cas.* 7, 50 *Fed. Rep.* 867.

And the fact that both defendant and the favored company were members of a terminal company, a mere combination of carriers, by which the favored road was permitted to reach New York city, would not relieve defendant of its duty to provide for the interchange of traffic with all roads directly connecting with it. *New York & N. R. Co. v. New York & N. E. R. Co.*, 53 *Am. & Eng. R. Cas.* 7, 50 *Fed. Rep.* 867.

100. Kentucky Bridge — Rights and duties of roads crossing.—Plaintiff company was chartered with power to build a bridge and to operate a line of railway over the bridge, and approaches thereto, and to connect it with lines of railroad companies by necessary terminal facilities or tracks. It owned several passenger cars and locomotives, but no freight cars, but used its bridge to transport trains or cars of railroad companies from one road to another in different states. *Held*, that it was engaged as a common carrier, and was entitled to demand of railroads intersecting its tracks equal facilities for the interchange of traffic, and for receiving, forwarding, and delivering the same. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 *Int. Com. Com. Rep.* 102, 2 *Int. Com. Com.* 162.

Defendant railroad company united with other companies in an agreement to transfer all their business across a river by a certain bridge, according to certain stipulated terms. Subsequently plaintiff's bridge was constructed over the river near the other, and one of the railroad companies to the above contract transferred its business to plaintiff's bridge; whereupon defendant company refused to accept the freights of such company which had been received

over plaintiff's bridge. *Held*, that such refusal was a violation of the statute, and therefore unlawful. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 *Int. Com. Com. Rep.* 102, 2 *Int. Com. Com.* 162.

If the company which transferred its business to plaintiff's bridge violated its contract with defendant company and the other bridge, the remedy must be the ordinary remedy for breach of contract, and not a refusal to extend to it equal facilities for the interchange of traffic. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 *Int. Com. Rep.* 102, 2 *Int. Com. Com.* 162.

The fact that a railroad company has been created by public authority is conclusive proof that it supplies a public necessity; and when another company is charged with discrimination in not supplying it with equal facilities for the interchange of traffic, the defendant company cannot set up as an excuse that the other company does not supply any public necessity. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 2 *Int. Com. Rep.* 102, 2 *Int. Com. Com.* 162.

101. Duty of one carrier to receive cars of another.—The act (section 3) forbidding "any undue or unreasonable preference" and requiring carriers to "afford all reasonable, proper, and equal facilities" for the exchange of traffic, does not require a railroad company to receive freight in the cars in which it is tendered by a connecting line, and transport it in such cars, paying car mileage therefor, when it has cars of its own available, and the freight will not be injured by the transfer. (Deady, J., dissenting.) *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.—QUOTING *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 624; *Chicago & A. R. Co. v. Pennsylvania R. Co.*, 1 *Int. Com. Com.* 86.

A stock car company which furnishes to shippers of live stock a special improved car, but does not exchange or use cars of others, is not "a connecting line" within the meaning of the statute, which requires such lines to furnish equal facilities for the interchange of traffic. *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 *Int. Com. Rep.* 329, 1 *Int. Com. Com.* 132.—APPLIED IN *United States v. Delaware, L. & W. R. Co.*, 40 *Fed. Rep.* 101.

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contract for the use of a part of the track of another company, its rights pertaining thereto are determined by the contract; and no authority is given the commission under the statute to authorize a different use of the track. *Alford v. Chicago, R. I. & P. R. Co.*, 2 *Int. Com. Rep.* 771, 3 *Int. Com. Com.* 519.

Where a company only has running privileges over a part of the track of another company it is not required to violate its agreement as to the use of the track; and it is not a violation of the statute to refuse to receive and discharge traffic on the track, where the sufficiency of the local service rendered by the company owning the track is not questioned. *Alford v. Chicago, R. I. & P. R. Co.*, 2 *Int. Com. Rep.* 771, 3 *Int. Com. Com.* 519.

103. Duty of one company to allow rival boats to land at its wharf.

—A company that operates a railway and a line of steamboats connected at a wharf, does not violate section 3 by refusing to permit the boats of a competitor to land at the wharf. *Ihwaco R. & N. Co. v. Oregon S. L. & U. N. R. Co.*, 57 *Fed. Rep.* 673; *reversing* 51 *Fed. Rep.* 611.—DISTINGUISHING *Baxendale v. Great Western R. Co.*, 1 Ry. & C. T. Cas. 202; *Baxendale v. London & S. W. R. Co.*, 1 Ry. & C. T. Cas. 231; *Parkinson v. Great Western R. Co.*, 1 Ry. & C. T. Cas. 280; *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387, 10 So. Rep. 480. FOLLOWING EXPRESS CASES, 117 U. S. 29, 6 Sup. Ct. Rep. 542, 628.

The above section contemplates independent carriers capable of mutual relations, and capable of being objects of favor or prejudice. There must be at least two other carriers beside the offending one. For a carrier to prefer itself in its own proper business is not the discrimination which is condemned by the statute. *Ihwaco R. & N. Co. v. Oregon S. L. & U. N. R. Co.*, 57 *Fed. Rep.* 673; *reversing* 51 *Fed. Rep.* 611.

104. Duty of receivers to grant equal facilities to connecting lines.

—The provisions of the statute requiring all charges for the transportation of passengers or property, or for receiving, delivering, storing, or handling property, to be reasonable and just, apply to railroad receivers; and it is unlawful for such receiver to discriminate in rates, charges, or facilities, as between two connecting steamship lines.

In re Mallory, 30 *Fed. Rep.* 663, 1 *Int. Com. Rep.* 294.

105. Duty as to through rates.—Individual shippers cannot require one carrier to ship by a particular route beyond the initial carrier's line at the same through rate that the carrier may have established with other connecting lines; and the same rule applies as to connecting interstate carriers. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

Defendant company broke up an arrangement which had existed for some time for through rates and through billing by way of complainant's road, and gave as a reason therefor that it had entered into a new arrangement with another road over which it was intended to take the business which formerly passed over plaintiff's line. No charge was made that complainant company was insolvent, or not responsible, or that the arrangement as formerly existing was unfair and unequal as between the parties. *Held*, that defendant was guilty of a violation of section 3, which requires equal facilities for the interchange of traffic. *New York & N. R. Co. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 542, 4 *Int. Com. Com.* 702.

Defendant company gave as an additional reason for breaking up such arrangement for through billing that it was a joint owner with the road which it had selected under the new arrangement, of a terminal company, by which the city of New York was reached. *Held*, that this was not sufficient reason for breaking up the arrangement, where defendant did not own or control the line of the favored company. *New York & N. R. Co. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 542, 4 *Int. Com. Com.* 702.

106. Duty as to furnishing yard and depot facilities.

—It is the duty of a carrier of live stock to provide proper facilities for receiving and discharging such live stock free from all charges except the regular transportation charges; and it cannot receive and discharge such stock only in yards of stock companies where a charge is made therefor. *Keith v. Kentucky C. R. Co.*, 1 *Int. Com. Rep.* 601, 1 *Int. Com. Com.* 189.

A railroad company cannot give one stock yard company the exclusive handling of all live stock received or delivered at a place where complainants have established yards, with the conveniences of receiving and hand-

ling stock. Where complainants are thus provided and demand the right to receive stock from the road, their demand must be complied with. *Keith v. Kentucky C. R. Co.*, 1 *Int. Com. Rep.* 601, 1 *Int. Com. Com.* 189.

Where a railroad company has supplied itself with all necessary stations and depot facilities for the accommodation of its business, it is under no further duty either to the public or connecting roads to make new stations and depot facilities, though they might be for the convenience of the public or such connecting roads. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

107. Duty in the sale of through tickets—Control of agents.—The act does not in terms require one company to sell through tickets over another road. The right to sell through tickets and check through baggage arises only out of contract. *Chicago & A. R. Co. v. Pennsylvania Co.*, 1 *Int. Com. Rep.* 357, 1 *Int. Com. Com.* 86.—APPLIED IN *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

Railroad companies have a right to control their own agents, and under this right may prohibit them from receiving commissions from other roads for the sale of through tickets, and from selling tickets over roads which insist on paying such commissions. *Chicago & A. R. Co. v. Pennsylvania Co.*, 1 *Int. Com. Rep.* 357, 1 *Int. Com. Com.* 86.—CITED IN *Oregon S. L. & U. N. R. Co. v. Northern Pac. R. Co.*, 51 *Am. & Eng. R. Cas.* 145, 51 *Fed. Rep.* 465.

A regulation by a company prohibiting its agents from selling tickets over another road which insists on paying the agents a commission, and from receiving such commission, does not violate section 3, which requires connecting carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic. *Chicago & A. R. Co. v. Pennsylvania Co.*, 1 *Int. Com. Rep.* 357, 1 *Int. Com. Com.* 86.

108. Enforcing sec. 3 by injunction—Federal question.—A suit in equity to enforce section 3 by injunction, to compel the defendant company to receive and deliver the plaintiff's interstate freight, involves a federal question, which gives a federal court jurisdiction of the whole case, which may involve ordinary remedies, cognizable by state courts. *Toledo, A. A. &*

N. M. R. Co. v. Pennsylvania Co., 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.—FOLLOWING *Osborn v. Bank of U. S.*, 9 *Wheat.* (U. S.) 738.

The mandatory provisions of the act which apply to railroad corporations apply with equal force to their officers and employes, and an injunction to compel a railroad company to comply with the provisions of such act applies to the officers and employes of the corporations, and takes effect as to them as soon as they are notified thereof. It is not necessary that they should be made parties in order to bind them by the writ of injunction. *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.*, 53 *Am. & Eng. R. Cas.* 293, 54 *Fed. Rep.* 746.

8. Long and Short Hauls.

109. Generally.*—There is nothing in the statute preventing the making of the aggregate charge less in proportion for a long than for a short haul, or less per hundred as the distance increases. *Farrar v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Rep.* 764, 1 *Int. Com. Com.* 480.

Joint rates for long hauls should be lower in proportion than rates on short hauls. *Farrar v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Rep.* 764, 1 *Int. Com. Com.* 480.

If railroad companies permit a "dispatch" company to use their tracks they are responsible for the long haul rates made. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

A charge of violation of the long and short haul clause of section 4 of the act is not made out by showing that a carrier, when called on for through rates, names rates greater for the shorter distance and receives the same amount for itself and its connections, when it appears that on its own line the charges are greater for the longer distance, and the through charges by the shorter line are only made greater by the fact that the connecting road, which is the shorter line, makes higher rates than the road which has the longer line. *Allen v. Louisville, N. A. & C. R. Co.*, 1 *Int. Com. Rep.* 621, 1 *Int. Com. Com.* 199.

110. Limitations of the long and short haul clause.—The provision of section 4 prohibiting a greater charge for a

* Long and short haul clause construed, see note, 12 *L. R. A.* 436. See also 33 *AM. & ENG. R. CAS.* 670, *abstr.*

shorter than for same line, in the being included applies to cases of conditions of transportation similar. *In re Int. Com. Rep.*

The phrase "circumstances," means the same required to judge the circumstances greater charge *re Southern R. Rep.* 278, 1 *Int.*

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shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer, only applies to cases where circumstances and conditions of transportation are substantially similar. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

The phrase "under substantially similar circumstances," as used in sections 2 and 4, means the same thing; and carriers are required to judge in the first instance whether the circumstances are such as to permit a greater charge for a shorter distance. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

But the judgment of the carrier is in all cases subject to the review of the commission and of the courts. And where a carrier is charged with violating section 4, relating to long and short hauls, the burden is on it to show that the circumstances and conditions are dissimilar. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

The provisions of section 1, providing that charges shall be "reasonable and just," and that of section 2, forbidding "unjust discrimination," apply when exceptional charges are made under section 4, relating to long and short hauls. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

Where a carrier is charged with receiving a greater charge in the aggregate for a shorter than for a longer distance over the same line, it is not a sufficient justification to show that the traffic subject to the greater charge is local, and that which is given the more favorable charge is not. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.—QUOTED IN *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 *Am. & Eng. R. Cas.* 93, 50 *Fed. Rep.* 29.

Neither is it a sufficient justification to show that the short haul traffic is more expensive to the carrier, unless it be exceptionally so, nor the long haul traffic exceptionally inexpensive. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

Neither is such discrimination justified because the lesser charge on the longer haul was for the purpose of encouraging manufactures or some other industry, or designed to build up business or trade centres, or merely a continuation of favorable

rates under which such trade centres had been built up. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

The fact that long haul traffic will only bear certain rates is no reason for carrying it for less than cost at the expense of other traffic. *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

111. Rates to different places should be relatively just and fair.—

The relative fairness of a rate is not determined alone by its being low. Thus a low rate to one place may not be just when a still lower rate is given to another place. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

In determining whether a rate to one place is just it must be compared with rates to other localities. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

The purpose of the statute to prevent unjust discrimination as between localities would be defeated if one carrier, by making unreasonably low rates to a certain place, would thereby entitle competing carriers to make greater charges upon short hauls to other stations than are made over the same line to the locality thus favored. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

112. Rates as affected by circumstances and conditions.*—A greater charge for a shorter haul than for a longer haul is permissible under section 4, if the circumstances and conditions are not in fact substantially similar, and a railroad company may determine this question for itself, subject to liability for violating the act if, on investigation, the fact be found against it. To render such a charge lawful it is not necessary first to obtain a ruling from the commission. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 *Am. & Eng. R. Cas.* 93, 50 *Fed. Rep.* 295, 4 *Int. Com. Rep.* 323; *appeal dismissed in* 149 *U. S.* 264, 13 *Sup. Ct. Rep.* 837.—QUOTING *In re Southern R. & S. Assoc.*, 1 *Int. Com. Rep.* 280.—*Northwestern Iowa G. & S. Shippers Assoc. v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 431, 2 *Int. Com. Com.*

*When competition justifies greater charge for shorter haul. "Similar circumstances and conditions," see note, 54 *AM. & ENG. R. CAS.* 397.

is such charge justified by the fact that the cars on a connecting road carried machinery one way to the long distance point, when profitable return loads could not always be had. *James v. East Tenn., V. & G. R. Co.*, 2 *Int. Com. Rep.* 609, 3 *Int. Com. Com.* 225.

114. — by competition, generally.*—Competition to or from a particular place may justify a carrier in charging less for a long haul than for a shorter one included therein, without violation of section 4. *Ex parte Koehler*, 12 *Sawy. (U. S.)* 446, 31 *Fed. Rep.* 315.—**REVIEWING** *Ex parte Koehler*, 11 *Sawy.* 191; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 *U. S.* 683.—*Harwell v. Columbus & W. R. Co.*, 1 *Int. Com. Rep.* 631, 1 *Int. Com. Com.* 236.

The existence of actual competition, which is of controlling force in respect to traffic important in amount, may make out the dissimilar circumstances and conditions, entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases: (1) When the competition is with carriers by water which are not subject to the provisions of the statute; (2) when the competition is with foreign or other railroads which are not subject to the provisions of the statute; (3) in rare and peculiar cases of competition between railroads which are subject to the statute, when a strict application of the general rule of the statute would be destructive of legitimate competition. *In re Southern R. & Steamship Assoc.*, 1 *Int. Com. Rep.* 278, 1 *Int. Com. Com.* 31.

In certain cases lower rates to competitive points than to shorter distances may be justified; but when the disparity between the long and short distance charges is very great, the inference is irresistible that the lesser rate must be unremunerative, or else the larger rate gives an unwarranted return for the services rendered. The above principle applied where a carrier charged seventy-three cents per hundred for the short distance and only forty-two cents per hundred for a distance 150 miles longer, which was claimed to be a competitive point. *Chattanooga Board of Trade v.*

East Tenn., V. & G. R. Co., 5 *Int. Com. Com.* 546, 4 *Int. Com. Rep.* 213.

Competition with carriers not subject to the statute is based upon natural causes and plain conditions, but the legitimate force of competition with carriers subject to the act depends upon compliance with the law by each of the competitors and the special circumstances and primarily indefinite conditions in each particular case. *Gerke Brewing Co. v. Louisville & N. R. Co.*, 5 *Int. Com. Com.* 596, 4 *Int. Com. Rep.* 267.

115. — by land competition.—The fact that one company makes an unreasonably low rate does not authorize a rival company, running between the same points, to make a greater charge for a short haul to an intermediate point than it does to the terminal point. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

Competition between roads alone will not make out the "dissimilar circumstances and conditions" contemplated by the statute, which will justify a greater charge for the shorter haul. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

Where a company makes a certain charge to a given point, and the same charge to other places only from a third to two thirds of the same distance, the charges to the shorter points are presumptively unjust and illegal. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Rep.* 137, 2 *Int. Com. Com.* 231.

The rule expressed by the fourth section that distance shall ordinarily limit the adjustment of rates is not rendered inoperative by the existence at one point of converging lines subject to the act, for the law applies to each of these lines, and neither can put in rates to that point which are lower than shorter distance charges on its line until upon a showing of special considerations, grounded in justice to its patrons and itself, it obtains permission from the regulating authority so to do. This principle applies both to lines between the same points, and to lines reaching the same destination from different points of consignment. *Gerke Brewing Co. v. Louisville & N. R. Co.*, 5 *Int. Com. Com.* 596, 4 *Int. Com. Rep.* 267.

The circumstances and conditions surrounding the shipment of freight to Los

*Competition justifies lower rates for long than for short haul, see note, 29 *AM. & ENG. R. CAS.* 60.

Angeles, Cal., a point to which there is active competition between several transcontinental railway lines, direct or partly by water, as well as by the all water route, from points east of the Missouri, are substantially dissimilar from those attending shipments to San Bernardino, an intermediate non-competitive point, sixty miles inland from Los Angeles, on one of the competing railroads; accordingly, a through rate to Los Angeles, lower than that to San Bernardino, is justified. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 Am. & Eng. R. Cas. 93, 50 Fed. Rep. 295, 4 Int. Com. Rep. 323.

A higher charge from San Francisco to Denver than to Kansas City, a greater distance, cannot be justified on the ground of competition over the Canadian roads, as such roads are now working under an agreement as to rates with the roads of the United States at points where they formerly competed. *Martin v. Southern Pac. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. Com. 1.

116. — by water competition. — Actual water competition of controlling force may justify a lower charge for a longer distance than for a shorter distance included therein for the same kind of traffic. *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. Com. 1.

But the reduced rates to the competing points must not be so low as to leave no revenue from the traffic; and the higher rates to non-competitive points must be reasonable in themselves, and relatively reasonable when compared with the competitive points. *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. Com. 1.

A lower rate to the terminus of a through route that is subject to actual water competition, does not amount to unjust discrimination, as against a shorter route not on the through route, but situated on the line of a branch road. *Lehmann v. Southern Pac. Co.*, 3 Int. Com. Rep. 80, 4 Int. Com. Com. 1.

Possible water competition is not sufficient to justify a greater charge for the shorter distance. It must be actual. *San Bernardino Board of Trade v. Atchison, T. & S. F. R. Co.*, 3 Int. Com. Rep. 138, 4 Int. Com. Com. 104.

To justify a greater charge for a shorter distance on account of water competition, it must appear that such competition would secure the freight and carry it to its desti-

nation by water, if the lower rate was not given. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Int. Com. Rep. 682, 4 Int. Com. Com. 744.

The presence of combined rail and water competition at a longer distance point does not justify a greater charge for a shorter distance while the carrier maintains the shorter distance rate, where such competition is of greater force and more controlling than at the longer distance point. *James v. East Tenn., V. & G. R. Co.*, 2 Int. Com. Rep. 609, 3 Int. Com. Com. 225.

117. Rates on main line as affected by competition on branches. — Where a company maintains two routes between designated points formed by its main line and different branch lines, a greater charge for a shorter than for a longer distance, the shorter being included in the longer, is a violation of section 4 of the act, and unlawful. *Northwestern Iowa G. & S. Shippers Assoc. v. Chicago & N. W. R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. Com. 604.

But where the branch lines of such company are crossed by the main line of another road, and there is competition between the two companies from the place of crossing, the charges on the branches do not establish a standard of rates for like distances on other branches where no competition exists. *Northwestern Iowa G. & S. Shippers' Assoc. v. Chicago & N. W. R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. Com. 604.

A departure from the rule of equal mileage rates as applied to the several branches of a road is not conclusive that such rates are unlawful; but the burden is on the company making such departure to show its rates to be reasonable, when disputed. *Northwestern Iowa G. & S. Shippers Assoc. v. Chicago & N. W. R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. Com. 604.

Where it appears that other roads have no advantages over the defendant company which enable them to force rates upon it, proof that defendant has long continued a rate without competition, except on equal terms, is proof that the rate is not unreasonably low. *Northwestern Iowa G. & S. Shippers Assoc. v. Chicago & N. W. R. Co.*, 2 Int. Com. Rep. 431, 2 Int. Com. Com. 604.

118. Effect of competition on passenger rates. — If a reduction in passenger rates be made between competing points, the rates must also be reduced be-

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tween intermediate points; otherwise it will be a violation of section 4 of the statute. *In re Passenger T. & R. Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. Com. 513.

No competition in passenger rates resulting from what is called a "rate war" will justify carriers in violating the statute. *In re Passenger T. & R. Wars*, 2 Int. Com. Rep. 340, 2 Int. Com. Com. 513.

119. Rates from Pacific coast to St. Paul and Fargo.—Such competition as may exist by reason of the Canadian Pacific Railway or by water by the way of Cape Horn, will not justify carriers in charging more on refined sugar from San Francisco to Fargo, N. Dak., than to St. Paul, Minn., a greater distance. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

St. Paul possesses natural advantages from its location in being able to get low rates on sugar from the Atlantic coast, which justifies a low rate from the Pacific coast, but not lower than should be awarded to Fargo, a shorter distance. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

The unjust discrimination denounced by section 2 of the act may apply where the long and short haul clause of section 4 is violated; and the right to make different rates to different places does not justify a difference so great as to amount to unjust discrimination. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

The fact that the rates to St. Paul might be raised without losing the traffic, and that both the rates to St. Paul and Fargo are not unreasonable in themselves, does not justify a discrimination against the latter place, which would amount to unjust discrimination. *Raworth v. Northern Pac. R. Co.*, 3 Int. Com. Rep. 857, 5 Int. Com. Com. 234.

120. — from St. Louis to Omaha and Lincoln, Neb.—Lincoln, Neb., is four miles nearer St. Louis over defendant's road than is Omaha, but a higher rate is charged from St. Louis to Lincoln than to Omaha. Defendant undertook to justify this difference on the ground that Lincoln is on a branch road, and the transportation to that point is more expensive. *Held*, that the facts of the case did not support this claim. *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. Com. 155.

It was also claimed that the traffic to Omaha was much larger than to Lincoln. *Held*, that the determination of the question would involve the consideration not only of the volume of business, but the comparative length of the two roads, the grades, crossings, bridges, interest, facilities with which trains may be handled, and other matters which might be material. *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. Com. 155.

It appeared that another and competing line is operated between St. Louis and Omaha, which is eighty-one miles shorter than defendant's road, which compelled lower rates to that place than to Lincoln. *Held*, that such competition could not be used as a reason for compelling a corresponding reduction to Lincoln. *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. Com. 155.

It is not a violation of section 4 of the act relating to long and short hauls for defendant company to meet any cut rates between St. Louis and Omaha made by the other company having the shorter line. *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. Com. 155.

It appeared also that the distributing rates from Lincoln were more favorable than those from Omaha, which would about equalize the difference in rates to the two places, though the advantage in the distributing rates were not given by defendant; but this still left a disparity as between the merchandise carried to and consumed in the two places. *Held*, that this was not sufficient to justify distributing the rates. *Lincoln Board of Trade v. Missouri Pac. R. Co.*, 2 Int. Com. Rep. 98, 2 Int. Com. Com. 155.

121. — on grain from Northwest to Minneapolis and Duluth.—A milling city like Minneapolis, which has both great and acquired milling facilities, and is favorably situated with reference to a large grain producing section, is entitled to these natural advantages; and carriers of grain are not justified in making rates to another competing place, like Duluth, which would destroy the natural advantages of the former. *Chamber of Commerce v. Great Northern R. Co.*, 5 Int. Com. Com. 571, 4 Int. Com. Rep. 230.

Duluth is nearer to the markets than Minneapolis, and to this extent its advantages ought not to be taken away; but, on the

other hand, Minneapolis is nearer to the great wheat producing district of the northwest than Duluth, and to this extent it is entitled to the advantages which naturally belong to it; and an adjustment of rates which denies to Minneapolis these natural advantages is unjust. *Chamber of Commerce v. Great Northern R. Co.*, 5 Int. Com. Com. 571, 4 Int. Com. Rep. 230.

And the fact that Minneapolis is also a large lumber producing place, and the unloading of trains which carry wheat to Minneapolis with lumber going west is more probable than from Duluth, is an element to be considered in establishing the rates. *Chamber of Commerce v. Great Northern R. Co.*, 5 Int. Com. Com. 571, 4 Int. Com. Rep. 230.

Rates on wheat from points in North and South Dakota to Minneapolis—*held*, unreasonable as compared with the rates to Duluth and other Lake Superior ports; and the commission ordered that the rate be adjusted to both places upon the basis of distance over the nearest practicable routes. *Chamber of Commerce v. Great Northern R. Co.*, 5 Int. Com. Com. 571, 4 Int. Com. Rep. 230.

122. — on cotton to New Orleans and to northeast Atlantic ports.—The New Orleans Cotton Exchange complained of the unreasonableness of relative rates from stations on defendant's road in Kentucky, Tennessee, and Mississippi, on cotton transported to New Orleans, as compared with the rates from same stations to eastern markets and Atlantic ports. *Held*, that the circumstances and conditions surrounding the traffic in the respective services performed must be considered; and when found substantially dissimilar and wholly unlike, may modify the rates. *New Orleans Cotton Exch. v. Illinois C. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. Com. 534.

The fact that one carrier's proportion of a through rate on such cotton is lower than its local rate over its own line does not make the through rate unlawful. *New Orleans Cotton Exch. v. Illinois C. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. Com. 534.

It appeared that new roads had been built which opened new competition and new lines for the transportation of such cotton to other points. *Held*, that such competition was one of the purposes intended to be promoted by the Interstate Commerce Act, and

it could not interfere because it might tend to divert freight from the market it had formerly sought. *New Orleans Cotton Exch. v. Illinois C. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. Com. 534.

And the fact that carriers were met by active water competition at New Orleans would justify them in making other rates which were just and reasonable, in view of such competition, without violating the statute. *New Orleans Cotton Exch. v. Illinois C. R. Co.*, 2 Int. Com. Rep. 777, 3 Int. Com. Com. 534.

123. — from seaboard to Chattanooga and Nashville.—Freights from New York and other north Atlantic points, over defendant's road, must pass through Chattanooga, Tenn., to reach Nashville, 150 miles beyond. Defendant charged seventy-three cents per hundred on a certain class of freight to Chattanooga, and carried like shipments to Nashville for forty-two cents per hundred, which was claimed as a competitive point. *Held*, that the charge was a violation of section 4 of the statute, relating to long and short hauls. *Chattanooga Board of Trade v. East Tenn., V. & G. R. Co.*, 5 Int. Com. Com. 546, 4 Int. Com. Rep. 213.

124. — on oil from Pennsylvania to Buffalo and the seacoast.—A carrier was charged with unreasonable rates on oil from a point in Pennsylvania to Buffalo, N. Y., and the charge was attempted to be sustained by comparing the rates charged on an inferior grade of oil which passed through Buffalo to the seacoast in New Jersey for export. The evidence showed that the export oil was chiefly carried in cars of another company, and that there were expensive terminal charges in Buffalo which were not met at the seacoast. *Held*, that the circumstances and conditions were substantially dissimilar, within the meaning of the statute. *Rice v. Western N. Y. & P. R. Co.*, 2 Int. Com. Rep. 298, 2 Int. Com. Com. 389.

125. Local and through rates.—If two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the separate tariff of either line is to be measured or condemned under the long and short haul clause. *Chicago & N. W. R. Co. v. Osborne*, 53 Am. & Eng. R. Cas. 18, 52 Fed. Rep. 912, 10 U. S. App. 430, 3 C. C. A. 347; reversing 49 Am. & Eng. R. Cas. 12, 48 Fed. Rep. 49.—FOLLOWED IN *Tozer*

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An intermediate rate should never exceed the through rate, plus the local rate back to the intermediate place. *Martin v. Southern Pac. Co.*, 2 Int. Com. Rep. 1, 2 Int. Com. Com. 1.

Whether a rate violates the long and short haul provision must be determined by a reference to the rate as an entirety, and not by the proportion allotted to each road on the through line. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.*, 2 Int. Com. Rep. 436, 2 Int. Com. Com. 618.

A through rate which gives each carrier less than its local rates is not necessarily illegal, provided it is not less than some one of the local rates, and does not unjustly discriminate against individuals or localities, and is not so low as to burden other kinds of traffic with a part of the cost of the business in question. *Lippman v. Illinois C. R. Co.*, 2 Int. Com. Com. 584, 2 Int. Com. Rep. 414.

Where two or more carriers combine and carry freight to a point on the last road in the line, they cannot avoid the obligations of the long and short haul clause of section 4 by claiming that they are but local carriers as to such freight. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Int. Com. Rep. 682, 4 Int. Com. Com. 744.

Plaintiff maintained a grain elevator at Schenectady, N. Y., and received most of his grain from western points by water, and found a market in Boston or other New England points, and asked that the carriers be required to carry his grain to New England points at the same proportionate rate that they received on through lines from Chicago. *Held*, that this could not be granted, when it would have the effect of reducing the rate below the rates charged from intermediate stations between Schenectady and Boston on the same roads, and existing under similar circumstances and conditions. *Thatcher v. Delaware & H. Canal Co.*, 1 Int. Com. Com. 152, 1 Int. Com. Rep. 356.

An order granting plaintiff the rates asked would be a violation of section 4 of the statute, unless the rates from such intermediate points should also be reduced; and the commission cannot order such rates reduced in the absence of anything to show that they are excessive. *Thatcher v. Dela-*

ware & H. Canal Co., 1 Int. Com. Com. 152, 1 Int. Com. Rep. 356.

126. What constitutes a "line" or "new line" in through rates.—The word "line," as used in section 4, providing that no carrier should charge more "for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance," means a physical line, and not a mere business or traffic arrangement; and under this construction a particular piece of railroad may be part of several lines. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 Int. Com. Rep. 571, 1 Int. Com. Com. 158.

The word "line," as used in section 4 of the statute, is significant. Two carriers may use the same road, but each has its separate line. One company may lease trackage rights to another company, but the joint use of the same track does not create the same line, so as to compel either to graduate its tariff by that of the other. *Chicago & N. W. R. Co. v. Osborne*, 53 Am. & Eng. R. Cas. 18, 52 Fed. Rep. 912, 4 Int. Com. Rep. 257; *reversing* 49 Am. & Eng. R. Cas. 12, 48 Fed. Rep. 49.

There is a clear distinction between the term "railroad," as used in various parts of the Interstate Commerce Act, and the term "line" as used in section 4. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 54 Am. & Eng. R. Cas. 365, 56 Fed. Rep. 925, 4 Int. Com. Rep. 332; *reversed on the merits*, 4 Int. Com. Rep. 582, 13 U. S. App. 730, mem., and *appealed to U. S. Supreme Court*.

There must be a "common arrangement" between the roads making a "new line" before it can be formed within the meaning of the statute; and where the last of connecting roads agrees to accept goods coming over the preceding roads only on condition that it be allowed to collect full local rates thereon, there is no such common arrangement as to come within the statute. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 54 Am. & Eng. R. Cas. 365, 56 Fed. Rep. 925, 4 Int. Com. Rep. 332; *reversed on the merits*, 4 Int. Com. Rep. 582, 13 U. S. App. 730, mem., and *appealed to U. S. Supreme Court*.

127. Procedure where complaint is against several connecting carriers.—Several connecting roads were charged with a violation of the long and short haul clause, and one of the companies

moved that the complaint be dismissed as to it, for the reason that the charges supposed to be in violation of the statute were not made or shared in by it, its participation therein being only in the low charges on the long hauls, which in themselves were legal, and were not averred to be otherwise. *Held*, that the complaint should not be dismissed as to that company, where the evidence showed that its interest, and the liability of the low rates on long haul traffic to be affected by changes made in the higher rates on short haul traffic, is so great that in case such company had not been made a party it would be proper to allow it to become so on application. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

Where one company institutes a proceeding against other companies for a violation of section 4, and it appears that the sole grievance of the complaining company is that the others accept through traffic at lower rates than are made by the complainant and its connections, the proceeding cannot be maintained. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

And such complaint cannot be sustained on the mere ground of obtaining a construction of the statute. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

The right to make greater charges for short than for long hauls is exceptional, and depends in every case upon the peculiar circumstances and conditions; and a ruling in reference thereto in the case of one carrier would not be applicable to another carrier differently circumstanced. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

If several companies join in making a through rate less for a longer haul than some one of the companies charged for a longer haul, it is a violation of section 4; and the company making the greater charge must justify it. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

Where business is done over several connecting roads by what is termed "a dispatch line," which appears to be merely an association of roads, a tariff rate made by the manager of the dispatch line, who is agent also for the individual roads, which is a violation of the statute, will render the in-

dividual companies liable. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

128. Sufficiency of indictment under long and short haul section.—The provision (section 4) relating to long and short hauls, only applies where the rate for both hauls is a joint through rate, and not where one is joint and the other a combined local rate. So an indictment for a violation of the statute, which charges that the long haul rate is a joint rate, is bad unless it also charges that the short haul rate is also joint; and in the absence of such charge it will be presumed that it was a combined local rate. *United States v. Mellen*, 53 *Fed. Rep.* 229, 4 *Int. Com. Rep.* 247. —QUOTING *Chicago & N. W. R. Co. v. Osborne*, 52 *Fed. Rep.* 912.

So an indictment is bad which merely charges that the share of a joint rate going to one company is less than its local rate for a shorter haul. *United States v. Mellen*, 53 *Fed. Rep.* 229, 4 *Int. Com. Rep.* 247.

A railroad agent who has nothing to do with fixing rates, but merely collects the freight, is not indictable for a violation of the long and short haul provision of the statute. *United States v. Mellen*, 53 *Fed. Rep.* 229, 4 *Int. Com. Rep.* 247. —FOLLOWING *United States v. Michigan C. R. Co.*, 43 *Fed. Rep.* 26.

129. Matters of procedure.—The commission will not make an order for relief under section 4, relating to long and short hauls, except upon a verified petition and investigation into the facts. *In re Southern Pac. R. Co.*, 1 *Int. Com. Com.* 6, 1 *Int. Com. Rep.* 16.

The commission will not grant a general suspension of section 4 to any road, but will give relief only as to the traffic between specified points. *In re Richmond & A. R. Co.*, 1 *Int. Com. Rep.* 22.

Where a complaint involves the reasonableness of rates at many points extending through a large territory, the commission will not undertake to determine the rates upon the face of the tariff without proofs. *Spartanburg Board of Trade v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 193, 2 *Int. Com. Com.* 304.

And in such proceeding affecting the charges at many places, where it appears that there are others who would be affected, and are as much interested as plaintiff, the commission will give them an opportunity

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to appear at the taking of evidence. *Spartanburg Board of Trade v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 193, 2 *Int. Com. Com.* 304.

Where it appears that the long and short haul rule of fixing rates has been departed from, the carriers making the rates assume the burden of proof to show that they are reasonable. *Spartanburg Board of Trade v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 193, 2 *Int. Com. Com.* 304.

Where carriers answer a charge of a violation of the long and short haul clause, and attempt to justify it, their answers must clearly set out the facts and circumstances relied on as a justification. *Raworth v. Northern Pac. R. Co.*, 3 *Int. Com. Rep.* 857, 5 *Int. Com. Com.* 234.

130. Difference in classification.—

A violation of section 4, relating to long and short hauls, may be effected by differences in classification as well as by differences in rates. *Martin v. Southern Pac. Co.*, 2 *Int. Com. Com.* 1, 2 *Int. Com. Rep.* 1. —RECOGNIZING *In re Louisville & N. R. Co.*, 1 *Int. Com. Com.* 31.

9. Filing and Publishing Schedules.

a. Freight Schedules.

131. Duty to make, file, and publish.—Common carriers are under obligations to take all descriptions of ordinary traffic from all points; and it is right that the rates should be known and announced publicly in advance of the offering of the traffic. *In re Tariffs of the Transcontinental Lines*, 2 *Int. Com. Rep.* 203, 2 *Int. Com. Com.* 324.

The commission has uniformly held that carriers themselves should devise the methods by which their tariffs should be framed in conformity to the law, without special suggestions from the commission. *In re Columbus & W. R. Co.*, 2 *Int. Com. Rep.* 11, 1 *Int. Com. Com.* 626.

One of the purposes of the statute is to put an end to the practice requiring shippers to ask carriers for rates. The statute requires that known and equal rates should always be announced to shippers at every point, by publishing them as required by the statute. *In re Tariffs of the Transcontinental Lines*, 2 *Int. Com. Rep.* 203, 2 *Int. Com. Com.* 324.

A carrier having established rates on a particular kind of freight is required by law to post rate sheets in its respective stations;

and the fact that freight is for export does not relieve it from this legal obligation. *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.*, 3 *Int. Com. Rep.* 523, 4 *Int. Com. Com.* 694.

Where a company carries oil both in barrels and in tank cars, which may be furnished by the shipper, the rates upon which they may be furnished should be uniform, and published with the company's rate sheets. *Rice v. Louisville & N. R. Co.*, 1 *Int. Com. Rep.* 722, 1 *Int. Com. Com.* 503.

No presumption arises as to the legality or illegality of rates from the mere fact of filing the schedules; and rates which are illegal cannot be legalized by any failure to challenge them. *San Bernardino Board of Trade v. Atchison, T. & S. F. R. Co.*, 3 *Int. Com. Rep.* 138, 4 *Int. Com. Com.* 104.

Where freight passes over continuous lines, operated by more than one company, but under a joint rate for through carriage, the commission is authorized to prescribe the measure of publicity which shall be given to such rates and the place in which they shall be published. *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.*, 3 *Int. Com. Rep.* 523, 4 *Int. Com. Com.* 694.

132. Joint schedules, how made, filed, and published.—A joint freight rate over several individual roads must show what carriers unite in establishing it. *Lehmann v. Texas & P. R. Co.*, 3 *Int. Com. Rep.* 706, 5 *Int. Com. Com.* 44.

Where several corporations unite in a joint through rate, and establish a joint association or committee for the control of such rates, it is not necessary for each corporation individually to file a schedule of rates; but it is sufficient if the schedule be filed by such joint association or committee with written authority from each of the corporations authorizing it to do so. *In re Joint Tariffs and Schedules*, 1 *Int. Com. Com.* 225.

Under section 6 it is not necessary for either of two connecting lines which unite in a joint through tariff to publish their joint tariff at a non-competing point, or to volunteer information of such tariff to shippers. The carrier fulfils its obligation when it publishes its local tariff and advises shippers truthfully in respect to any rates as to which he makes special inquiry. *Chicago & N. W. R. Co. v. Osborne*, 53 *Am. & Eng. R. Cas.* 18, 4 *Int. Com. Rep.* 257, 52 *Fed. Rep.* 912, 10 *U. S. App.* 430, 3 *C. C. A.* 347; re-

versing 49 Am. & Eng. R. Cas. 12, 48 Fed. Rep. 49.

The Interstate Commerce Act, § 6, requires carriers engaged in such traffic to establish and publish a schedule of rates, and makes it unlawful for any carrier to charge, demand, or collect any greater or less compensation for transportation than specified. Had appellant and connecting lines knowingly entered into the contract in question, whereby less than specified, they would have incurred severe penalties; and if appellant had collected different rates from those specified it would have been as guilty as if it had made the contract. *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. Rep. 290.

The same law forbids discriminations, but does not provide that an unjust discrimination shall have the effect of limiting the carrier to the lowest rate charged. The carrier must schedule its rates, and can discriminate only at the peril of criminal prosecution, and the party injured may restrict the carrier to just remuneration, and hold it responsible for damages for its wrongful conduct; but the mere fact that a less rate is allowed to one class of shippers than to another is not proof that the rate charged is unreasonable. *Missouri, K. & T. R. Co. v. Trinity County Lumber Co.*, 1 Tex. Civ. App. 553, 21 S. W. Rep. 290.

133. Schedules on international roads.—The provision of section 1 that the act shall apply to a "continuous carriage or shipment from one state or territory to any other state or territory * * * or from any place in the United States to an adjacent foreign country," applies to a road that takes up goods in the United States for continuous carriage to a point in the Dominion of Canada. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

The word "to" as used in the statute means the destination of the property into, or at any place within the state reached by the continuous carriage or shipment, and the regulation intended is from the origin to the destination of the carriage; and the same rule applies where it goes into a foreign country. The word "to" means "into," if that be the place of destination of the freight, and not to the border of the country. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

The word "to," as used in the statute, is employed in the descriptive sense in accordance with ordinary usage, as when a person speaks of going to some city or to some other country. He does not mean merely to the boundary line, but into the city or country. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

And as such carriers are subject to the statute, it follows that they must comply with the provision respecting the printing of schedules of rates, and the filing with the commission, and posting copies thereof, and of any advances or reductions made; and also the provision respecting joint tariffs of rates and fares. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

Whenever the carriage originates in the United States and goes to a destination in an adjacent foreign country, or comes from a port of entry, or other place, in an adjacent foreign country to a destination within the United States, it is subject to regulation under the statute. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

And this is not an attempt to regulate the internal affairs, or to antagonize the laws of another country; but is merely the assertion of proper control over the domestic business of the United States, and for the protection of its own citizens; nor is the object of the statute for the protection of subjects of another government. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

And it is no objection to applying such statute to an international carrier that no domestic carrier or other person makes proof of specific injury from a disregard of the statute, and that the commission could not interfere without such proof, as it is expressly provided by section 13 of the statute that "no complaint at any time shall be dismissed because of the absence of direct damage to the complainant." *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

And where such carrier has filed a schedule of rates it is unlawful for it to receive from any person a greater or less compensation for taking up goods in the United States and carrying them to a destination in Canada, than is fixed in the published schedule. *In re Grand Trunk R. Co.*, 2 Int. Com. Rep. 496, 3 Int. Com. Com. 89.

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134. Inland and ocean rates on export goods.—An inland joint rate for foreign traffic, with any advances or reductions therein, should be published by posting them in a public place at a depot where the freight is received at a port of entry, and also at its place of destination in the United States. *New York Board of Trade & Transp. Co. v. Pennsylvania R. Co.*, 3 *Int. Com. Rep.* 417, 4 *Int. Com. Com.* 447.

The New York Produce Exchange complained that carriers charged more for grain and other products shipped from Chicago and western points to New York than on like shipments to New York, but intended for export, and often on through bills. *Held*, that the general rule, and the one approved by experience, is to make the through rate by adding to the inland rate to the seaboard the current ocean rate at the time. *New York Produce Exch. v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 553, 3 *Int. Com. Com.* 137.

This is based upon the fact that the work of the inland carrier is completed when he discharges his freight at the seaboard, whether in warehouses, elevators, or on board vessels; and that the service is identical in each case; and that the rates may be fixed at what is fair and just, while the very opposite applies to ocean rates, not being subject to control, and liable to hourly fluctuation. *New York Produce Exch. v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 553, 3 *Int. Com. Com.* 137.

And it follows that in making and publishing export tariff rates, the rate to the seaboard should be specified, and should not discriminate against the inland tariff rate, unless justifiable conditions exist for the difference; and such conditions do not exist as to inland shipments to New York. *New York Produce Exch. v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 553, 3 *Int. Com. Com.* 137.

Under the act as amended March 2, 1889, requiring ten days' notice of intended reductions in rates, it is unlawful to vary them from day to day to meet fluctuations in ocean rates, as the evidence shows had been done in this case. *New York Produce Exch. v. New York C. & H. R. R. Co.*, 2 *Int. Com. Rep.* 553, 3 *Int. Com. Com.* 137.

135. Liability for violation of schedule.—A railroad company fixed a through rate of 20 cents a hundred on certain kinds of freight from Chicago to New

York, and 22 cents a hundred for the same freight which came from a certain distance west of Chicago, which would be brought to that city on other roads. When the freight originated west of Chicago the company's proportion of the through rate would be 18.2 cents, and 3.8 cents would go to the road bringing the freight to Chicago. The company made shipments from Chicago, but billed the goods at 22 cents as though they had come from western points, but paid the shipper back 3.8 cents. *Held*, that this was a violation of the provision of the Interstate Commerce Act making it unlawful for a carrier to charge different rates from those specified in its published schedule. *United States v. Michigan C. R. Co.*, 43 *Fed. Rep.* 26, 3 *Int. Com. Rep.* 287.—*FOLLOWED* in *United States v. Mellen*, 53 *Fed. Rep.* 229.

The indictment was against the company and three different agents, who, it was claimed, participated in the shipments, but it appeared that the arrangement was made through the company's general freight agent, one of the defendants. *Held*, that the fact that the local freight agent, who made out the bills, knew that there was something unusual about the shipments, was not sufficient to make him criminally liable. *United States v. Michigan C. R. Co.*, 43 *Fed. Rep.* 26, 3 *Int. Com. Rep.* 287.

136. Schedule that violates the long and short haul section.—Where a carrier issues a rate sheet which seems to violate the long and short haul clause, and there is no apparent water competition or other carriers not subject to regulation, the presumption is that it is unlawful, and it will be called on to justify such rate. *In re Chicago, St. P. & K. C. R. Co.*, 2 *Int. Com. Com.* 231, 2 *Int. Com. Rep.* 137.

137. Wrong classification.—Where a party only complains of the wrong classification of an article which he ships, and the correcting of the classification is all the relief he seeks, the initial carrier is the only necessary defendant; and it is not necessary to unite other carriers that may carry the goods part of the way and share in the freight collected. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

If the commission should be called on to make a retroactive order requiring the refunding of overcharges, by reason of the wrong classification, then it might be neces-

sary to unite all of the parties who had received any share of the rate. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

Complainant gave as a reason for the correcting of the classification that the defendant company had held out assurances to him that his goods should be shipped in a lower classification, as an inducement for him to locate on its line of road. *Held*, that such assurances were no reason for making a classification different from what the facts would justify, however honestly made, or honestly relied on. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

Plaintiff prepared and shipped hub blocks which were prepared by sawing blocks about twelve inches long from small trees, which were then turned into cylindrical blocks of uniform thickness, with a hole bored through the middle, which were placed in the fifth class, which embraced, among other things, "wagon material unfinished"; but a great deal of work was necessary on such blocks to convert them into real hubs. *Held*, that they should have been put in the sixth class, embracing lumber, wooden paving blocks, pickets, picture backing, shingles, stave bolts, staves, heading, telegraph cross arms, etc. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

138. When commission will consider filed schedules.—All contracts and rate sheets required to be filed with the commission, under section 6, will be considered without being specially put in evidence. *Boston F. & P. Exch. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 493, 4 *Int. Com. Com.* 664.

b. Passenger Schedules.

139. Duty to make and publish.—The failure of a carrier to publish rates for mileage tickets is a violation of section 6. *Larrison v. Chicago & G. T. R. Co.*, 1 *Int. Com. Rep.* 369, 1 *Int. Com. Com.* 147.

The agents and officers of a large number of carriers produced before the commission specimens of the passenger rate sheets which they had prepared, and asked the commission to express a general approval of the method of classification, unless some legal objection appeared. *Held*, that the commission would act cautiously in such matters, and would refuse specific approval,

though the rates apparently were without objection, and might be acquiesced in until a better mode might be substituted. *In re Passenger Tariffs*, 2 *Int. Com. Rep.* 445, 2 *Int. Com. Com.* 649.

When changes are made in passenger rates, the advances or reductions should be sent to the commission and made public, as required by the statute. A new individual or joint passenger tariff must be posted at the stations to which it applies, and tickets can be sold on combination of the initial or terminal locals thereof. *In re Passenger Tariffs*, 2 *Int. Com. Rep.* 445, 2 *Int. Com. Com.* 649.

140. Excursion rates.—The provision of section 6, relating to the publication of rate sheets, applies to passenger excursion rates. *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.*, 2 *Int. Com. Rep.* 729, 3 *Int. Com. Com.* 465.

The provision of section 22 that nothing therein shall apply "to the issuance of mileage, excursion, or commutation passenger tickets," authorizes such tickets, but they must be reasonable, and issued impartially, as required by other portions of the statute. *Larrison v. Chicago & G. T. R. Co.*, 1 *Int. Com. Com.* 147, 1 *Int. Com. Rep.* 369.

141. Rate wars.—Any reduction of passenger rates without filing a schedule thereof with the commission, as required by section 6, is unlawful. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

What is known as a "rate war," whereby competing carriers repeatedly reduce passenger rates to a very low basis, is unlawful, unless schedules of the reductions are filed with the commission. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

And such rate wars cannot create any necessity or compulsion which will justify a reduction, without filing the schedule with the commission. *In re Passenger T. & R. Wars*, 2 *Int. Com. Rep.* 340, 2 *Int. Com. Com.* 513.

10. Continuous Carriage of Freights.

142. Shipment must be at uniform rate.—The carriage of freight cannot be prevented from being treated as one continuous carriage from the place of shipment to the place of destination by any means or devices intended to evade any of the pro-

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Carriers should not treat shipments of traffic intended to be continuous between interstate points as consisting of two kinds of service independent of each other, the one to or from a so-called basing or competitive point on a through rate, and the other between the basing or competitive point and a so-called local or intermediate point on a local rate. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

143. Through rate may be less than aggregate of local rates.—Where the transportation is continuous and uninterrupted, a charge for the through transportation may be less than the sum of the local charges between the same points. *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 721, 3 *Int. Com. Com.* 450.

144. Rates when freight is to be reshipped at an intermediate point.—Where live stock is shipped with the understanding that it may be unloaded at an intermediate point to test the market there, but to be reloaded if the market is not satisfactory, at the option of the shipper, such shipment cannot be treated as a through shipment. *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co.*, 2 *Int. Com. Rep.* 721, 3 *Int. Com. Com.* 450.

11. Pooling Contracts.

145. Pooling contract between carrier and pipe line company not within the statute.—The provision of section 5, making any "contract, agreement, or combination with any common carrier or carriers for the pooling of freights of different and competing railroads" unlawful, does not apply to a pooling contract between a railroad company and a pipe line company for the transportation of oil. *Independent Refiners' Assoc. v. Western N. Y. & P. R. Co.*, 5 *Int. Com. Com.* 415, 4 *Int. Com. Rep.* 162.

146. Whole contract not invalidated by pooling provisions.—The provision of section 5, prohibiting freight pooling, does not invalidate a contract for such pooling as a whole, but only the pooling provisions therein. *Ives v. Smith*, 8 *N. Y. Supp.* 46; *affirming* 3 *N. Y. Supp.* 645.

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12. Enforcement of the Statute.

147. Effect and force of findings of the commission.—The commission is not a court. It is a special tribunal whose duties, though largely administrative, are sometimes *quasi* judicial. It is required to investigate and report; but its final decision is not treated as a judgment. *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.*, 3 *Int. Com. Rep.* 830, 5 *Int. Com. Com.* 166.

Its findings are neither final nor conclusive. Nor has it any authority to enforce its decision or award. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351.

The facts found or reported by it are only given the force and weight of *prima-facie* evidence in such judicial proceedings as may thereafter be had for the enforcement of its recommendation or order. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567, 2 *L. R. A.* 289, 2 *Int. Com. Rep.* 351. *Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 *Am. & Eng. R. Cas.* 93, 50 *Fed. Rep.* 295, 4 *Int. Com. Rep.* 323; *appeal dismissed in* 149 *U. S.* 264, 4 *Int. Com. Rep.* 347.—*FOLLOWING Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567; *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 *Fed. Rep.* 177.

Where the commission itself files a petition in a federal court to enforce its findings, such findings are not entitled to any greater weight than if an individual filed the complaint. Such findings are not conclusive of the facts. *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 *Fed. Rep.* 177, 3 *Int. Com. Rep.* 796.—*FOLLOWED IN Interstate Commerce Commission v. Atchison, T. & S. F. R. Co.*, 50 *Am. & Eng. R. Cas.* 93, 50 *Fed. Rep.* 295.

148. Findings of, only enforceable in federal courts.—The commission, by section 12 of the statute, is "authorized and required to execute and enforce the provisions of this act." Under this power it can investigate, find facts, reach conclusions, and make orders, either on complaint or upon inquiry instituted on its own motion; but its findings, conclusions, and orders can only be enforced through the courts. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 151, 4 *Int. Com. Com.* 116.

And the trial in court to enforce the or-

ders or findings of the commission is a new one, in which the court reaches its own conclusions and makes its own orders. The conclusions and findings of the commission are *prima-facie* evidence, but have no binding force. *Rates and Charges on Food Products*, 3 *Int. Com. Rep.* 151, 4 *Int. Com. Com.* 116.

149. When orders of the commission should be enforced.—Where the commission has reached a conclusion, it is no objection to enforcing such conclusion in a federal court that the complainant before the commission had suffered no real damage or grievance, but that another railroad really instigated the proceeding, as, under section 13 of the statute, it is provided that no complainant shall be dismissed because of the absence of direct damage to the complainant; and the commission itself is empowered to institute proceedings on its own motion, and apply to the federal courts to have its findings enforced. *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.*, 57 *Fed. Rep.* 1005, 4 *Int. Com. Rep.* 722.

Where application has been made to a federal court to enforce an order of the commission, forbidding an unjust discrimination in rates, the order should be enforced, although it might appear that difference in circumstances might make some discrimination justifiable, where it appears that the rate charged is unlawful, and the defendant carrier fails to show what would be a lawful discrimination under the circumstances. *Interstate Commerce Commission v. Texas & P. R. Co.*, 57 *Fed. Rep.* 948, 4 *Int. Com. Rep.* 408; *affirming* 51 *Am. & Eng. R. Cas.* 33, 52 *Fed. Rep.* 187, 4 *Int. Com. Rep.* 114.

The commission has power to set on foot a prosecution in the federal courts against a carrier for a violation of its orders; but this will not be done where the carrier conforms to the rulings of the commission as soon as they are declared, for a violation before such ruling is made, where it acts in good faith under advice of counsel; especially in a case where the motive of the complainant is that of retaliation for a fancied wrong. *Slater v. Northern Pac. R. Co.*, 2 *Int. Com. Rep.* 243, 2 *Int. Com. Com.* 359.

Where the commission applies, under section 16 of the statute, for an injunction to restrain a railroad company from disobeying an order of the commission, a preliminary

injunction should not be granted after the coming in of the company's answer denying all the facts upon which the order of the commission is based. *Interstate Commerce Commission v. Lehigh Valley R. Co.*, 49 *Fed. Rep.* 177, 3 *Int. Com. Rep.* 796.—FOLLOWING *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567.

13. Complaints and Adjudications.

150. Who may file complaints.*—

It is not necessary that a person making a complaint before the commission should have a personal interest in the violation of the statute complained of; but it is sufficient if he complains of a matter which amounts to a public grievance. *Boston & A. R. Co. v. Boston & L. R. Co.*, 1 *Int. Com. Rep.* 571, 1 *Int. Com. Com.* 158.

The commission will not entertain a complaint by a ticket broker of unjust discrimination on the part of a railroad in allowing one person to sell a ticket and not another, where it appears that the ticket broker has no personal interest in the transaction. As an evidence of good faith the complaint should be made by the holder of the ticket. *Ottenger v. Southern Pac. R. Co.*, 1 *Int. Com. Rep.* 607, 1 *Int. Com. Com.* 144.

Under the provision of the statute that "no complaint shall at any time be dismissed because of the absence of direct damage to complainant," a defendant is not entitled to have a complaint made by commission merchants dismissed on the ground that the rate complained of works no direct injury to them. *James v. Canadian Pac. R. Co.*, 5 *Int. Com. Com.* 612, 4 *Int. Com. Rep.* 274.

Complainant, a miner and shipper of coal, complained of a preference in the rates given for the carriage of coal. The company set up as a defense that complainant was not entitled to be heard because he had entered into a contract with the defendant before the passage of the statute by which the rates were determined. *Held*, that such contract would not prevent complainant from showing that such rates are unjust, oppressive, or unreasonable. *Haddock v. Delaware, L. & W. R. Co.*, 3 *Int. Com. Rep.* 302, 4 *Int. Com. Com.* 296.

"The Boston Fruit & Produce Exchange," a corporation, comes within section 13 of the statute, providing that "any person,

* Complaints under Interstate Commerce Act. see note, 2 L. R. A. 446.

firm, corporation, mercantile, agricultural society," may of the statute maintain a complaint without place without Boston F. & P. E. R. Co., 3 *Int. Com.* 664.

151. Complaint by evidence unsupported by evidence to impeach the commission against a defendant. *St. Paul, M. & N. W. R. Co.*, 102, 1 *Int. Com. Rep.* 102.

Where the plaintiff, and no complaint will be dismissed. *Pac. R. Co.*, 1 *Int. Com. Rep.* 185. *Rice v. Int. Com. Com.* 5.

Where the evidence grounds of a violation upon, but shows of the line improvement commission will separate proceedings opportunity to *Assoc. v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 43, 2 *Int. Com. Com.* 152.

152. Process fails to answer filed by aggrieved party, and the defendant or make any defense proceed to take proper and reasonable order as the natural demand. *Tecumseh J. & M. R. Co.*, 1 *Int. Com. Rep.* 318.

153. Complaint act complainant A complaint charged with custom to make weight of wheat whereby persons loss, but failing was delivered for or indeed any to sufficient and without prejudice but without prejudice. *C. R. Co.*, 2 *Int. Com. Rep.* 281.

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firm, corporation, or association, or any mercantile, agricultural, or manufacturing society," may file complaints of a violation of the statute; and such exchange may maintain a complaint affecting rates to its place without showing any damage to itself. *Boston F. & P. Exch. v. New York & N. E. R. Co.*, 3 *Int. Com. Rep.* 604, 4 *Int. Com. Com.* 664.

151. Complaint must be supported by evidence.—A mere naked complaint, unsupported by evidence, does not authorize the commission to make any order against a defendant carrier. *Holbrook v. St. Paul, M. & M. R. Co.*, 1 *Int. Com. Com.* 102, 1 *Int. Com. Rep.* 323.

Where the pleadings present only issues of fact, and no evidence is offered, the complaint will be dismissed. *Leonard v. Union Pac. R. Co.*, 1 *Int. Com. Rep.* 627, 1 *Int. Com. Com.* 185. *Rice v. St. Louis S. W. R. Co.*, 5 *Int. Com. Com.* 660, 4 *Int. Com. Rep.* 321.

Where the evidence fails to establish the grounds of a violation of the statute relied upon, but shows that upon another portion of the line improper rates were charged, the commission will investigate the matter in a separate proceeding, giving the parties an opportunity to be heard. *Business Men's Assoc. v. Chicago & N. W. R. Co.*, 2 *Int. Com. Rep.* 43, 2 *Int. Com. Com.* 73.

152. Proceedings where carrier fails to answer.—Where a complaint is filed by aggrieved shippers under section 13, and the defendant carrier fails to answer or make any defense, the commission will proceed to take such proofs as it may deem proper and reasonable, and will make such order as the nature of the case may seem to demand. *Tecumseh Celery Co. v. Cincinnati, J. & M. R. Co.*, 5 *Int. Com. Com.* 663, 4 *Int. Com. Rep.* 318.

153. Complaint must show that act complained of is interstate.—A complaint charging that a carrier was accustomed to make deductions from the true weight of wheat delivered at its elevators, whereby persons delivering it suffered a loss, but failing to charge that the wheat was delivered for interstate transportation, or indeed any transportation at all, is insufficient and will be dismissed on motion, but without prejudice. *White v. Michigan C. R. Co.*, 2 *Int. Com. Rep.* 641, 3 *Int. Com. Com.* 281.

And a charge that the defendant is an interstate carrier, subject to the statute, is

not sufficient, without showing that the wheat delivered was for interstate carriage. *White v. Michigan C. R. Co.*, 2 *Int. Com. Rep.* 641, 3 *Int. Com. Com.* 281.

154. Complaint against a classification committee.—Plaintiff, a dealer and shipper, complained of a classification made by a classification committee, which represented about seventy-five railroads in making classifications, but not in making rates. It appeared that many of the roads made their own rates and were not bound to accept the classification rates made by the committee. *Held*, that the various carriers themselves were the proper ones to proceed against, and that the complaint should specify the ones maintaining the objectionable rates. *McMillan v. Western Classification Committee*, 3 *Int. Com. Rep.* 282, 4 *Int. Com. Com.* 276.

In such case the commission will not institute an investigation of its own, under section 12 of the statute, where it appears that all of the carriers of the country are working through a committee to reach a uniform classification of freights, where it might have the effect of retarding their work. *McMillan v. Western Classification Committee*, 3 *Int. Com. Rep.* 282, 4 *Int. Com. Com.* 276.

In such case, the commission will aid the parties by an informal hearing, and endeavor fairly and justly to adjust their differences; but if this cannot be done, the commission will not proceed with any investigation until a complaint is filed in proper form, embracing the different localities, dealers, and carriers interested. *McMillan v. Western Classification Committee*, 3 *Int. Com. Rep.* 282, 4 *Int. Com. Com.* 276.

155. Procedure as to abstract, collateral, and ex parte questions.—The commission only expresses opinions when a controversy is pending, involving a violation of the statute. It does not lend its aid to parties by expressing opinions on abstract questions, or on *ex parte* statements of the facts, or upon questions merely presented for the purpose of gaining a construction of the statute. *In re Order of Railway Conductors*, 1 *Int. Com. Com.* 8, 1 *Int. Com. Rep.* 18.

Carriers must, in the first instance, determine questions for themselves, and then the question can be brought before the commission whether they violated the statute, and it will have jurisdiction to decide the

by the commission, but the court hears and determines the case *de novo* upon proper pleadings and proof. The commissioners' report is *prima-facie* evidence of the matters of fact therein reported, but the court will hear all such other and further testimony as either party may introduce bearing upon the matters in controversy, and will permit such pleadings as will bring before the court clearly and in legal form such matters as may be pertinent and proper in view of the issues raised. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 54 *Am. & Eng. R. Cas.* 365, 56 *Fed. Rep.* 925, 4 *Int. Com. Rep.* 332; *reversed on other grounds in 4 Int. Com. Rep.* 582.

161. Necessary parties.—In a proceeding under section 16 to enforce an order of the commissioners against a single carrier, it is not necessary that another carrier, making the forbidden rate jointly with defendant, be made a party. *Interstate Commerce Commission v. Texas & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 33, 52 *Fed. Rep.* 187, 4 *Int. Com. Rep.* 114; *affirmed in 57 Fed. Rep.* 948, 4 *Int. Com. Rep.* 408.

162. What must be shown in proceedings against agents.—Under section 10, making railroad agents liable for a wilful violation of the statute, it is sufficient to allege in an indictment that the defendant was agent of a certain railway at the time the offense was committed, and had charge of a certain freight office of the road. This sufficiently shows that the offense was committed under color of his office or agency, and it is not necessary to allege or prove that the unlawful act was done under the direction or authority of the company. *United States v. Tozer*, 37 *Fed. Rep.* 635, 2 *L. R. A.* 444, 2 *Int. Com. Rep.* 422; *reversed in 53 Am. & Eng. R. Cas.* 14, 52 *Fed. Rep.* 917, 4 *Int. Com. Rep.* 245.

Where a company and several of its agents are indicted for billing goods so as to give the shipper a rebate under pretense of collecting a certain charge for a connecting carrier, and it appears that the arrangement was made through the company's general freight agent, one of the defendants, the fact that a local freight agent, another defendant, who made out the bills, knew that there was something unusual about the shipments, is not sufficient to make him criminally liable. *United States v. Michigan C. R. Co.*, 43 *Fed. Rep.* 26, 3 *Int. Com. Rep.* 287.

163. Action for violation of long and short haul section.*—If two railroad companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the separate tariff of either line is to be measured or condemned, under the long and short haul clause. *Chicago & N. W. R. Co. v. Osborne*, 53 *Am. & Eng. R. Cas.* 18, 52 *Fed. Rep.* 912, 4 *Int. Com. Rep.* 257; *reversing 49 Am. & Eng. R. Cas.* 12, 47 *Fed. Rep.* 290, 48 *Fed. Rep.* 49, 3 *Int. Com. Rep.* 663.

It is not necessary for either of two connecting lines which unite in a joint through tariff to publish their joint tariff at a non-competing point, or to volunteer information of such tariff to shippers. The carrier fulfils its obligation when it publishes its local tariff and advises shippers truthfully in respect to any rates as to which he makes special inquiry. *Chicago & N. W. R. Co. v. Osborne*, 53 *Am. & Eng. R. Cas.* 18, 52 *Fed. Rep.* 912, 4 *Int. Com. Rep.* 257; *reversing 49 Am. & Eng. R. Cas.* 12, 47 *Fed. Rep.* 290, 48 *Fed. Rep.* 49, 3 *Int. Com. Rep.* 663.

15. Procedure before the Commission.

164. Matters of procedure, generally.—Where a complaint is filed charging a carrier with maintaining excessive rates, and with unjust discrimination, and the company answers denying unjust discrimination, and that its rates are very much lower than the complainant supposed they were, and a copy of this answer is sent to the complainant with notice when the case will be heard, if he fails to appear, it will be presumed that he is satisfied with the answer, and the complaint will be dismissed. *Jackson v. St. Louis, A. & T. R. Co.*, 1 *Int. Com. Rep.* 599, 1 *Int. Com. Rep.* 184.

Where an important question is raised by the pleadings which would affect other persons beside the parties to the record, and the parties confine their evidence to other questions, and furnish the commission with no information, it will not decide such question, but leave it open for further consideration, if the parties wish again to bring it forward. *Rice v. Louisville & N. R. Co.*, 1 *Int. Com. Rep.* 722, 1 *Int. Com. Rep.* 503.

The Act of the Legislature of Florida, of June 13, 1891, repealing the law creating a

* Action for violation of long and short haul clause; see 49 *AM. & ENG. R. CAS.* 22, *abstr.*

state railroad commission, does not operate as a dismissal or withdrawal of a complaint previously filed by that commission before the interstate commerce commission. *Railroad Commission of Fla. v. Savannah, F. & W. R. Co.*, 3 *Int. Com. Rep.* 688, 5 *Int. Com. Com.* 13.

The commission does not undertake to report evidence which is only cumulative or which is immaterial or irrelevant, or mere details of evidence already embraced in findings of fact. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 773, 1 *Int. Com. Com.* 490.

Where a charge of excessive rates is made, the complainant assumes the burden of proof to sustain the charge. *Harding v. Chicago, St. P., M. & O. R. Co.*, 1 *Int. Com. Rep.* 375, 1 *Int. Com. Com.* 104.

Where shippers complain of unjust discrimination, and ask that pecuniary damages be awarded them, a claim for damages will not be entertained, where it presents a case at common law in which the defendants are entitled to a jury trial. *Heck v. East Tenn., V. & G. R. Co.*, 1 *Int. Com. Rep.* 775, 1 *Int. Com. Com.* 495.

165. Necessary parties.—Where a carrier is directly interested in an investigation, and the matter complained of is such that the carrier is responsible for it in whole or in part, and the merits of the controversy cannot be investigated in the absence of such party, then it should be made a party to the proceeding. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 773, 1 *Int. Com. Com.* 490.

In a proceeding against an initial carrier to correct a classification of through freights, it is better to make all the carriers parties; but the proceeding is not necessarily defective because only the initial carrier is made a party. *Hurlburt v. Lake Shore & M. S. R. Co.*, 2 *Int. Com. Rep.* 81, 2 *Int. Com. Com.* 122.

Where it appears that other carriers are committing the same violation of the statute charged against the defendants, an order may issue against the defendants, and the case be continued for the purpose of bringing in the other carriers for like proceedings against them. *Bates v. Pennsylvania R. Co.*, 2 *Int. Com. Rep.* 715, 3 *Int. Com. Com.* 435.

166. Rehearings.—An order for a rehearing which involves considerable expense to the parties will not be granted unless the

commission is satisfied at the argument for a rehearing that the result might be changed. *Riddle v. Pittsburgh & L. E. R. Co.*, 1 *Int. Com. Rep.* 773, 1 *Int. Com. Com.* 490.

Where the commission has fully investigated a matter on elaborate pleadings and proofs, a rehearing will not be granted on the application of third parties; but if a new complaint is filed, if it should be made to appear that any decision made was erroneous, the commission will correct it. *In re Toledo Produce Exch.*, 2 *Int. Com. Rep.* 412, 2 *Int. Com. Com.* 588.

Where a petition asking for a rehearing is filed after a case has been decided it should be verified, and should indicate the purpose and the nature of the new evidence. *Rice v. Western N. Y. & P. R. Co.*, 2 *Int. Com. Rep.* 496, 3 *Int. Com. Com.* 87.

But where a question of general public interest is involved, the commission may of its own motion open a case to give the parties a more extended investigation. *Rice v. Western N. Y. & P. R. Co.*, 2 *Int. Com. Rep.* 496, 3 *Int. Com. Com.* 87.

A petition asking for a rehearing should show *prima facie* some errors in the findings or conclusions, or that some material evidence had been overlooked or misapprehended. *Myers v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 544, 3 *Int. Com. Com.* 130. *Proctor v. Cincinnati, H. & D. R. Co.*, 4 *Int. Com. Com.* 443, 3 *Int. Com. Rep.* 131.

And where an application for a rehearing does not embrace the above requirements, but only asks a reconsideration of the same questions of fact and of law, without any offer of new evidence, the application will be denied. *Myers v. Pennsylvania Co.*, 2 *Int. Com. Rep.* 544, 3 *Int. Com. Com.* 130.

A former order made by the commission may be vacated when the additional evidence at a rehearing warrants a contrary finding. *Bates v. Pennsylvania R. Co.*, 3 *Int. Com. Rep.* 296, 4 *Int. Com. Com.* 281.

167. Amendments—Replications.—In considering complaints and amendments thereto, the commission acts upon the same rules that applied in ordinary courts of justice; and an amendment introducing a new cause of action will not be allowed. *Riddle v. Baltimore & O. R. Co.*, 1 *Int. Com. Rep.* 701, 1 *Int. Com. Com.* 372.

It is not necessary to amend the pleadings in order to introduce any evidence

that is admissible. *Delaware, York, P. & N. R. Co.*, 2 *Int. Com. Com.*

Under the statute, a proceeding, a complaint and answer, neither requires a replication. *Line R. Co. v. Com. Rep.* 639.

168. Subpoena.—Laying down rules to compel the production of papers, the commission in the practice in the federal courts, which seem to be indicated by *Rice v. Cincinnati, H. & D. R. Co.*, 4 *Int. Com. Com.* 584.

In the federal courts, an application to be made to the commission, supporting a petition be an attorney, or other party, of the facts that the petition must describe, called for with which is practical circumstances of which may know what have the book. *Rice v. Cincinnati, H. & D. R. Co.*, 4 *Int. Com. Com.* 584, *LOWING United States* (U. S.) 566.

Under the Rules of the United States, section 1, it may be made to the commission, written in the possession of the parties, and that the competent and party applying for a subpoena duces tecum. *W. & B. R. Co.*, 3 *Int. Com. Com.*

In proceedings where it is shown that the parties are not carriers, the statute, or proceeding, to documents, and writing to the nearly as may documents described by an attorney.

that is admissible under the original complaint. *Delaware State Grange v. New York, P. & N. R. Co.*, 2 *Int. Com. Rep.* 187, 2 *Int. Com. Com.* 309.

Under the rules adopted by the commission, a proceeding is at issue upon the complaint and answer; and a replication is neither required nor allowed. *Oregon Short Line R. Co. v. Northern Pac. R. Co.*, 2 *Int. Com. Rep.* 639, 3 *Int. Com. Com.* 264.

168. Subpoenas duces tecum.—In laying down rules for the issuing of process to compel the production of books and papers, the commission has considered the practice in the federal courts, and the rules indicated by federal statutes in proceedings which seem to be most nearly analogous. *Rice v. Cincinnati, W. & B. R. Co.*, 2 *Int. Com. Rep.* 584, 3 *Int. Com. Com.* 186.

In the federal courts the practice is for an application for a subpoena duces tecum, to be made to the court or the judge by petition, supported by affidavit, unless the petition be an official statement of a district attorney, or other prosecuting public officer, of the facts therein alleged; and the petition must describe the books or papers called for with that degree of certainty which is practicable, considering the circumstances of the case, so that the witness may know what is wanted of him and to have the books and papers at the trial. *Rice v. Cincinnati, W. & B. R. Co.*, 2 *Int. Com. Rep.* 584, 3 *Int. Com. Com.* 186.—FOLLOWING *United States v. Babcock*, 3 *Dill. (U. S.)* 566.

Under the Revised Statute of the United States, section 869, a *prima-facie* case must be made to the effect that "the paper, writing, written instrument, book, or document is in the possession or power of the witness, and that the same, if produced, will be competent and material evidence for the party applying therefor," before the subpoena duces tecum is issued. *Rice v. Cincinnati, W. & B. R. Co.*, 2 *Int. Com. Rep.* 584, 3 *Int. Com. Com.* 186.

In proceedings before the commission, where it is sought to compel parties who are not carriers, subject to the regulation of the statute, or who are strangers to the proceeding, to produce books, papers, or documents, application should be made in writing to the commission, specifying as nearly as may be the books, papers, or documents desired to be produced, accompanied by an affidavit that they are in the

possession of the witness or under his control, and setting forth facts which make a *prima-facie* case that they contain evidence that is material and necessary. *Rice v. Cincinnati, W. & B. R. Co.*, 2 *Int. Com. Rep.* 584, 3 *Int. Com. Com.* 186.

And where the application is for the production of books or papers of third parties, the application may be denied, where it appears that injustice might be done such parties by the production of such books or papers. *Haddock v. Delaware, L. & W. R. Co.*, 3 *Int. Com. Rep.* 302, 4 *Int. Com. Com.* 296.

169. Proceedings against receivers.—Where a complaint is against a railroad company and alleges that it had been in the hands of a receiver, but had been restored to the company, an error in calling the receiver the president of the company may be corrected by an amendment, showing the existence of the receivership, where the complaint has been served on the receiver, and an answer has been filed by the company. *Reynolds v. Western N. Y. & P. R. Co.*, 1 *Int. Com. Com.* 347, 1 *Int. Com. Rep.* 685.

Where the proceeding before the commission is merely for the purpose of regulating charges, the fact that the road passes into the hands of a receiver after the complaint is filed is no reason for stopping the proceeding, especially where the company answers on its own behalf, and the receiver appears by counsel at the hearing. *Trammell v. Clyde Steamship Co.*, 5 *Int. Com. Com.* 324, 4 *Int. Com. Rep.* 120.

Under such facts the proceeding may go on without determining whether a regulating order would affect the receivers without an order of the court which appointed them. As a general proposition the commission sees no reason why the fact of a receivership subsequent to complaint should interfere with the progress of a proceeding merely to regulate charges. *Trammell v. Clyde Steamship Co.*, 5 *Int. Com. Com.* 324, 4 *Int. Com. Rep.* 120.

170. When rate complained of is corrected before or pending proceedings.—If a carrier corrects the matters complained of at any stage of the proceedings before the commission renders a final opinion, so as to conform to the relief prayed for, the commission will make no order and render no opinion. *Manufacturers & J. Union v. Minneapolis & St. L. R.*

Co., 1 *Int. Com. Rep.* 630, 1 *Int. Com. Com.* 227. *Lincoln Board of Trade v. Union Pac. R. Co.*, 2 *Int. Com. Rep.* 101, 2 *Int. Com. Com.* 229. *Harris v. Duval*, 2 *Int. Com. Rep.* 514, 3 *Int. Com. Com.* 128. *New Orleans Cotton Exch. v. Louisville, N. O. & T. R. Co.*, 3 *Int. Com. Rep.* 523, 4 *Int. Com. Com.* 694.

The statute contemplates that when a complaint is made the carrier may change its rates before a hearing is had, so as to remedy the matter complained of, if it shall see proper to do so; in which case, if there is no complaint against the modified rates, and there is nothing to show that they are unreasonable, the complaint will be dismissed. *Fulton v. Chicago, St. P., M. & O. R. Co.*, 1 *Int. Com. Rep.* 375, 1 *Int. Com. Com.* 104.

Where a complaint is made of a failure to furnish cars, and the railroad answers, and avows a purpose to comply with the law, it must be assumed that it will do so, and it is doing so, until there is evidence to the contrary. *Holbrook v. St. Paul, M. & M. R. Co.*, 1 *Int. Com. Com.* 102, 1 *Int. Com. Rep.* 323.

And no order will be made where a tariff complained of was abandoned by the carriers for a long time before the complaint was made, and shortly after the tariff was put in force. *Rauson v. Newport News & M. V. Co.*, 2 *Int. Com. Rep.* 626, 3 *Int. Com. Com.* 266.

And no opinion will be expressed in such case, even though the parties request it. *Pennsylvania Co. v. Louisville, N. A. & C. R. Co.*, 2 *Int. Com. Rep.* 603, 3 *Int. Com. Com.* 223.

171. Refunding excessive rate.—Where a passenger has, under a mistake of facts, bought two tickets for a continuous ride, where he might have bought a through ticket at a less sum, the commission will order a return of the excess, though it appear that the two charges were regular local rates, and that the carriers acted in good faith, without any intention of misleading or defrauding the complainant. *Sanger v. Southern Pac. Co.*, 2 *Int. Com. Rep.* 548, 3 *Int. Com. Com.* 134.

Where it appears that the question of whether a carrier should refund a portion of an alleged unlawful rate is pending in a federal court, the commission will not take cognizance of the matter. *Harris v. Duval*, 2 *Int. Com. Rep.* 514, 3 *Int. Com. Com.* 128.

172. Estoppel.—The doctrine of estoppel of record is not applicable to parties who appear before the commission. It is applied to the records and judgments of courts; but the commission is not a court. *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.*, 3 *Int. Com. Rep.* 830, 5 *Int. Com. Com.* 166.

A person who appears before the commission as a member of a committee which represents a mercantile association, and institutes proceedings which are afterward dismissed, is not thereby estopped from instituting a similar proceeding in his own name. *Toledo Produce Exch. v. Lake Shore & M. S. R. Co.*, 3 *Int. Com. Rep.* 830, 5 *Int. Com. Com.* 166.

173. Witnesses not bound to criminate themselves.—A person under examination before a grand jury, in an investigation into certain alleged violations of the Interstate Commerce Act, is not obliged to answer questions where he states that his answers might tend to criminate him; the witness in such a case may invoke the protection of the fifth amendment to the constitution of the United States, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself," although section 860 of the U. S. Revised Statutes provides that no evidence given by him shall in any manner be used against him in any court of the United States in any criminal proceeding. The object of such constitutional provision is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime: the protection of the provision is not limited to a criminal prosecution against the witness himself. *Counselman v. Hitchcock*, 48 *Am. & Eng. R. Cas.* 448, 142 *U. S.* 547, 12 *Sup. Ct. Rep.* 195; reversing 44 *Fed. Rep.* 268.

16. Reparation.

174. Power of commission to pass on questions of reparation.—Since the amendment of March 2, 1889, of section 16, providing for a trial by jury in proceedings to enforce the orders of the commission, it is the duty of the commission to pass on questions of reparation for past damages whenever such questions shall be raised. *Macloon v. Chicago & N. W. R. Co.*, 3 *Int. Com. Rep.* 711, 5 *Int. Com. Com.* 84.

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175. Burden of proof.—Where the complaint is against unreasonable rates and a claim for reparation is made, the burden of proof is on the complainant to support the claim; and the commission will refuse to award reparation unless sufficient evidence is introduced to enable it to determine what reparation is due. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

176. Measure of damages.—In order to determine the amount of reparation to be made by charging excessive rates, the commission must in all cases first determine what is a reasonable rate. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

In cases of charging unreasonable rates, the measure of reparation due to an injured party is the difference between the rate actually charged and the reasonable rate which should have been charged. *Perry v. Florida C. & P. R. Co.*, 3 *Int. Com. Rep.* 740, 5 *Int. Com. Com.* 97.

17. *Mileage, Excursion, Commutation Tickets, etc.*

177. Generally.—The provision of section 22 that nothing therein shall apply "to the issuance of mileage, excursion, or commutation passenger tickets" authorizes such tickets, but they must be issued impartially and at reasonable rates. *Larrison v. Chicago & G. T. R. Co.*, 1 *Int. Com. Rep.* 369, 1 *Int. Com. Com.* 147.

And the rates must be published, as is required of other tickets. *In re Passenger Tariffs*, 2 *Int. Com. Rep.* 445, 2 *Int. Com. Com.* 649.

The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage"; and from the provision of section 22, that the act shall not prevent issuing tickets at reduced rates to certain classes therein specified, it does not follow that there may not be other classes of persons in whose favor a discrimination may be made without the discrimination being unjust. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 *U. S.* 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; *affirming* 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.

The provision of section 2, prohibiting unjust discrimination, construed to prohibit the giving of passes or free carriage to par-

ticular persons. *Ex parte Koehler*, 12 *Sawyer* (U. S.) 446, 31 *Fed. Rep.* 315, 1 *Int. Com. Rep.* 317.—*REVIEWING* *Ex parte Koehler*, 11 *Sawyer* 37; *Union Pac. R. Co. v. United States*, 104 *U. S.* 662, 117 *U. S.* 355; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.*, 26 *Am. & Eng. R. Cas.* 293, 1 *L. R.* 10 *H. L. Cas.* 97.

178. Excursion and commutation tickets.—The price for mileage, excursion, or commutation passenger tickets is determined for each class without reference to the other. So where \$25 was charged for a 1000-mile ticket it does not follow that the price is too high because excursion and commutation tickets were sold so that passengers may ride a thousand miles for less than \$25. *Associated Wholesale Grocers v. Missouri Pac. R. Co.*, 1 *Int. Com. Rep.* 393, 1 *Int. Com. Com.* 156.

Plaintiff held a commutation ticket which contained a condition that he should have no claim for a rebate on account of the non-use of the ticket from any cause. For a time the company had been in the habit of giving a rebate if persons holding such tickets failed to have them and had to pay full rates, but it had discontinued the practice some three weeks before and had so notified the commission. Plaintiff attempted to ride without his ticket and had to pay full fare. *Held*, that he was not entitled to a rebate, though he supposed that the former custom was still in vogue. *Sidman v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

And in such case it was not unjust discrimination for the conductor to collect twenty-five cents extra, where that regulation was made a part of the company's schedule and so filed with the commission. *Sidman v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

Plaintiff purchased such ticket on the 13th day of June, and it showed on its face that it was good for three months only from the first day of June. *Held*, that he was not entitled to recover anything for the thirteen days of the quarter elapsing before he purchased the ticket. *Sidman v. Richmond & D. R. Co.*, 2 *Int. Com. Rep.* 766, 3 *Int. Com. Com.* 512.

179. Disabled soldiers or sailors.—The commission will not undertake to say, where no controversy is pending, whether it is lawful to give free transportation, under section 22 of the statute, to such persons as

disabled soldiers or sailors. *In re Disabled Soldiers & Sailors*, 1 *Int. Com. Com.* 28, 1 *Int. Com. Rep.* 75.

180. Government property.—Under the provision of section 22, that nothing therein contained shall apply to "the carriage, storage, or handling of property free, or at reduced rates, for the United States, states, or municipal governments," it is lawful for a carrier to give special rates to individuals to enable them to make proposals to the general government for the transportation of Indian supplies. *In re Indian Supplies*, 1 *Int. Com. Rep.* 22, 1 *Int. Com. Com.* 15.

And under the above provision fish and eggs distributed by the United States Fish Commission may be given free transportation. *In re United States Commission of Fish and Fisheries*, 1 *Int. Com. Rep.* 606, 1 *Int. Com. Com.* 21.

181. Land explorers or settlers.—It is unlawful to sell what are termed "land explorers' tickets" or "settlers' tickets" below regular passenger rates. *Smith v. Northern Pac. R. Co.*, 1 *Int. Com. Rep.* 611, 1 *Int. Com. Com.* 208.

And such tickets are not justified on the ground that they are issued to poor persons who are seeking permanent locations, and that the business of the carriers will be benefited by the settlement and development of the country along their lines. *Smith v. Northern Pac. R. Co.*, 1 *Int. Com. Rep.* 611, 1 *Int. Com. Com.* 208.

But there is nothing illegal in a carrier selling such tickets under an agreement that if the passengers purchase lands from the company it will refund a part or the whole of the price of the tickets. *Smith v. Northern Pac. R. Co.*, 1 *Int. Com. Rep.* 611, 1 *Int. Com. Com.* 208.

182. Public officers—Religious teachers.—The habit of interstate carriers of issuing free transportation to persons who are described as "gentlemen long eminent in the public service, high officers of the states, members of legislative railroad committees," and others whose good will the carriers deem important, does not come within section 22 of the statute, and is therefore unlawful. *In re Boston & M. R. Co.*, 3 *Int. Com. Rep.* 717, 5 *Int. Com. Com.* 69.

There is no doubt of the right of the railroads to grant special privileges to religious teachers; and in deciding in good faith what they will do they can scarcely be said

to run a risk of penalties. Penalties are for wilful violations of law, and not for errors of judgment. *In re Religious Teachers*, 1 *Int. Com. Rep.* 21.

183. Railroad employes or families.—The commission will not make a ruling, in advance of any action by the railroads, as to their right to grant free passes to railroad employes and their families, and the right to give free transportation to extra baggage of commercial travelers. *In re Order of Railway Conductors*, 1 *Int. Com. Rep.* 18, 1 *Int. Com. Com.* 8.

The provision of section 22 that nothing therein shall be construed "to prevent railroads from giving free carriage to its own officers and employes," does not include the families of such persons. *Ex parte Kochler*, 12 *Sawyer* (U. S.) 446, 31 *Fed. Rep.* 315, 1 *Int. Com. Rep.* 317.

184. Theatrical companies.—Where the established rate for single passengers is three cents a mile, it is not unlawful to issue what are termed "party-rate tickets" to a number of persons, usually theatre companies traveling together, at two cents a mile, where such tickets are offered to the public generally. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 *Sup. Ct. Rep.* 844, 4 *Int. Com. Rep.* 92; affirming 43 *Fed. Rep.* 37, 3 *Int. Com. Rep.* 192.

The commission will not undertake to say in advance what rates carriers may make to certain classes of persons, such as theatrical companies. *In re Theatrical Rates*, 1 *Int. Com. Rep.* 18.

IV. STATE LAWS AFFECTING INTERSTATE COMMERCE.

1. Tax on Interstate Carriers or Traffic.

a. Right to Tax, Generally.*

185. General principles.—The power of a state to construct railroads and other highways and to impose tolls, fares, or freights for transportation thereon, is unlimited and uncontrolled. The disposition of the revenues thus derived is subjected to its own discretion. But a state cannot impose a tax on the movement of persons or property from one state to another. *Baltimore & O. R. Co. v. Maryland*, 21 *Wall* (U. S.) 456, 6 *Am. Ry. Rep.* 483.—ADHERING TO *Crandall v. Nevada*, 6 *Wall* (U. S.) 42;

* State tax on interstate commerce, see note, 13 *AM. & ENG. R. CAS.* 311.

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State Freight Tax Case, 15 Wall. 232.—FOLLOWED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307. QUOTED IN *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532. REVIEWED IN *Carton v. Illinois C. R. Co.*, 6 Am. & Eng. R. Cas. 305, 59 Iowa 148, 44 Am. Rep. 672; *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.

The taxation of the property of a corporation engaged in interstate commerce is not a taxation of interstate commerce. *Pittsburgh, C. & St. L. R. Co. v. Buckus*, 54 Am. & Eng. R. Cas. 227, 133 Ind. 625, 33 N. E. Rep. 432.

A state cannot tax a foreign corporation on a principle different from that in which she can tax one of her domestic corporations. *Erie R. Co. v. State*, 31 N. J. L. 531; reversing 30 N. J. L. 473.

186. Stamp tax on gold or silver exported.—The California law imposing a stamp tax on gold or silver shipped out of that state is a tax on interstate commerce, and void. *Almy v. California*, 24 How. (U. S.) 169.—DISTINGUISHED IN *Com. v. Erie R. Co.*, 62 Pa. St. 286. QUOTED IN *Clarke v. Philadelphia, W. & B. K. Co.*, 4 Houst. (Del.) 158.

187. Capitation tax on persons leaving a state.—The provision of the Nev. Act of 1865, by which a capitation tax shall be levied and collected upon every person leaving the state by railroad or stage coach, to be paid by the owners of such roads or stage coaches, is in violation of the U. S. constitution. This conclusion is based upon the right of the general government to send its officers and agents to any part of the country, and the right of every citizen to pass through a state unaffected by state taxation. *Crandall v. Nevada*, 6 Wall. (U. S.) 35.—ADHERED TO IN *Baltimore & O. R. Co. v. Maryland*, 21 Wall. (U. S.) 456. APPROVED IN *Clarke v. Philadelphia, W. & B. R. Co.*, 4 Houst. (Del.) 158. DISTINGUISHED IN *Com. v. Erie R. Co.*, 62 Pa. St. 286. EXPLAINED AND DISTINGUISHED IN *State v. Baltimore & O. R. Co.*, 34 Md. 344. FOLLOWED IN *Fargo v. Michigan*, 121 U. S. 230.

188. Tax on franchise granted by congress.—Franchises granted by congress cannot, without consent, be taxed by the states. So a California tax on the franchise of a railroad granted by congress to a

company operating a railroad through that state and other territories—held, to be a violation of the federal interstate commerce laws. *California v. Central Pac. R. Co.*, 33 Am. & Eng. R. Cas. 451, 127 U. S. 1, 8 Sup. Ct. Rep. 1073.—DISTINGUISHING *Thompson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. 5.—FOLLOWED IN *San Benito County v. Southern Pac. R. Co.*, 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827.

Taxation of the franchise of a railway granted by act of congress, by the territories, is not in conflict with the constitutional grant to congress of the power to regulate commerce among the several states. *Atlantic & P. R. Co. v. Lesueur*, (Ariz.) 37 Am. & Eng. R. Cas. 368, 19 Pac. Rep. 157.

189. Remedy by injunction.—If the tax can be separated, the court will enjoin that portion only which is on interstate traffic. *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411, 8 Sup. Ct. Rep. 1127.—REVIEWED IN *Ratterman v. American Exp. Co.*, 49 Ohio St. 608.

b. Tax on Sleeping Cars.

190. Generally.—A state cannot tax or regulate transportation of passengers from one state to another in sleeping cars. *Indiana v. Pullman Palace Car Co.*, 13 Am. & Eng. R. Cas. 307, 11 Biss. (U. S.) 561, 16 Fed. Rep. 193.

191. On capital stock of foreign corporation as represented by number of cars in state.—A state may tax the cars of a foreign sleeping car company employed in interstate commerce and which run into, through, and out of such state, and may ascertain the proportion of the property of such company upon which the tax should be placed by taking as a basis of assessment such proportion of the capital stock of the company as the number of miles over which it runs cars within the state bears to the whole number of miles in that and other states over which its cars are run. An act imposing such a tax is a valid and constitutional law. *Pullman Palace Car Co. v. Pennsylvania*, 46 Am. & Eng. R. Cas. 236, 141 U. S. 18, 11 Sup. Ct. Rep. 876; affirming 107 Pa. St. 156.—DISTINGUISHED IN *People ex rel. v. Wemple*, 138 N. Y. 1. FOLLOWED IN *Pullman Palace Car Co. v. Hayward*, 141 U. S. 36. QUOTED IN *Denver & R. G. R. Co. v. Church*, 17 Colo. 1.

192. Tax on gross earnings.—A sleeping car company, engaged in the business of transporting passengers from one state to another, is not subject to have a state tax levied upon its gross earnings. The fact that the amount of tax is restricted to the distance passengers are carried through the state does not render it valid, for the tax assumed to be levied is upon interstate commerce, and not upon the internal commerce of the state. *State v. Woodruff S. & P. Coach Co.*, 33 Am. & Eng. R. Cas. 476, 114 Ind. 155, 15 N. E. Rep. 814, 1 Int. Com. Rep. 798.—QUOTING *Robbins v. Shelby Taxing Dist.*, 120 U. S. 489.

In no event can a corporation engaged in the business of interstate commerce be taxed for the privilege of doing business in a certain state. *State v. Woodruff S. & P. Coach Co.*, 33 Am. & Eng. R. Cas. 476, 114 Ind. 155, 15 N. E. Rep. 814, 1 Int. Com. Rep. 798.

193. Tax on value of cars employed in state.—Louisiana Revenue Act of 1890, § 29, provides that "any transportation company whose sleeping cars run over any line lying partly within this state, or partly within another state or states, shall be assessed in this state in the ratio which the number of miles of the line within the state has to the total number of miles of the entire line." *Held*, that a sleeping car company of another state, which only did the usual business of transporting passengers in or through the state, and did no other business therein, except to make casual repairs to its cars, was not wholly exempt under the above statute from taxation. *Pullman Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206.

But where it appears from the facts of the case that the tax is assessed on the total value of the property employed within the state, and not in the ratio of mileage, as the statute directs, it is unlawful, and may be enjoined. *Pullman Palace Car Co. v. Board of Assessors*, 55 Fed. Rep. 206.

194. Uniform tax on each car.—Tenn. Act of March 16, 1877, § 6, imposing a tax of \$50 on sleeping cars run over the railroads of the state, and not owned by them, is unconstitutional, so far as it relates to cars used in interstate business. *Pickard v. Pullman Southern Car Co.*, 24 Am. & Eng. R. Cas. 511, 117 U. S. 34, 6 Sup. Ct. Rep. 635. — DISAPPROVING *Pullman Southern Car Co. v. Gaines*, 3 Tenn. Ch. 587. DIS-

TINGUISHING *Osborne v. Mobile*, 16 Wall. (U. S.) 479; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365. FOLLOWING *State Freight Tax Case*, 15 Wall. 232. — FOLLOWED IN *Tennessee v. Pullman Southern Car Co.*, 117 U. S. 51.

c. Tax on gross receipts.*

195. Generally.—A state statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through the state is a tax upon commerce among the states, and therefore void. *Fargo v. Michigan*, 31 Am. & Eng. R. Cas. 452, 121 U. S. 230, 7 Sup. Ct. Rep. 857.—FOLLOWING *State Freight Tax Case*, 15 Wall. (U. S.) 232; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Crandall v. Nevada*, 6 Wall. 35. —FOLLOWED IN *People ex rel. v. Wemple*, 138 N. Y. 1.

While a state may tax the money actually within the state, after it has passed beyond the stage of compensation for carrying persons or property, as it may tax other money or property within its limits, a tax upon receipts for this class of carriage, specifically, is a tax upon the commerce out of which it arises, and, if that be interstate commerce, it is void under the constitution. *Fargo v. Michigan*, 31 Am. & Eng. R. Cas. 452, 121 U. S. 230, 7 Sup. Ct. Rep. 857.

196. Under various statutes.—The Dakota Act of March 9, 1883, which provides for the levy and collection of a percentage of the gross earnings of railroad companies in lieu of other taxes, is unconstitutional and invalid, in so far as it imposes a tax upon the transportation of freight or passengers to or from points outside the state, such traffic being interstate commerce subject only to the regulations of congress. *Northern Pac. R. Co. v. Raymond*, 37 Am. & Eng. R. Cas. 379, 5 Dak. 356, 40 N. W. Rep. 538, 1 L. R. A. 732, 2 Int. Com. Rep. 321. Contra, see *Northern Pac. R. Co. v. Barnes*, 53 Am. & Eng. R. Cas. 616, 2 N. Dak. 310, 51 N. W. Rep. 386.—FOLLOWED IN *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 395; *Northern Pac. R. Co. v. Strong*, 2 N. Dak. 395; *Northern Pac. R. Co. v. Brewer*, 2 N. Dak. 396; *Northern Pac. R. Co. v. Tressler*, 2 N. Dak. 397.

* State taxation of profits of business of corporations engaged in interstate commerce, see note, 17 AM. & ENG. R. CAS. 404.

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Indiana Act of March 29, 1881, § 87, providing for a tax of two per cent. on the gross receipts of foreign sleeping car companies on business done in the state, is unconstitutional. *Indiana v. Pullman Palace Car Co.*, 13 Am. & Eng. R. Cas. 307, 11 Bliss. (U. S.) 561, 16 Fed. Rep. 193.

Michigan Act of March 27, 1867, entitled "An act to regulate express companies and their agents, and individuals prosecuting the express business, not incorporated by the state of Michigan," and requiring the payment of a specific tax of one per cent. of the gross business done in the state, is not in conflict with the commerce clause of the constitution of the United States. *Walcott v. People*, 17 Mich. 68.

A statute of Missouri levying a tax on the gross receipts of an express company from business "done within the state," does not attempt to tax the company's receipts from business done between that state and other states. *Pacific Exp. Co. v. Seibert*, 48 Am. & Eng. R. Cas. 610, 142 U. S. 339, 12 Sup. Ct. Rep. 250.

107. Under Pennsylvania statute.—Penn. Act of August 25, 1864, entitled "An act to provide additional revenue for the use of the commonwealth," is not in conflict with the constitution of the United States so far as it imposes a tax on the gross receipts of railroad companies, though such receipts are made up from interstate traffic. Such tax cannot properly be said to be a regulation of commerce among the states; nor a tax on imports or exports; nor a tax on transportation. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 284.—FOLLOWED IN *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675. QUOTED IN *Porter v. Rockford*, R. I. & St. L. R. Co., 76 Ill. 561; *Ratterman v. American Exp. Co.*, 49 Ohio St. 608; *Providence Coal Co. v. Providence & W. R. Co.*, 26 Am. & Eng. R. Cas. 42, 15 R. I. 303; *State v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 466, 24 W. Va. 783.

The Pennsylvania Act of June 17, 1879, which imposes a tax upon the gross receipts of railroad companies organized or doing business within the commonwealth "for tolls and transportation, telegraph business or express business," is invalid as a contravention of the provision of the federal constitution that congress shall have power to regulate interstate commerce in so far as such receipts are derived from commerce

between points within and points without the state. *Delaware & H. Canal Co. v. Com.*, (Pa.) 37 Am. & Eng. R. Cas. 359, 17 Atl. Rep. 175.

Where both or one of the terminal points of a railway company is beyond the state, a tax laid on the gross receipts received from transportation of freight or passengers between those points is void, being a tax on interstate commerce. *Com. v. Lehigh Valley R. Co.*, (Pa.) 17 Atl. Rep. 179.—DISTINGUISHING *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. Rep. 475.

108. On a steamship company.—A state cannot tax the gross receipts of a steamship company derived from the carriage of persons and property between the state and other states, or foreign nations. *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118.—QUOTED IN *People ex rel. v. Wemple*, 138 N. Y. 1.

d. Tax on the Property or Business of a Carrier.

100. On freights, estimated by their weight.—A state statute requiring all carriers doing business in the state to pay a tax upon all merchandise carried, based upon the weight of the merchandise, is in conflict with the commerce clause of the constitution of the United States, so far as it relates to interstate traffic. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.—ADHERED TO IN *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456. APPROVED IN *Maryland v. Cumberland & P. R. Co.*, 40 Md. 22. FOLLOWED IN *Erie R. Co. v. Pennsylvania*, 15 Wall. 282; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Fargo v. Michigan*, 121 U. S. 230; *United States Exp. Co. v. Hemmingway*, 39 Fed. Rep. 60.

The constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. The test is, what is the subject of the tax—upon what does the burden, really rest; not from whom the state exacts payment into its treasury. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

So long as the tax is upon the freight carried, it is in conflict with the federal law, though the tax itself is collected from

the carriers. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

In determining the constitutionality of such a statute, its effect on commerce, and not the legislative purpose in enacting it, must be considered. So it is no defense of the statute that it was the purpose of the legislature in enacting it to raise revenue for the state government. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

Neither is the statute made valid by the fact that the tax is levied upon all of the freight alike, both state and interstate. The state only has the right to tax its own domestic commerce and property as it pleases. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

And such statute cannot be sustained on the ground that it is not intended as a regulation of commerce, but as compensation for the use of works of internal improvement, constructed under franchises granted by the state; or, in other words, that it is a toll for the use of railways considered as highways. The error of such proposition is in the fact that the tax is not upon the franchises of the corporations, but upon their freight. *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.

200. Tonnage tax.—The Pa. Act, Aug. 25, 1864, levying a tax on the freight of a railroad, only a part of which is situate in that state, which freight is either taken up in the state and carried out, or received in another state to be brought within it, is unconstitutional as an attempt to regulate commerce among the states. *Erie R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 282, 4 Brews. (Pa.) 202; reversing 62 Pa. St. 286. —FOLLOWING *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232.—FOLLOWED IN *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658.

A clause in the charter of a railroad company, providing that all tonnage of whatsoever kind or description, except the ordinary baggage of passengers, carried or conveyed on said railroad, in each and every year, shall be subject to a toll or duty for the use of the commonwealth, of three mills per ton per mile, is simply a mode of taxing the company according to the magnitude of its business, and is not intended as a tax on commerce. *Pennsylvania R. Co. v. Com.*, 3 Grant's Cas. (Pa.) 128.

Such a tax is not in violation of the pro-

visions of the constitution of the United States, that "congress shall have exclusive power to regulate commerce with foreign nations, and among the states," and prohibiting the states, without the consent of congress, from laying duties on imports and exports. *Pennsylvania R. Co. v. Com.*, 3 Grant's Cas. (Pa.) 128.

The acceptance by the company of a charter with such a provision is equivalent to an express contract to pay the tax. Treated as a contract, therefore, between the state and the corporation, it is not to be tested by the constitution as a law of the state; regarded as a law, the company cannot complain of it, for they freely subjected themselves to it, for the sake of the benefits offered with it. *Pennsylvania R. Co. v. Com.*, 3 Grant's Cas. (Pa.) 128.

201. On the interstate business of a foreign corporation.—It seems the property of a foreign corporation, engaged in foreign or interstate commerce, may be taxed equally with like property of a domestic corporation engaged in the same business, but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of public waters, is invalid, as an interference with the power of congress in the regulation of commerce. *People ex rel. v. Wemple*, 131 N. Y. 64, 43 N. Y. S. R. 963, mem., 29 N. E. Rep. 1002; affirming 61 Hun 83.

It seems the state may impose upon domestic corporations, engaged in state and interstate commerce, a franchise tax, measured by the whole capital or business, or in any other way, in the discretion of the legislature, without regard to the part of the business arising from interstate commerce, provided no hostile discrimination is made against such part. *People ex rel. v. Wemple*, 54 Am. & Eng. R. Cas. 1, 138 N. Y. 1, 51 N. Y. S. R. 702; affirming 65 Hun 252, 47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.

The state may not tax a foreign corporation upon its business carried on in this state, where it is exclusively the business of interstate commerce. Such a tax is a regulation of commerce, and the power to regulate commerce between the states is vested exclusively in congress. *People ex rel. v. Wemple*, 54 Am. & Eng. R. Cas. 1, 138 N. Y. 1, 51 N. Y. S. R. 702; affirming 65 Hun 252,

47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.

It seems property engaged in interstate commerce, having a substantial connection with the interstate commerce, is not to be taxed by the state, but by the federal government. *Am. & Eng. R. Cas. 1, 138 N. Y. S. R. 702; 20 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.*

The relative importance of the interstate commerce, but a tax or other burden imposed upon the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of public waters, is invalid, as an interference with the power of congress in the regulation of commerce. *People ex rel. v. Wemple*, 131 N. Y. 64, 43 N. Y. S. R. 963, mem., 29 N. E. Rep. 1002; affirming 61 Hun 83.

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47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.

It seems the state may levy a tax upon property employed in interstate commerce, having a situs within the jurisdiction, provided no adverse discrimination is made in the imposition of the tax between such property and other property of a similar character. *People ex rel v. Wemple*, 54 Am. & Eng. R. Cas. 1, 138 N. Y. 1, 51 N. Y. S. R. 702; affirming 65 Hun 252, 47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.

The relator, a Pennsylvania railroad corporation, whose line extends into other states, but not into this state, operates in connection with its road a ferry across the Hudson river to the city of New York, where it has terminal facilities used in receiving and delivering freight and passengers; it collects in that city money due for transportation of freight to and from it, and sells there passenger tickets, employing a large number of agents, clerks, and laborers. The state comptroller imposed a tax upon the corporation, under N. Y. Act of 1880, ch. 542, as amended in 1881, ch. 361, providing for taxing corporations. Held, that the business in which the relator was engaged in this state was exclusively that of interstate commerce, and so that the tax was void. *People ex rel v. Wemple*, 54 Am. & Eng. R. Cas. 1, 138 N. Y. 1, 51 N. Y. S. R. 702; affirming 65 Hun 252, 47 N. Y. S. R. 695, 20 N. Y. Supp. 287, 29 Abb. N. Cas. 85.

DISTINGUISHING *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217. FOLLOWING *Fargo v. Michigan*, 121 U. S. 230; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196. QUOTING *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326.

202. On the interstate business of a domestic corporation.—The N. Y. Act of 1880, ch. 542, § 6, as amended by ch. 361 of Acts of 1881, providing for a tax on transportation corporations of one half of one per cent. "upon the gross earnings in this state of the said corporation *** for *** business transacted in this state," is not in conflict with that provision of the federal constitution giving the United States exclusive power to regulate commerce among the states, when applied to

a railroad created under the laws of, and operated from a point in New York to a point in another state, and to its interstate business. *People ex rel v. Campbell*, 74 Hun 210, 26 N. Y. Supp. 832, 56 N. Y. S. R. 358.—APPROVING *People ex rel v. Wemple*, 138 N. Y. 1; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217.

203. On value of capital stock and net earnings.—Del. Act of April 8, 1869, taxing railroads and canals three per cent. of their net income, and one fourth of one per cent. upon the cash value of the capital stock, with a provision that if the road or canal lay partly out of the state, the tax should be in the same proportion that the part of the road or canal bore to the whole length thereof, is not in conflict with the power of congress to regulate commerce among the states. *Minot v. Philadelphia, W. & B. R. Co.*, 18 Wall. (U. S.) 206, 7 Am. Ky. Rep. 312; affirming 7 Phila. (Pa.) 555.—QUOTED IN *Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch. 600, 8 Atl. Rep. 363.

204. On business done, based on weight of freights and number of passengers.—A law for revenue, laying a distinctive tax on the business of foreign corporations habitually doing business in a state, such business consisting of the transportation of goods, *in transitu*, from state to state, and the tax being graduated by the weight of the goods and the number of the passengers carried, is an infringement of the clause of the constitution of the United States giving to congress the regulation of commerce between the several states. *Erie R. Co. v. State*, 31 N. J. L. 531; reversing 30 N. J. L. 473.

A tax on the business of a foreign railroad company passing through the state, though in form on the business of the companies, is in substance a tax on the commodities, the transportation of which constitutes such business. *Erie R. Co. v. State*, 31 N. J. L. 531; reversing 30 N. J. L. 473.—DISTINGUISHED IN *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546. REVIEWED IN *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1.

Whenever the taxation of a commodity would amount to a regulation of commerce within the prohibition of the constitution, so will the taxation of an inseparable incident or necessary concomitant of such commodity. *Erie R. Co. v. State*, 31 N. J. L. 531; reversing 30 N. J. L. 473.

The power to refuse a recognition of corporate existence does not involve the right to tax a foreign corporation at the arbitrary discretion of the government possessing such power. *Erie R. Co. v. State*, 31 N. J. L. 531; *reversing* 30 N. J. L. 473.

An act of taxation is a recognition of the legal status of the corporation taxed, and admits that such corporation is clothed with all the rights necessary to defend itself against illegal taxation. *Erie R. Co. v. State*, 31 N. J. L. 531; *reversing* 30 N. J. L. 473.

Del. Act of 1864, imposing a tax upon all carriers of passengers by steam of ten cents for each passenger transported across any portion of the state, but allowing carriers to increase their tolls by that amount, in effect imposes a tax upon the passengers, and is in conflict with the commerce clause of the constitution of the United States, so far as it relates to the interstate carriage of passengers. *Clarke v. Philadelphia, W. & B. R. Co.*, 4 How. (Del.) 158, 6 Am. Ry. Rep. 7.—*APPROVING* *Crandall v. Nevada*, 6 Wall. (U. S.) 35; *Brown v. Maryland*, 12 Wheat. (U. S.) 444; *Gibbons v. Ogden*, 9 Wheat. 1. *DISTINGUISHING* *New York v. Miln*, 11 Pet. (U. S.) 136. *QUOTING* *Almy v. California*, 24 How. (U. S.) 169; *Passenger Cases*, 7 How. 283.

205. On property of foreign corporation found in state on a leased road.—Section 9 of the N. J. Taxation Act provides that where a railroad of the state is under lease to a foreign corporation, any tangible personal property of such foreign company, if used or kept but a part of the time in the state, shall be assessed such proportionate part of its value as the time it is used or kept in the state during the year preceding the first day of January designated in the act bears to the whole year; and it appearing that certain engines and cars that were used on its leased lines in the state by the Philadelphia & Reading Railroad Company, in the course of interstate commerce, such company having in use a full local equipment of such leased lines which was duly taxed in the state—*held*, that the tax upon such property employed in interstate commerce was illegal, being in contravention of that clause of the constitution of the United States that gives to congress the exclusive regulation of commerce between the several states. *Central R. Co. v. State Board of Assessors*, 49 N. J. L. 1, 7 Atl. Rep.

306.—*REVIEWING* *Erie R. Co. v. State*, 31 N. J. L. 531; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596.

206. On loc. motives and cars.—Where a state statute imposes a tax upon locomotives and passenger and freight cars, it amounts to a tax upon the freight and passengers carried, and if in conflict with the commerce clause of the constitution of the United States, so far as it relates to interstate business, where it appears that the object of the statute is to raise revenue, as distinguished from a mere police regulation. *Minot v. Philadelphia, W. & B. R. Co.*, 2 Abb. (U. S.) 323; *affirmed* in 18 Wall. 206.

207. On coal mined in one state to be shipped to another.—Md. Act of 1872, ch. 274, imposing a tax of two cents per ton on all coal mined in the state and transported to any place in the state, or elsewhere, for sale, is repugnant to the constitution of the United States so far as it relates to coal that is shipped out of the state. (Stewart, Bowie and Robinson, JJ., dissenting.) *State v. Cumberland & P. R. Co.*, 40 Md. 22.—*APPROVING* *Philadelphia & R. R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 232; *Osborne v. Mobile*, 16 Wall. 479. *REVIEWING* *Mayor, etc., of Baltimore v. Baltimore & O. R. Co.*, 6 Gill (Md.) 291.—*REVIEWED IN* *State v. Northern C. R. Co.*, 44 Md. 131; *State v. Philadelphia, W. & B. R. Co.*, 45 Md. 361.

e. License Tax.*

208. For privilege to foreign corporation to keep office in state.—A tax imposed by a state upon a foreign corporation owning an interstate railroad, for the privilege of keeping an office in the state for the use of its officers, stockholders, agents, and employes, is a tax upon commerce among the states, and as such is repugnant to the constitution of the United States. *Norfolk & W. R. Co. v. Pennsylvania*, 45 Am. & Eng. R. Cas. 9, 136 U. S. 114, 10 Sup. Ct. Rep. 958; *reversing* 26 Am. & Eng. R. Cas. 48, 114 Pa. St. 256, 6 Atl. Rep. 45.—*QUOTED IN* *Norfolk & W. R. Co. v. Com.*, 88 Va. 95.

200. For privilege of exercising franchise.—"An excise tax for the privilege of exercising its franchises," being a

* License tax on foreign corporations, see notes, 45 AM. & ENG. R. CAS. 8; 13 Id. 306.

varying per mile, and in miles within interstate co company op extending be levying the t Co., 48 Am. 217, 12 Sup. GUISHED IN N. Y. 1.

210. For sales of goods.—A persons engag sale, or of so such liquors without impos gaged in the an attempt to and repugnan of the United gun, 116 U. S. REVIEWED IN R. Co., 109 N.

211. For ness in a m imposed by th the agent of a cago and New ing business i soliciting pass New York to not the sale of receipt or pay it, is a tax up is unconstitut California, 45 U. S. 104, 10 S. Rep. 181.—EX Co. v. Pennsy bina Con. Sil vania, 125 U. 124 U. S. 465.

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* When a mu pany entering interstate comm Cas. 378 abstr.

varying percentage on its gross receipts per mile, and in proportion to the number of its miles within the state is not a regulation of interstate commerce when levied upon a company operating under lease a railroad extending beyond the limits of the state levying the tax. *Maine v. Grand Trunk R. Co.*, 48 Am. & Eng. R. Cas. 602, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163.—DISTINGUISHED IN *People ex rel. v. Wemple*, 138 N. Y. 1.

210. For privilege of soliciting sales of goods for interstate shipments.—A state law imposing a tax on persons engaged in selling liquors at wholesale, or of soliciting or taking orders for such liquors to be shipped into the state, without imposing a like tax on persons engaged in the same business in the state, is an attempt to regulate interstate commerce, and repugnant to the constitution and laws of the United States. *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454.—REVIEWED IN *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. Car. 279.

211. For privilege of doing business in a municipality.*—A license tax imposed by the city of San Francisco upon the agent of a line of railroad between Chicago and New York, for the privilege of doing business in San Francisco, consisting of soliciting passengers from San Francisco to New York to take that line at Chicago, but not the sale of tickets for the route, or the receipt or payment of money on account of it, is a tax upon interstate commerce, and is unconstitutional and void. *McCall v. California*, 45 Am. & Eng. R. Cas. 1, 136 U. S. 104, 10 Sup. Ct. Rep. 881, 3 Int. Com. Rep. 181.—EXPLAINING *Norfolk & W. R. Co. v. Pennsylvania* 114 Pa. St. 256; *Pembina Con. Silver M. & M. Co. v. Pennsylvania*, 125 U. S. 181; *Smith v. Alabama*, 124 U. S. 465.

A municipal ordinance imposing an annual tax upon a railroad company, which passes through the corporate limits, is not a tax upon interstate commerce, nor upon the instruments employed in the transportation of such commerce, and is valid where authorized by state law. *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404, 2 L.

R. A. 284, 2 Int. Com. Rep. 416, 8 S. E. Rep. 124.

And such tax is not rendered invalid because the property of the railroad is subject to an *ad valorem* tax under the general laws of the state. *Piedmont R. Co. v. Reidsville*, 101 N. Car. 404, 2 L. R. A. 284, 2 Int. Com. Rep. 416, 8 S. E. Rep. 124.

212. Requiring railroad engineers to be licensed.—Ala. Act of Feb. 28, 1887, requiring railroad engineers in that state to be examined and licensed¹ is not in conflict with any federal law regulating commerce between the states, when applied to an engineer who drove an engine between a point in that state and a point in another state. *Smith v. Alabama*, 33 Am. & Eng. R. Cas. 425, 124 U. S. 465, 8 Sup. Ct. Rep. 564.—EXPLAINED IN *McCall v. California*, 136 U. S. 104. QUOTED IN *Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619; *Bagg v. Wilmington, C. & A. R. Co.*, 109 N. Car. 279; *Wigton v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 184.

213. On foreign telegraph companies.—States cannot impose a license tax on the business of a telegraph company so far as it is interstate. *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380.—FOLLOWED IN *United States Exp. Co. v. Hemmingway*, 39 Fed. Rep. 60.—*Western Union Tel. Co. v. Alabama State Board*, 132 U. S. 472, 10 Sup. Ct. Rep. 161.—FOLLOWED IN *Gibson County v. Pullman South. Car. Co.*, 42 Fed. Rep. 572.

A state law imposing a license tax upon foreign telegraph companies doing business within the state of \$1 per annum per mile for the line of poles and first wire, and fifty cents for each additional wire, is void, as an attempt to regulate interstate commerce. *Com. v. Smith*, 92 Ky. 38, 17 S. W. Rep. 187.

214. On foreign express companies.—An express company engaged in interstate commerce cannot be restrained or regulated as to such business by the local or state law. *Wells v. Northern Pac. R. Co.*, 10 Sawy. (U. S.) 441, 23 Fed. Rep. 469.—APPLYING *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, 9 Sawy. 253.

An act of a state legislature (Act Ky. March 2, 1860, as amended by Act of 1866) regulating the agencies of foreign express companies, by requiring the agents of such companies to obtain a license from the state before they are permitted to carry on business there, and further requiring as a

* When a municipal license tax on each company entering corporate limits is not a tax on interstate commerce, see 37 AM. & ENG. R. CAS. 378. *abstr.*

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preliminary to such license, that such agents shall deposit with the auditor a statement of the company's assets and liabilities, and satisfy him that it has an actual capital of at least \$150,000, and further providing that if any agent of a foreign express company engages in business without such license he shall be subject to fine, is unconstitutional as a regulation of interstate commerce, in so far as it applies to a corporation of another state engaged in that business, although such corporation may also transport goods between points within the state. (Fuller, C. J., and Gray, J., dissenting.) *Crutcher v. Kentucky* 46 Am. & Eng. R. Cas. 637, 141 U. S. 47, 11 Sup. Ct. Rep. 851; reversing 40 Am. & Eng. R. Cas. 29, 89 Ky. 6, 12 S. W. Rep. 141.—QUOTED IN *Com. v. Smith*, 92 Ky. 38. REVIEWED IN *Minneapolis, St. P. & S. Ste. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

A statute of a state requiring express companies carrying on business in the state to pay a license tax of \$500 per annum where the distance over which the line of the company extends in this state is less than one hundred miles, and the annual sum of \$1000 where the distance is more than one hundred miles, is a regulation of interstate commerce in so far as it applies to companies doing business between this state and other states, and is to that extent in violation of the federal constitution. *Com. v. Smith*, 92 Ky. 38, 17 S. W. Rep. 187.—QUOTING *Crutcher v. Kentucky*, 141 U. S. 47; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196.

While the state may impose a tax upon property within its borders owned by a person or company engaged in carrying on interstate commerce, yet when it is apparent that the tax imposed is a mere arbitrary sum fixed by the state, without regard to the value of the property, it will be regarded as a tax upon the business of the owner and, therefore, such a regulation of interstate commerce as is forbidden by the federal constitution. *Com. v. Smith*, 92 Ky. 38, 17 S. W. Rep. 187.

The Mississippi statute imposing an annual tax of \$3000 upon express companies doing business in the state, for the privilege of doing such business, is unconstitutional as to all interstate transportation; but is valid as to all business which is confined to the state. *United States Exp. Co. v. Hem-*

mingway, 39 Fed. Rep. 60.—FOLLOWING *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380; *State Freight Tax Case*, 15 Wall. (U. S.) 232.

And where the tax is levied upon the company doing an interstate business it will be enjoined until the portion that is upon the state and the interstate business can be separated and shown. *United States Exp. Co. v. Hemmingway*, 39 Fed. Rep. 60.

The Missouri Act of May 16, 1889, prescribing the mode of taxing express companies, only imposes a tax on the business done within the state, and is therefore not an interference with interstate commerce. *Pacific Exp. Co. v. Seibert*, 44 Fed. Rep. 310; affirmed in 48 Am. & Eng. R. Cas. 610, 142 U. S. 339, 3 Int. Com. Rep. 810.

The statute does not deprive express companies of the equal protection of the law, nor constitute inequality of taxation, simply because it prescribes a special mode of taxing them. A state has the right to tax different kinds of property in different ways. *Pacific Exp. Co. v. Seibert*, 44 Fed. Rep. 310; affirmed in 48 Am. & Eng. R. Cas. 610, 142 U. S. 339, 3 Int. Com. Rep. 810.

2. Regulation of Interstate Carriers or Traffic.*

215. Power of states, generally.—

The following propositions may be regarded as settled: (1) The transportation of merchandise from place to place by railroad is commerce; (2) the transportation of merchandise from a place in one state to a place in another is "commerce among the states"; (3) to fix or limit the charges for such transportation is to regulate commerce; (4) a statute fixing or limiting such charges for transportation from places in one state to places in other states is a regulation of commerce among the states; (5) the power to regulate such commerce is vested by the constitution in congress; (6) this power of congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national, or admit of one uniform system or plan of regulation. *Kaiser v. Illinois C. R. Co.*, 16 Am. & Eng. R. Cas. 40, 5 McCrary (U. S.) 496, 18 Fed. Rep. 151. *Carton v. Illinois C. R.*

* Regulation of interstate commerce. State laws, see notes, 7 AM. & ENG. R. CAS. 634; 16 Id. 44; 18 Id. 440; 27 AM. ST. REP. 547; 13 L. R. A. 107.

Co., 6 Am. & Eng. R. Cas. 148, 44 Am. & Eng. R. Cas. 187. *McGuire v. R. Co.*, 95 N. C. 187. *burgh & C. R.*

State interference with interstate commerce is absolute. The substitution of the state for the federal government in the premises does not pass any law in violation of the constitution. *an v. Wilmington*, 428.—FOLLOWING (U. S.) 286; H.

A city ordinance requiring express companies from selling freight cars in the city or in depot building is unconstitutional and hinders competition. *far as relates to roads may have if it be intended such as the press or to prevent criminal places. Spelle* Rep. 3.

216. Under Act of 1874, § 2 passenger trains of time at railroad to receive and load is not in conflict with the constitution of the United States. *ing congress to the states; neither with the constitution of the C. R. Co. v. People* 173.

Iowa Act of 1874, providing a tariff of interstate traffic. *Illinois C. R. Co. v. 5 McCrary* (U. S.) 496. FOLLOWED IN 18 Am. & Eng. R. Cas. 468. QUOTED IN *lotte, C. & A. Cas.*, 29, 22 So. C. Sec. 57, ch. 2, 1878, known as

* Statute regulating interstate commerce as a regulation of interstate commerce. See note, 21 AM. & ENG. R. CAS. 634.

Co., 6 Am. & Eng. R. Cas. 305, 59 Iowa 148, 44 Am. Rep. 672, 13 N. W. Rep. 67. *Com. v. Smith*, 92 Ky. 38, 17 S. W. Rep. 187. *McGowan v. Wilmington & W. R. Co.*, 95 N. Car. 428. *Baltimore v. Pittsburgh & C. R. Co.*, 3 Pittsb. (Pa.) 20.

State interference with interstate commerce is absolutely forbidden by the constitution of the United States, and the failure of congress to take any action in the premises does not give the states power to pass any law in relation thereto. *McGowan v. Wilmington & W. R. Co.*, 95 N. Car. 428.—FOLLOWING Passenger Cases, 7 How. (U. S.) 286; Hall v. De Cuir, 95 U. S. 485.

A city ordinance prohibiting railroad companies from selling fruit, vegetables, or perishable freights from their cars, platforms, or in depot buildings or grounds, is unconstitutional and void, if it be intended to hinder competition with resident dealers, so far as relates to interstate traffic that the roads may have brought in; but it is valid if it be intended as a mere police regulation, such as the preservation of the public health, or to prevent crowds from gathering at public places. *Spelman v. New Orleans*, 45 Fed. Rep. 3.

216. Under various statutes.*—Ill. Act of 1874, § 25, which requires all regular passenger trains to stop a sufficient length of time at railroad stations of county seats to receive and let off passengers with safety, is not in conflict with that provision of the constitution of the United States empowering congress to regulate commerce among the states; neither is it invalid as interfering with the carrying of the mails. *Illinois C. R. Co. v. People*, 143 Ill. 434, 33 N. E. Rep. 173.

Iowa Act of March 23, 1874, is unconstitutional and void, so far as it attempts to provide a tariff of maximum charges for interstate traffic or passengers. *Kaiser v. Illinois C. R. Co.*, 16 Am. & Eng. R. Cas. 40, 5 McCrary (U. S.) 496, 18 Fed. Rep. 151.—FOLLOWED IN *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468. QUOTED IN *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

Sec. 57, ch. 23, Comp. Laws of Kansas, 1878, known as the "Maximum Freight

Rate Law" of 1868, had no application to fix or limit the charges for transportation of freight from another state into this state, because if it was intended to apply to such interstate commerce it was in violation of art. 1, § 8, of the constitution of the United States, and therefore void. *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698, 5 Pac. Rep. 6.

The Act of the Mississippi Legislature of March 11, 1884, regulating the rates of transportation of railroads, is, so far as it relates to the Mobile & Ohio R. Co., a railroad incorporated in several states, and running therein, a regulation of interstate commerce, and void. *Illinois C. R. Co. v. Stone*, 18 Am. & Eng. R. Cas. 416, 20 Fed. Rep. 468.—DISTINGUISHING *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164. FOLLOWING *Kaiser v. Illinois C. R. Co.*, 18 Fed. Rep. 151; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.—QUOTED IN *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

The Act of the Legislature of Missouri of March 18, 1881 (Laws, p. 83), requiring railroad companies to furnish double-decked cars for the shipment of sheep, and providing a penalty for failing to do so, so far as attempted to be applied to interstate shipments, would be a regulation of commerce and violation of the federal constitution (art. 1, § 8). *Stanley v. Wabash, St. L. & P. R. Co.*, 42 Am. & Eng. R. Cas. 328, 100 Mo. 435, 13 S. W. Rep. 709, 8 L. R. A. 549, 3 Int. Com. Rep. 176.

New York Act of 1887, ch. 116, as amended in 1888, ch. 189, relating to the heating of passenger cars, is but a police regulation, and is not void as an attempt to regulate interstate commerce. *People v. New York, N. H. & H. R. Co.*, 55 Hun 409, 29 N. Y. S. R. 172, 8 N. Y. Supp. 672; affirmed in 123 N. Y. 635, mem., 25 N. E. Rep. 953, mem., 33 N. Y. S. R. 1028.—QUOTING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 149.

Wisconsin Act of March 11, 1874, entitled "An act relating to railroads, express, and telegraph companies in the state of Wisconsin," only applies to such commerce as is confined to the state, and is therefore valid. *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164, 16 Am. Ry. Rep. 413.—FOLLOWED IN *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179.

* Statute regulating rates. When unconstitutional as a regulation of interstate commerce, see note, 21 AM. & ENG. R. CAS. 51.

217. Under Texas statutes.—Texas Const. art. 10, § 5, prohibiting railroad companies from controlling competing or parallel lines, is not void as attempting to regulate interstate commerce, when applied to an agreement between parallel lines forming a traffic association for the purpose of "preventing sudden and extreme changes in Texas rates," though some of the traffic embraced is partly without the state. Where some of the parties to such agreement are Texas corporations, the agreement as to them, under the constitutional provision, is illegal, and being illegal as to them is illegal as to all. *Gulf, C. & S. F. R. Co. v. State*, 36 Am. & Eng. R. Cas. 481, 72 Tex. 404, 1 L. R. A. 849, 10 S. W. Rep. 81, 2 Int. Com. Rep. 335.

The Texas statute which imposes a penalty upon railroad companies refusing to deliver freight upon payment or tender of the charges specified in the bill of lading, is not, even when applied to freight shipped into the state, a regulation of interstate commerce, but is a proper exercise of the police power of the state, and is valid. *Gulf, C. & S. F. R. Co. v. Dwyer*, 42 Am. & Eng. R. Cas. 503, 75 Tex. 572, 12 S. W. Rep. 1001.—FOLLOWED IN *Southern Pac. R. Co. v. Haas*, 49 Am. & Eng. R. Cas. 37, 17 S. W. Rep. 600.—*Fl. Worth & D. C. R. Co. v. Lillard*, 4 Tex. App. (Civ. Cas.) 123, 16 S. W. Rep. 654.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. Rep. 1001.

Texas Rev. St. art. 278, preventing common carriers from limiting their liability, applies to domestic carriers on land within the state, or on waters entirely within the state, and was not intended by the legislature to apply to or affect interstate carriage and traffic. *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. (Civ. Cas.) 730.

218. Statute requiring notice of arrival of passenger trains.—While a statute, requiring notice under certain conditions of the arrival of passenger trains, deals with persons and corporations engaged in interstate commerce, yet the statute is a proper police regulation, which does not interfere with interstate commerce, and is in the power of the legislature to enact. *State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N. E. Rep. 817.

219. Missouri Texas cattle act.—The statute (Wagn. Mo. St. p. 251, § 1), known as the Texas Cattle Act, prohibiting

the introduction of Texas, Mexican, or Indian cattle into the state between March 1 and November 1, unless they had been kept the entire previous winter in the state, is in conflict with that provision of the constitution of the United States conferring upon congress the power to regulate commerce among the states. *Gilmore v. Hannibal & St. J. R. Co.*, 67 Mo. 323.—FOLLOWING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465. *OVERRULING Wilson v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 184; *Dimond v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 393; *Mercer v. Kansas City, St. J. & C. B. R. Co.*, 60 Mo. 397; *Kenney v. Hannibal & St. J. R. Co.*, 62 Mo. 476.

220. Exclusive power in congress—Effect of absence of federal legislation.—A state statute intended to regulate, or to tax, the transmission of persons or property from one state to another is unconstitutional, the power being reserved exclusively to the United States, and the fact that congress may not have legislated on the subject does not give the states the right to do so. *Wabash, St. L. & P. R. Co. v. Illinois*, 26 Am. & Eng. R. Cas. 1, 118 U. S. 557, 7 Sup. Ct. Rep. 4.

Transportation of merchandise through a state, or from one state to another, although the carriage may be continuous, is interstate commerce, and beyond the control of the state, even where congress has taken no action upon the subject. *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

Any regulation of freights for the transportation from Columbia in this state to points in the state of North Carolina, by the statutes of the state, is beyond the power of the state, because of its being an invasion of the power exclusively vested in congress by the constitution of the United States. *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

221. Power of state railroad commissioners.*—The railroad and warehouse commission of Minnesota has no authority to prescribe rates for transportation by common carriers in another state. It cannot fix the rates for carriage between two points within this state, over a route extending

* State railroad commissions cannot regulate interstate commerce, see 26 AM. & ENG. R. CAS. 47, *abstr.* See RAILWAY COMMISSIONERS.

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across a neighboring state. Such power is vested exclusively in congress. *State ex rel. v. Chicago, St. P., M. & O. R. Co.*, 37 Am. & Eng. R. Cas. 602, 40 Minn. 267, 41 N. W. Rep. 1047, 3 L. R. A. 238, 2 Int. Com. Rep. 519.—APPROVING *Lord v. Goodall, N. & P. Steamship Co.*, 102 U. S. 541. CRITICISING *Com. v. New York, L. E. & W. R. Co.*, 2 Int. Com. Rep. 227, n.; *Lehigh Valley R. Co. v. Com.*, 2 Int. Com. Rep. 226. DISTINGUISHING *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, 9 Sawy. (U. S.) 253. REVIEWING *Sternberger v. Cape Fear & Y. V. R. Co.*, 29 So. Car. 510, 7 S. E. Rep. 836. —REFERRED TO IN *Burlington, C. R. & N. R. Co. v. Dey*, 82 Iowa 312.

The South Carolina general railroad law is unconstitutional so far as it attempts to give the railroad commissioners of the state power to regulate charges between points in the state and points without the state. *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 29, 22 So. Car. 220.

And such commission has no jurisdiction of a complaint for unlawful freight charges made by a company whose line is partly in an adjoining state. *Sternberger v. Cape Fear & Y. V. R. Co.*, 35 Am. & Eng. R. Cas. 693, 29 So. Car. 510, 7 S. E. Rep. 836, 2 Int. Com. Rep. 426, 2 L. R. A. 105.—QUOTING *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 22 So. Car. 220.—REVIEWED IN *State ex rel. v. Chicago, St. P., M. & O. R. Co.*, 37 Am. & Eng. R. Cas. 602, 40 Minn. 267, 41 N. W. Rep. 1047, 3 L. R. A. 238, 2 Int. Com. Rep. 519.

222. Colored passengers.—La. Act of Feb. 23, 1869, providing that "All persons engaged within this state in the business of common carriers of passengers shall have the right to refuse to admit any person to their railroad cars, street cars, steamboats, or other water craft, stage coaches, omnibuses, or other vehicles," for non-payment of the fare, or for bad character or conduct, but that no discrimination shall be made "on account of race or color," is unconstitutional in so far as it affects interstate commerce. *Hall v. De Cuir*, 95 U. S. 485.—DISTINGUISHED IN *Louisville, N. O. & T. R. Co. v. State*, 39 Am. & Eng. R. Cas. 399, 66 Miss. 662, 6 So. Rep. 203; *Louisville, N. O. & T. R. Co. v. Mississippi*, 41 Am. & Eng. R. Cas. 36, 133 U. S. 587, 10 Sup. Ct. Rep. 348. FOLLOWED IN *Britton v. Atlanta & C. A. L. R. Co.*, 88 N. Car. 536; *McGwigan v. Wilmington & W. R. Co.*, 95 N.

Car. 428. QUOTED IN *People v. Wabash St. L. & P. R. Co.*, 7 Am. & Eng. R. Cas. 628, 104 Ill. 476; *Hardy v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 432, 32 Kan. 698. REVIEWED IN *Wigton v. Pennsylvania R. Co.*, 20 Phila. (Pa.) 184.

223. Sunday laws.—The provision of Ga. Code, § 4578, making it a misdemeanor to run a freight train upon any railroad in the state on the Sabbath day, is a regulation of internal police, and not a regulation of commerce. It is not in conflict with the constitution of the United States, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freight received on board before the trains entered the state, and consigned to points beyond its limits. *Hennington v. State*, 57 Am. & Eng. R. Cas. 42, 50 Ga. 396, 17 S. E. Rep. 1009.—APPROVING *State v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 466, 24 W. Va. 783. DISAPPROVING *Norfolk & W. R. Co. v. Com.*, 47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340.

A court of equity has power to grant an injunction, in an action against the Board of Police of the city of New York, a corporation, to restrain them from interfering with the necessary operations and business of an express company engaged in the business of interstate commerce, even though a law of the state of New York prohibits any such operations and business on Sunday, and such interference was pursuant to such law. *Dinsmore v. New York Board of Police*, 12 Abb. N. Cas. (N. Y.) 436.

If the New York Penal Code, relating to work on the Sabbath day, is susceptible of such a construction as would interfere with the interstate traffic of an express company, such provisions are unconstitutional and void, as violating the provisions of the constitution of the United States, which delegates to congress the exclusive power to regulate commerce among the several states. *Adams Exp. Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72.—FOLLOWING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 469.

An express company under New York laws is not justified in transacting its ordinary business on Sunday, or in receiving and delivering merchandise on that day in the same place, but it has a right to move its interstate business, or perishable articles,

* See SUNDAY, D.

on that day, and may enjoin the police of a city from interfering with such business. *Adams Exp. Co. v. Board of Police*, 65 How. Pr. (N. Y.) 72.

Statutes forbidding interstate freight trains to run on Sunday are by their necessary operation, whatever their professed object, a regulation of, or an obstruction to, interstate commerce. *Norfolk & W. R. Co. v. Com.*, 47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340.—DISAPPROVING *State v. Baltimore & O. R. Co.*, 24 W. Va. 783. QUOTING *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557; *Leisy v. Hardin*, 135 U. S. 100; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114. QUOTING AND DISTINGUISHING *Cooley v. Philadelphia Port Wardens*, 12 How. 299.

Va. Code, 1887, § 3891, relating to Sunday trains, is inconsistent with United States Constitution, art. 1, § 8, giving congress power to regulate interstate commerce, and void as to trains running between different states. *Norfolk & W. R. Co. v. Com.*, 47 Am. & Eng. R. Cas. 1, 88 Va. 95, 13 S. E. Rep. 340.—DISAPPROVED IN *Hennington v. State*, 90 Ga. 396.

Code of West Virginia, ch. 149, §§ 16, 17, making ordinary labor on the Sabbath day penal, is not to be regarded as an attempt to regulate commerce among the states, when applied to the interstate freights of a railroad. It is purely a law relating to the internal policy of the state, and does not violate that provision of the constitution of the United States conferring upon congress the power to regulate commerce among the states. *State v. Baltimore & O. R. Co.*, 18 Am. & Eng. R. Cas. 466, 24 W. Va. 783.

224. Intoxicating liquors—"Original packages."—Iowa Code, § 1553, as amended by the act of April 5, 1886, making it an offense for any common carrier to bring intoxicating liquors into the state without first having a certificate from a county auditor, as therein provided for, is void, as an attempt to regulate commerce between the states. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689.—FOLLOWED IN *State v. Creeden*, 40 Am. & Eng. R. Cas. 31, 78 Iowa 556, 7 L. R. A. 295, 43 N. W. Rep. 673.

* Importations of intoxicating liquors under Interstate Commerce Law. "Original package." State prohibitory laws, see note, 10 L. R. A. 616.

Such statute, being void, is no defense to a suit against a railroad for refusing to carry beer into the state. *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689.

A state statute, prohibiting the sale of intoxicating liquors except for pharmaceutical, medicinal, chemical, or sacramental purposes, and under a license, is, as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void, as repugnant to the clause of the constitution granting to congress the power to regulate commerce with foreign nations and among the several states. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681.—OVERRULING *Peirce v. New Hampshire*, 5 How. (U. S.) 554.—FOLLOWED IN *State ex rel v. Winters*, 44 Kan. 723, 10 L. R. A. 616, 25 Pac. Rep. 235.

Where liquors are imported in small bottles, each wrapped in paper and labeled "Original package," and, for the purpose of facilitating shipment, packed in an open box marked with the number and size of the bottles, the box is the original package; but where the carrier, for the purpose of facilitating transportation, furnishes the box, the bottle constitutes the original package. *Keith v. State*, 91 Ala. 2, 8 So. Rep. 353, 10 L. R. A. 430.

225. Interstate bridges.—It is not a regulation of interstate commerce for the state of Kentucky to regulate charges for the use of a bridge across the Ohio River, where it is a line between states and owned by a Kentucky corporation. *Com. v. Covington & C. Bridge Co.*, (Ky.) 54 Am. & Eng. R. Cas. 461, 21 S. W. Rep. 1042.

226. Alabama statute superseded by Interstate Commerce Act.—As to contracts for the transportation of goods by railroad from another state into Alabama, the provisions of the Alabama statute prohibiting, under a penalty, extortionate or discriminating rates or charges (Code, § 1159) are superseded and rendered inoperative by the provisions of the act of congress known as the "Interstate Commerce Law"; but the consignor and consignee of goods not being chargeable with notice of the schedule of rates established and fixed by the interstate commerce commission, they may lawfully contract for the transportation of goods at a less rate; and the consignee is

entitled to recover who gave or tendered unless it is published so. *R. Co. v. D.* 42, 94 Ala. 1.

227. Chops or meat business.—Respecting flows not upon flows unconstitutional to regulate. *Voight v. W.* Rep. 855.

Va. Act of "An act to provide some meat," for sale any entered one hundred place where has been pre-spectors, but of meat slaughtered miles of the sale, is unconstitutional in restraint of ever applied from other 138 U. S. 78.

228. Chops.—North Dakota providing for the thing it to be instituting the the grain, is interstate commerce when of carriers of the inspector to open cars of other states of Great North Rep. 406.

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entitled to recover the goods from the carrier who gave the bill of lading on payment or tender of the charges therein specified, unless it is shown that he had notice of the published schedule of rates. *Mobile & O. R. Co. v. Dismukes*, 49 *Am. & Eng. R. Cas.* 42, 94 *Ala.* 131, 10 *So. Rep.* 289.

3. State Inspection Laws.

227. Charge for inspecting flour or meat brought into state.—Va. Act of March, 1867, imposing a charge for inspecting flour brought into the state, but not upon flour manufactured in the state, is unconstitutional as an attempt by a state to regulate commerce between the states. *Voight v. Wright*, 141 *U. S.* 62, 11 *Sup. Ct. Rep.* 855.

Va. Act of February 18, 1890, entitled "An act to prevent the selling of unwholesome meat," and making it unlawful to offer for sale any meat which has been slaughtered one hundred miles or more from the place where it is offered for sale, unless it has been previously inspected by local inspectors, but does not require the inspection of meat slaughtered within one hundred miles of the place where it is offered for sale, is unconstitutional and void as being in restraint of interstate commerce whenever applied to meat shipped into the state from other states. *Brimmer v. Rebman*, 138 *U. S.* 78, 11 *Sup. Ct. Rep.* 213.

228. Charge for inspecting grain.—North Dakota Act of 1890, ch. 188, providing for the storage of grain, and requiring it to be inspected and graded, and constituting the inspection charges a lien on the grain, is a regulation of interstate commerce when applied to grain in the hands of carriers destined for other states; and the inspectors cannot require such carriers to open cars containing wheat consigned to other states for inspection at the state line. *Great Northern R. Co. v. Walsh*, 47 *Fed. Rep.* 406.

INTERSTATE COMMERCE ACT.

Discrimination as between places under, see DISCRIMINATION, 39.

Effect of, on powers of states to regulate charges, see CHARGES, 12.

Issuance of free passes as affected by, see PASSES, 5.

Remedy for discrimination under, see DISCRIMINATION, 73.

Removal of causes arising under, see REMOVAL OF CAUSES, 10.

Rights of colored persons under, see COLORED PERSONS, 14.

See INTERSTATE COMMERCE.

INTERSTATE FREIGHTS.

Discrimination in, see DISCRIMINATION, 71, 72.

Power of railway commissioners over, see RAILWAY COMMISSIONERS, 38, 39.

Texas rule as to limitation of liability for negligence as respects, see CARRIAGE OF MERCHANDISE, 482, 483.

INTERVENING CAUSE.

Effect of, on doctrine of contributory negligence, see CROSSINGS, INJURIES, ETC., AT, 205.

INTERVENTION.

By attorney-general, in suits against corporation, see ATTORNEY-GENERAL, 5.

— stockholders in suits against corporation, see STOCKHOLDERS, 80.

Costs of proceedings in, see COSTS, 10.

In attachment suits, see ATTACHMENT, ETC., 65.

— foreclosure suits, see MORTGAGES, 185-188, 201.

— suits by stockholders, see STOCKHOLDERS, 124.

1. Who may intervene.—In the federal courts a person having an interest, though not a party to the suit, may intervene to assert his rights without reference to the citizenship of the parties. *Osborn v. Michigan Air Line R. Co.*, 2 *Flipp.* (*U. S.*) 503.

Where a railroad mortgage is executed to trustees to secure bondholders, if the trustees fail to act, any of the bondholders, for themselves and in behalf of the rest, may bring suit to foreclose, and make the trustees defendants; and it is not necessary to make all of the bondholders parties, especially where they are numerous; but those not named as parties may come in and take the benefit of a decree, or show it to be erroneous, or entitle themselves to a rehearing; or, in other words, they may intervene and make themselves actual parties, so long as the proceedings are *in fieri*. *Campbell v. Texas & N. O. R. Co.*, 1 *Woods* (*U. S.*) 368.

And where a suit is thus commenced bondholders who are not named as parties have no right to commence an independent and original suit to foreclose the mortgage. They can only intervene and become actual parties to the former suit, and then make such application to the court for relief as it is competent for parties to make in the same suit; or they may institute such other auxiliary, revisory, or supplemental proceedings as a party to the suit might institute. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

Where a railroad company is sued for infringing a patent on a certain kind of car, and it answers disclaiming any ownership to the cars, or any interest in the patent, and that it is simply transporting the cars for other parties who are the real owners, the real owners of the cars may file a petition, setting up their rights, and be made a party and defend the suit. *Standard Oil Co. v. Southern Pac. R. Co.*, 54 Fed. Rep. 521, 7 U. S. App. 636, 4 C. C. A. 491; *affirming* 48 Fed. Rep. 109.—APPLYING *American C. T. Supply Co. v. McCready*, 17 Blatchf. (U. S.) 291.

Where one company, claiming to own certain corporate franchises and property, has instituted proceedings in equity to secure its alleged rights, it is not irregular to admit as a party to the controversy another company who files its petition for that purpose, where the latter claims the same franchises and property, in order that the rights of both companies may be litigated and determined in the same proceeding. *Washington, A & G. R. Co. v. Martin*, 7 D. C. 120.—QUOTING *Ohio & M. R. Co. v. Wheeler*, 1 Black (U. S.) 297.

Where the road of a company passes into two states in each of which it is a domestic corporation, and the trustee in a mortgage upon the whole road first brings a suit in one state to foreclose the mortgage, and afterward brings an ancillary suit in the other state for the same purpose, the plaintiff in said suits cannot object to or prevent a lien creditor of the railroad company, who has not filed his claim in the first suit, from intervening in the second to establish his lien. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180.

2. Who may not intervene.—Persons who are not parties to a suit cannot, in general, file a petition therein for any cause;

but persons belonging to a class represented in the suit, such as mortgage creditors, represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition or motion. *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 850.—FOLLOWING *Anderson v. Jacksonville, P. & M. R. Co.*, 2 Woods (U. S.) 628.

Where a suit for the foreclosure of a railroad mortgage is properly instituted, the relief prayed for being proper to grant, a receiver being appointed, a decree *pro confesso* being regularly entered, and the receiver having properly reported, and the court has entered judgment on such report for a sale of the road, individual stockholders cannot be permitted to intervene and file a cross-bill on a general charge of fraud and collusion on the part of the receiver, and erroneous judgment on the part of the court in making the order of sale. *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323.

Where the bill is filed on behalf of plaintiffs and all other stockholders, creditors or bondholders of the company, such stockholders may come in and take the benefit of the proceedings, but they cannot oppose and nullify them. *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323.

Rival creditors, by proceedings before the master, may fix the priority of their respective liens, and creditors or stockholders may contest the validity of the claims of other creditors and stockholders, but all in subordination to the general object and purpose of the suit, to obtain an administration of the company's assets and property. *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323.

Persons will not be allowed to intervene as general defendants and contestants, unless they show that they have an interest in the results as stockholders or otherwise, and are also able to show fraud and collusion between the plaintiffs in the suit and the officers of the company having charge of its interests. *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323.

Where receivers are appointed by a federal court in one state for a railroad that extends to an adjoining state, and the authority of the receivers is extended to such other state by auxiliary proceedings had therein, a person claiming to have a prior lien upon the roadbed for materials fur-

nished, and the income of other liens, the receiver *Clyde v. R. R. Co.*, 539, 17 Tex. Rep. 539.—*East Tennessee & Georgia R. Co. v. East Tennessee & Georgia R. Co.*, 896.

Under a mortgage of a railroad for the benefit of the receiver of sale having been appointed, but not confirmed by the company at the term, asking that they may be made defendants, and in the original *Ala.* 140.

Where a suit is brought against a railroad for the bonds and notes of the railroad, filed by the bonds of the railroad, by a creditor, allow judgment that the railroad grants of land to maintain low if said bonds the rate will be increased and does not show to entitle the state such judgment charter of the law repeals a charter of the state that its rates the state reg. *& T. Co.*, 50 Tex. 530, 17 S. E. 2d 175.

Where it is shown that the state that the receiver, or an agent of the company, sent the company to act unauthor- bonds and the giving the state *v. Farmers' D. & M. R. Co.*, 683, 81 Tex. Cas. 683, 81 Tex. 683, 81 Tex. 683.

nished, and praying that it be paid out of the income of the road in preference to other liens, must apply to the court where the receivers were originally appointed. *Clyde v. Richmond & D. R. Co.*, 56 Fed. Rep. 539.—FOLLOWING *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 30 Fed. Rep. 896.

Under a bill filed to foreclose several mortgages executed by a railroad company for the benefit of its bondholders, a decree of sale having been rendered and executed, but not confirmed, unsecured creditors of the company cannot intervene by petition at the term to which the sale is reported, asking that the sale may be set aside, and that they may be allowed to come in as defendants, and file an answer and cross-bill in the original cause. *Ex parte Branch*, 53 Ala. 140.

Where a creditor is seeking judgment against a railroad company on certain bonds and mortgages, an intervening petition, filed by the state, which alleges that the bonds of mortgages are void; that the railroad, by collusion and neglect, is about to allow judgment to go against it by default; that the railroad, in consideration of large grants of land from the state, has agreed to maintain low rates of transportation; that if said bonds or mortgages are foreclosed the rate will of necessity be greatly increased and impose burdens on commerce, does not show such public interest as would entitle the state to intervene and prevent such judgment, especially when neither the charter of the road nor any subsequent law repeals any such contract as that alleged and the charter expressly provides that its rates of traffic shall be governed by the state regulation. *State v. Farmers' L. & T. Co.*, 50 Am. & Eng. R. Cas. 683, 81 Tex. 530, 17 S. W. Rep. 60.

Where it was alleged in behalf of the state that the bonds sued upon were not issued by the railroad company, by its directors, or any person authorized to represent the company, it follows that the railroad company in this respect performs no act unauthorized by law in issuance to the bonds and the execution of the mortgage giving the state the cause of action. *State v. Farmers' L. & T. Co.*, 50 Am. & Eng. R. Cas. 683, 81 Tex. 530, 17 S. W. Rep. 60.

Certain parties petitioned to be made parties to a proceeding to foreclose a railroad mortgage, alleging that the defendant

corporation was but a consolidation of three other corporations, and that they had never consented to the consolidation or recognized its validity, and therefore were not bound by the defendant in creating the mortgage sought to be foreclosed; that the individual company of which they were members had no officers who could sue, and that there was no one else who could or would set up the defense which they desired to make. *Held*, that these facts showed no ground for a right to intervene, in the absence of any charge of fraud or collusion. If the facts were true, the remedy would seem to be by an independent suit. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 14.—QUOTING *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283; *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods (U. S.) 323; *Blackman v. Central R. & B. Co.*, 58 Ga. 189.

3. Rights of intervenors.—Where a party comes in by intervention and seeks to enforce a claim for damages for personal injuries against the receivers, in a chancery proceeding and issues are presented which are ordinarily triable by a jury, the court will not set aside the finding of the master on the issues of fact, unless the testimony on which the finding is based is of such character as to produce a firm conviction that the finding is erroneous. *Central Trust Co. v. Texas & St. L. R. Co.*, 32 Fed. Rep. 448.

Where property is under the control of the court, in the hands of a receiver, and a creditor of the defendant intervenes by petition *pro interesse suo*, the petition is amendable at any stage of the proceeding so as to develop all the material facts out of which the substantial rights of the petitioner as a creditor arose. Where the claim set forth originally was a promissory note given by an officer of the corporation after the receiver was appointed, an amendment setting forth the consideration of the note, and the contract under which that consideration was realized by the company before the receiver was appointed, is allowable. *Bright v. Central City St. R. Co.*, 88 Ga. 535, 15 S. E. Rep. 12.—APPLYING *Ellison v. Georgia R. Co.*, 87 Ga. 691.

A party who lived in a remote county of a state obtained a small judgment against a railroad company before it went into the hands of the receiver, and filed a petition of intervention in the suit appointing the

receivers. Upon the filing of the master's report, which was adverse to the claim, the matter passed along for nearly a year, when new counsel filed an amended petition of intervention, and moved to set aside the order confirming the master's report and refer the matter back to him. *Held*, that technically the party was not entitled to further hearing; but, as it was an equitable proceeding, under the circumstances of the case, the fullest opportunity for a hearing should be granted; and that the order of confirmation should be set aside upon the payment of costs of the intervention since the filing of the original petition. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 27 *Fed. Rep.* 175.

The president of plaintiff, an improvement company, was a stockholder in a railroad company and a large contractor for its construction. Plaintiff, being interested in the construction of the railroad, furnished rolling stock therefor, which was marked in the name of the railroad company, the object being to enable it to issue bonds and secure them by a mortgage, which bonds were placed largely through such president. *Held*, that neither the improvement company nor its assignee could set up that the rolling stock was only loaned, and thereby deny title in the railroad company, as against the bondholders who were proceeding to foreclose the mortgage. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 *Fed. Rep.* 850, 2 *U. S. App.* 1, 1 *C. C. A.* 116; reversing 48 *Fed. Rep.* 32.—FOLLOWED IN *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 *Fed. Rep.* 864, 2 *U. S. App.* 106, 1 *C. C. A.* 139; *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 *Fed. Rep.* 875, 2 *U. S. App.* 113, 1 *C. C. A.* 140.

INTOXICATING LIQUORS.

Seizure of, in the hands of carrier, see also CARRIAGE OF MERCHANDISE, 209.

State regulation of carriage of, see INTER-STATE COMMERCE, 224.

1. **Constitutionality of state statutes.***—State laws imposing restrictions on the sale of intoxicating liquors do not violate any law of the United States. *Li-*

* Imports of intoxicating liquors under Interstate Commerce Law. "Original package." State prohibitory laws, see note, 10 *L. R. A.* 616.

cense Cases, 5 *How. (U. S.)* 504.—REVIEWED IN *Minneapolis, St. P. & S. Ste. M. R. Co. v. Milner*, 57 *Fed. Rep.* 276.

2. **Mandamus to compel company to transport liquor.**—Inasmuch as "beer" is included in the term "intoxicating liquors," as defined by chapter 8, Laws of 1884, and the transportation by common carriers of intoxicating liquors into Iowa, except under certain conditions, is prohibited by statute—*held*, that the defendant could not be compelled by mandamus to transport for the plaintiff into Iowa "New Era Beer," there being nothing in the words "New Era" to indicate that the beer in question is not intoxicating; and that the case would not be different if the plaintiff alleged the beer in question to be non-intoxicating; for then the discretion of the defendant would be called in question in determining the truth of that allegation; and mandamus will not lie to compel the performance of an act involving the exercise of discretion. *Milwaukee Malt Extract Co. v. Chicago, R. I. & P. R. Co.*, 73 *Iowa* 98, 34 *N. W. Rep.* 761.

3. **South Carolina dispensary act.**—South Carolina Act of December 24, 1892, usually known as the "Dispensary Act," section 25, providing that "liquor intended for an unlawful sale in this state may be seized in transit and proceeded against as if it were unlawfully kept and deposited in any place," does not authorize a seizure without warrant. *Bound v. South Carolina R. Co.*, 57 *Fed. Rep.* 485.

Before liquors can be seized under the above section it must appear that they were in transit, and that they were intended for unlawful sale in the state—two facts which are not determinable by a constable in his own mind upon his own suspicion. *Bound v. South Carolina R. Co.*, 57 *Fed. Rep.* 485.

The provision of section 2 that "any package containing intoxicating liquors, without the certificate [of a county dispenser], which shall be brought into this state or shipped out of the state, or shipped from place to place within the state, by any railroad, express company, or other common carrier, shall be regarded as intended for unlawful sale," applies only to liquors which shall be brought into the state after the act went into operation, and has no application to liquors which were brought in before that time, and kept in a warehouse of the carrier awaiting delivery to the proper con-

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Even if the statute gave express permission to search for and seize intoxicating liquors without a warrant, it would be in violation of So. Car. Const. art. 1, § 22, securing the people against unreasonable searches or seizures of their "persons, houses, papers, or possessions," and prescribing that warrants shall only issue upon oath or affirmation, and further providing the formalities generally which shall attend their issuing and execution. *Bound v. South Carolina R. Co.*, 57 Fed. Rep. 485.

The Act of Congress of August 8, 1890, commonly known as the "Wilson Act," enacted for the purpose of removing the effect of certain decisions of the federal courts, known as the "original package" decisions, only puts an imported package of liquors, whether in its original shape or otherwise, under the police power of the state upon its arrival in such state, precisely as other intoxicating liquor in the state is subject to such police power. *In re Langford*, 57 Fed. Rep. 570.

The term "upon arrival," as used in the above act, where it provides that liquors transported into any state or territory, upon arrival therein, shall be subject to the laws of such state or territory, does not mean at the border of the state, but when they have reached their destination. *In re Langford*, 57 Fed. Rep. 570.

And liquors so shipped are subject to the police power of the state from the time they arrive at their place of destination, and not from the time they are actually delivered to the consignee or owner. And it is not necessary that the whole duty of the carrier with reference thereto shall have been performed, such as an actual delivery, collecting the freight charges, etc. *In re Langford*, 57 Fed. Rep. 570.

So. Car. Dispensary Act, § 25, in one provision, makes it a criminal offense "for any servant, agent, or employé" of a carrier to remove from any car, etc., any intoxicating liquor, without any sort of qualification; but in the other provisions of the section, relating to other classes of persons, knowledge on their part that liquors are intended for sale is necessary to make the act criminal. *Held*, that the provision singling out servants, agents, and employes, and making them absolutely liable, is a violation of So. Car. Const. art. 1, § 12, providing that "no per-

son shall * * * be liable to any other punishment for any offense, or be subjected in law to any other restraint or disqualifications in regard to any personal rights, than such as are laid upon others under like circumstances." *In re Langford*, 57 Fed. Rep. 570.

The Wilson Act created no new power in the states. It only limited the regulation of interstate commerce; but the most broad and liberal construction of the above provision of section 25 of the South Carolina statute would not permit a state in the guise of a police power to thus single out and punish the agents of interstate commerce for a crime specially created for them, especially in face of the fourteenth amendment to the constitution of the United States. *In re Langford*, 57 Fed. Rep. 570.

A person acting as constable in South Carolina, and claiming to act under the "Dispensary Act," seized a cask of whiskey while in the hands of a receiver who was operating a railroad under appointment by a federal court; whereupon the receiver had the constable attached for contempt and obtained an order requiring him to restore the property. *Held*, (1) that a U. S. circuit court had jurisdiction of the matter; (2) that the judgment of the circuit court holding the act of the constable illegal, and adjudging him guilty of contempt, was not reviewable on original petition for a writ of *habeas corpus*. *In re Swan*, 150 U. S. 637, 14 Sup. Ct. Rep. 225.

4. Seizure of liquor in possession of carrier.—Where a railroad company combines with an individual to aid him in violating the law by carrying intoxicating liquors, several packages at a time, and storing them in its depot, so as to allow him to take them away one at a time, for the purpose of unlawful sale, it ceases to be a carrier, and becomes a mere warehouseman as to such liquors, and cannot claim protection under the Interstate Commerce Law, where they are seized under a search warrant while in the warehouse. *State v. Creeden*, 40 Am. & Eng. R. Cas. 31, 78 Iowa 556, 7 L. R. A. 295, 43 N. W. Rep. 673.—FOLLOWING *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062.

Neither could the company in such case make a claim to the liquors on the ground that it had a lien thereon for unpaid freight charges. *State v. Creeden*, 40 Am. & Eng.

R. Cas. 31, 78 *Iowa* 556, 7 *L. R. A.* 295, 43 *N. W. Rep.* 673.

Where an officer who has a warrant for the search of intoxicating liquors goes to a railroad depot where they are unlawfully stored, after the usual time for closing it, he is justified in forcibly breaking and opening it, if it be necessary to execute his warrant, where there is no one present from whom he can demand admission. It is not necessary first to ask permission to enter. *Androsoggin R. Co. v. Richards*, 41 *Me.* 233.

Under the Maine Act of March 31, 1853, intoxicating liquors belonging to a town are not protected from seizure and forfeiture unless the casks or vessels holding them are plainly and conspicuously marked with the name of the town and its agent. *Androsoggin R. Co. v. Richards*, 41 *Me.* 233.

A dealer in New York shipped intoxicating liquors to parties in Vermont, by express, C. O. D. The liquors, intended for an unlawful use, were seized, without warrant, while in the possession of the express company, and confiscated, before delivery and payment. *Held*, that the seizure was lawful. *State v. O'Neil*, 58 *Vt.* 140, 2 *Atl. Rep.* 586.

A statute which authorizes the seizure of intoxicating liquor, intended for unlawful use, in the possession of an express company, does not interfere with interstate commerce, and is not in conflict with section 8 of the federal constitution. *State v. O'Neil*, 58 *Vt.* 140, 2 *Atl. Rep.* 586.

5. Conviction of agent of express company for illegal transportation.

—An employé of an express company, which is engaged in the illegal transportation of intoxicating liquors to a no-license city, may himself be convicted of that offense, if after their arrival in the city he aids in forwarding them to their destination therein, having reasonable cause to believe that the same were intended to be sold there in violation of law, although he had no personal knowledge that the particular liquors had been ordered, or were coming, until they reached the company's city office, and did not himself bring, or manually aid in bringing, them into the city, and could not have prevented their transportation there. *Com. v. Brown*, 154 *Mass.* 55, 27 *N. E. Rep.* 776.

But in order that such liability be imposed it is essential that knowledge on the

part of the agent, or at least a reasonable suspicion, of the contents of the package should exist. The rule is the same where the agent delivered the liquor to a stage-driver, who paid for it with money furnished by the consignee, where it did not appear that the express company had undertaken to deliver it beyond the *terminus* of its own transit, or that the stage-driver was an express carrier; for a delivery to the stage-driver was a delivery to the consignee. *State v. Goss*, 30 *Am. & Eng. R. Cas.* 118, 59 *Vt.* 266, 9 *Atl. Rep.* 829.

6. Sales of liquor to "travelers" under the English act.—One who has purchased a ticket at the usual time before the starting of the train is a traveler within the meaning of 2 and 3 *Vict. c.* 47, s. 42, and no penalty is incurred for selling him liquor on Sunday. *Fisher v. Howard*, 34 *L. J. M. C.* 42, 11 *Jur. N. S.* 305, 13 *W. R.* 145, 11 *L. T.* 373.

Persons arriving by train at a station distant a mile from the town in which they reside, and persons residing in the town who go to the station for the purpose of meeting a train, are travelers within 11 & 12 *Vict. c.* 49, s. 1, relating to the sale of liquor on Sunday. *Peache v. Colman*, 1 *H. & R.* 393, *L. R.* 1 *C. P.* 324, 12 *Jur. N. S.* 273, 35 *L. J. M. C.* 118, 14 *W. R.* 439.

A conviction of a person charged with having opened his house for the sale of wine and beer on Sunday to persons not travelers is wrong, where it appears that all of the persons in his house except one took tickets and went away by train, and that one accompanied his son, who went by train. *Copley v. Burton*, 39 *L. J. M. C.* 141, *L. R.* 5 *C. P.* 489, 22 *L. T.* 888.

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I. RENDITION AND ENTRY OF JUDGMENTS.

1. Formal requisites, generally.—

Jurisdiction to render a judgment can be acquired only by compliance with what the law prescribes shall be done to confer it, and without a substantial compliance with this, power to render a judgment does not exist. *Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. Rep. 430.

Where a minor sues for damages by her next friend, the proper form of judgment is to recite that the plaintiff, by her next friend, naming them, do have and recover the amount of the judgment for the sole use of the minor; and the judgment should

also recite that the money, when collected, is to remain in court until the qualification of a regular guardian, or the minor reaches her majority. *Texas C. R. Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. Rep. 962.

2. Rules relative to parties.—Where a railroad is mortgaged to secure its bonds and the mortgage trustee brings a suit to foreclose, he does not so far represent bondholders who do not join in the suit as to bind them by any decree which may be entered in the proceeding. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 324.—EXPLAINED IN *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 Fed. Rep. 604.

A decree that a certain branch of a railroad is not subject to the lien of a mortgage to secure bonds which have been guaranteed by the state is of no validity, where it is shown that such decree was made in a suit in which the bondholders were not represented, of which the state has not been notified, and which was brought in a county in which no part of the branch was situated. *Central Trust Co. v. Florida R. & N. Co.*, 46 Am. & Eng. R. Cas. 370, 43 Fed. Rep. 751.

Where a judgment of a justice's court is against the "Florida Central Railroad," and real estate belonging to the "Florida Central Railroad Company" is sold under an execution issued on said judgment, such sale is invalid to divest title of the "Florida Central Railroad Company," in the absence of proof showing that the last-named company was the real defendant meant in said judgment. *L'Engle v. Florida C. & W. R. Co.*, 21 Fla. 353.

Where the owner of abutting mortgaged property brings an action against an elevated railway in the street, it is not necessary to make the mortgagees parties, where the decree granting the injunction provides that on payment of the damages assessed plaintiff shall execute releases for himself and the mortgagees. *Giordano v. Manhattan R. Co.*, 31 N. Y. S. R. 134, 9 N. Y. Supp. 258, 56 Hun 642.

A judgment founded upon service of citation upon two of the trustees under a mortgage, where there were ten, the presumption being as great that all have accepted and are competent to act as the two served (there being no evidence of acceptance of the trust by any), will not warrant the seizure and sale of property not in the posses-

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sion or under the immediate control of the trustees served with citation. *Witherspoon v. Texas Pac. R. Co.*, 48 Tex. 309.

Plaintiff bought a ticket over a railroad from a point east to the city of St. Louis; but its road terminated on the east side of the river at East St. Louis, and passengers were transported across the river to the city over the track of a transit company. Plaintiff was injured through the negligence of the latter company, and brought separate suits against each company, which were consolidated and tried together. *Held*, no error; and where a verdict was returned against each, it was proper to enter judgment thereon, with the provision that only one satisfaction was to be had, and leave it to the companies to adjust the matter as between themselves. *Keep v. Indianapolis & St. L. R. Co.*, 3 *McCrory* (U. S.) 208, 9 *Fed. Rep.* 625.

3. Entry of judgment by default.—According to the common law as in force in West Virginia there cannot be a final judgment by default in an action at law against a railroad for damages for personal injuries to a passenger without a writ of inquiry, where the value in controversy exceeds \$20, and either party may, under the constitution, demand a trial by jury. *Hickman v. Baltimore & O. R. Co.*, 30 *W. Va.* 296, 4 *S. E. Rep.* 654.—*REVIEWING* Central & M. R. Co. v. Morris, 68 Tex. 49, 3 *S. W. Rep.* 457; *Baltimore & O. R. Co. v. Faulkner*, 4 *W. Va.* 180.

Suit against a company for damages occasioned by the loss or destruction of goods, as shown by an itemized account supported by the affidavit of the plaintiff, in accordance with article 2266 of Tex. Rev. St. Judgment by default was rendered for the amount of the plaintiff's claim, without other proof than the claim itself. *Held*, that article 2266 did not apply to this character of claim. To entitle a plaintiff to the benefit of that article it must appear that the debt claimed exists by contract between the parties to the suit, either express or implied; in other words, the action must be founded upon a contract. *Houston & T. C. R. Co. v. White*, 1 *Tex. App. (Civ. Cas.)* 64.

4. — by confession.—A corporation, nothing to the contrary appearing, may, by the action of its proper officers, confess judgments as a natural person, if the essential requirements of the statute are com-

plied with. *Sharp v. Danville, M. & S. W. R. Co.*, 106 *N. Car.* 308, 11 *S. E. Rep.* 530.

Where a record shows a judgment or decree against a corporation, and further shows that such judgment was rendered "by consent of the parties" to the action, there is no presumption that such consent was given by the attorney of the corporation, notwithstanding the rule that "there can be no appearance of a corporation in court but by attorney." *Union Pac. R. Co. v. McCarty*, 8 *Kan.* 125, 5 *Am. Ry. Rep.* 112. —*FOLLOWED IN* *Piper v. Union Pac. R. Co.*, 14 *Kan.* 574.

The New York statute which declares that all judgments confessed by the corporation after the filing of a petition for the dissolution thereof shall be absolutely void as against the receiver who may be appointed on such petition and as against the corporate creditors, is aimed at the confession of judgments made by the corporation as its voluntary act without the interference of the court, and does not affect a consent by the corporation to the entry of an order of sale in foreclosure proceedings, which rests upon the action and order of the court at the regular term and session thereof, although such consent may have been made after action brought for dissolution of the corporation. *Herring v. New York, L. E. & W. R. Co.*, 35 *Am. & Eng. R. Cas.* 54, 105 *N. Y.* 340, 19 *Abb. N. Cas.* 340, 12 *N. E. Rep.* 763, 7 *N. Y. S. R.* 547; *affirming* 34 *Hun* 634, *mem.*, 63 *How. Pr.* 497.

5. Power of clerk to enter.—Where the proceeding is to ascertain the compensation due for crossing one railroad by another, an objection that the judgment or decree is not signed by the judge is not well taken, as there is no provision of the statute requiring the judge to sign the judgment, and the presumption is that the judgment entered by the clerk was directed and authorized by the judge; and this presumption is strengthened where the judge makes further orders in the cause, recognizing the judgment complained of. *California Southern R. Co. v. Southern Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 309, 67 *Cal.* 59, 7 *Pac. Rep.* 123.

An action against a railroad company to recover for loss of baggage, under N. Y. Code, § 246, is an action sounding in tort; and where judgment is taken for want of an answer, application must be made to the court for judgment, as provided in section

129 of the code. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308.

6. What relief may be granted, generally.—Where a person admits that he holds lands in trust for a corporation, and offers to convey them upon payment for the improvements, a decree authorizing the corporation to acquire title to the lands only upon payment of compensation for the improvements is not unjust or inequitable. *Case v. Kelly*, 43 Am. & Eng. R. Cas. 1, 133 U. S. 21, 10 Sup. Ct. Rep. 216; affirming 13 Am. & Eng. R. Cas. 70.

A decree providing that a company shall build a bridge so as to allow a landowner to get from one side of the track to the other need not give specific directions as to how it shall be built; but it is sufficient to specify that it shall be proper and sufficient for the purpose intended. *Carpenter v. Easton & A. R. Co.*, 28 N. J. Eq. 390, 14 Am. Ry. Rep. 195.

A decree in a suit by a company for the specific performance of a contract providing for the use by any railroad company of a line of road constructed by another company on payment of a *pro rata* share of the cost of construction and other expenses, of which two other companies have already availed themselves, properly directs the payment of the *pro rata* share into court, instead of directly to the original company, especially where mortgages have been given upon the property. *Louisville & N. R. Co. v. Mississippi & T. R. Co.*, 92 Tenn. 681, 22 S. W. Rep. 920.

7. Judgment must conform to the pleadings.—Where the action is to restrain the unlawful use and occupation of plaintiff's premises, and he bases his right to recover, in the complaint and at the trial, exclusively upon his legal title to the land, and the invasion of his right as owner, he cannot sustain a judgment in his favor on appeal on the ground that the *locus in quo* is a public highway on which he has rights as abutting owner, which have been infringed by defendant company. *Vail v. Long Island R. Co.*, 106 N. Y. 283, 12 N. E. Rep. 607, 8 N. Y. S. R. 700, 8 Cent. Rep. 673; reversing 31 Hun 173, mem.—FOLLOWED IN *Benedict v. Seventh Ward R. Co.*, 51 Hun 111, 24 N. Y. S. R. 169, 5 N. Y. Supp. 406. REVIEWED IN *Fosdick v. Hemipstead*, 29 N. Y. S. R. 545.

A court of law cannot render a judgment that defendant, a corporation, shall deliver

to plaintiff so many shares of stock. Upon a contract to deliver stock in payment of a debt or otherwise, a court of law can only award damages for the failure to deliver it; and the measure of damages for such failure is the value of the stock at the time it ought to have been delivered. *Orange & A. R. Co. v. Fukvey*, 17 Gratt. (Va.) 366.

Where C. sued a railroad company for only \$57, and did not at any time ask or obtain leave to amend, and did not amend his pleadings, it was error for the court to render judgment in favor of the plaintiff and against the defendant for \$72 and costs. *Atchison, T. & S. F. R. Co. v. Combs*, 25 Kan. 729.—FOLLOWED IN *Kansas City, L. & S. W. R. Co. v. Richardson*, 31 Kan. 28.

8. Provisions as to amount.—In an action for damages the judgment should be for the amount assessed by the jury as damages, and interest on this amount from the day the judgment is actually rendered, and not from the first day of the term at which the judgment is rendered. *Hawker v. Baltimore & O. R. Co.*, 15 W. Va. 628.

Where the judgment against a railroad company, and also against a trust company which was operating the railroad for the benefit of the railroad company and its creditors, was for \$1000 against the former and \$500 against the latter, but it appeared from the record that the judgment against the trust company was for \$500 of the same amount of the judgment against the railroad company—held, that the judgment was not in excess of the amount claimed in the petition, although the petition claimed judgment for only \$1380. *Union Trust Co. v. Cuffy*, 11 Am. & Eng. R. Cas. 562, 26 Kan. 754.

II. INTERPRETATION AND EFFECT. CONCLUSIVENESS.

1. In General.

6. General rules of construction.—A judgment against a railway company in favor of an assignee of claims for labor performed for a subcontractor, which forecloses a statutory lien on the property of the company for debt, and orders a sale of the property, cannot be construed as a judgment *in personam*. *Austin & N. W. R. Co. v. Rucker*, 12 Am. & Eng. R. Cas. 258, 59 Tex. 587.

A city instituted proceedings to condemn a street across a railroad track, and a de-

creed was entered for the land, but should have been a decree to deliver the land, and switches to construct turnouts. Held, in the street the terms of the consideration decree by construction excluded. *R. Co. v. St. J.*, 457, 3 L. R. A. 10. Effect of decrees, generally, that by the first the Constitution of Congress of therewith, a judgment the same creditor other court has in the street Railroad Co. 226.

A judgment to the owner of itself passes defendant becomes *St. Louis, A. Tex.* 298, 14 S.

One holding road brought ment, and a judgment declared void decree accordingly not affect the lease as to *Graham v. La* (U. S.) 704.

A party subscribing railroad stock one half of the amount of made, and was company to receive The subscriber statute of limitation as to \$800, and the remaining subsequently proceeding compel the corporation the full twenty ing the plea of to the \$800 did payment, and the tificates for the *Albany & S. R.*

decree was entered by consent condemning the land, but providing that the company should have the right to maintain its tracks and switches upon the land, with the right to construct further tracks, switches, and turnouts. *Held*, that the rights of the city in the street could only be determined by the terms of the decree, and evidence of the consideration which led to the entry of the decree by consent was immaterial and properly excluded. *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457, 3 L. R. A. 240, 10 S. W. Rep. 826.

10. Effect of judgments and decrees, generally.—There is no doubt that by the first section of the 5th article of the Constitution of the U. S., and the Act of Congress of May 28, 1790, in conformity therewith, a judgment of a state court has the same credit, validity, and effect in every other court in the United States that it has in the state where it was rendered. *Railroad Co. v. Mercer*, 11 Phila. (Pa.) 226.

A judgment for the value of horses lost to the owner by negligence of the defendant of itself passes title to the horses to the defendant becoming liable for their value. *St. Louis, A. & T. R. Co. v. McKinsey*, 78 Tex. 298, 14 S. W. Rep. 645.

One holding a judgment against a railroad brought a suit to have another judgment, and a lease of the road to secure it, declared void for fraud, and obtained a decree according. *Held*, that the decree did not affect the validity of the judgment and the lease as between the parties thereto. *Graham v. La Crosse & M. R. Co.*, 3 Wall. (U. S.) 704.

A party subscribed for twenty shares of railroad stock amounting to \$2000, and paid one half of the amount, but failed to pay the amount of the other calls as they were made, and was subsequently sued by the company to recover the remaining \$1000. The subscriber interposed a plea of the statute of limitations which was held good as to \$800, and judgment was entered for the remaining \$200, which was paid. Subsequently proceedings were commenced to compel the company to issue certificates for the full twenty shares. *Held*, that sustaining the plea of the statute of limitations as to the \$800 did not raise a presumption of payment, and he was only entitled to certificates for the shares paid for. *Johnson v. Albany & S. R. Co.*, 54 N. Y. 416, 6 Am. Ry.

Rep. 331; *reversing* 40 *How. Pr.* 193, 5 *Lans.* 222.

11. Effect as evidence.—After a railroad went into the hands of a receiver, plaintiff, without leave of the court, instituted a proceeding against the company in another court and took judgment by consent, and then filed his petition asking to intervene and to have the amount of the judgment allowed as a prior lien. No testimony was offered in the intervention save the judgment itself. *Held*, that the judgment was not admissible in evidence against the receivers, in so far as they represented the bondholders, as they were not parties to the proceeding in which the judgment was taken; and it was not in itself sufficient to establish a prior lien as against the bondholders. *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 33 *Fed. Rep.* 238.

12. Judgment of no force unless court had jurisdiction.—It is well settled, that to entitle the judgment to full faith and credit in an action *in personam* it is essential that it be rendered by a tribunal having jurisdiction over the person of the defendant. *Railroad Co. v. Mercer*, 11 *Phila. (Pa.)* 226.

13. Merger of original cause of action, or contract.—A municipal corporation issued its bonds in payment of railroad stock, and after default a bank holding a portion of the bonds brought suit thereon; but pending the suit the bank and the town agreed on a compromise, reduced it to writing, and a judgment was entered thereon for less than the amount of the bonds. *Held*, that the effect of the compromise and judgment was to merge the town's liability on the bonds in that on the judgment, and to destroy the bonds as a cause of action, and to leave the judgment as the only legal evidence of indebtedness from the town to the bank. *Mobile Bank v. Mobile & O. R. Co.*, 69 *Ala.* 305.

The effect of an express provision of such compromise and judgment, that the judgment rendered in pursuance of the compromise was in full satisfaction of the bonds and coupons held by the plaintiff, was to leave the parties as if the plaintiff had never owned or asserted a greater claim against the defendant than shown by the judgment recovered. *Mobile Bank v. Mobile & O. R. Co.*, 69 *Ala.* 305.

Any effort to collect the balance of the

amount of the bonds might be defeated by a plea of former recovery; for a judgment *inter partes*, not reversed and not successfully assailed for fraud, or on some other ground, is conclusive against each party who is properly before the court; against the defendant that the amount adjudged is due, and against the plaintiff that no more is due on account of the contract or liability sued on. *Mobile Bank v. Mobile & O. R. Co.*, 69 Ala. 305.

Under the Iowa statute prohibiting the laying of a railroad track in a street before the damage is ascertained and paid to abutting property owners, the right of an abutting property owner to enjoin the company from occupying the street on the ground that it is a trespasser and maintaining a nuisance, is not merged in a judgment obtained by him against the company for damages to his property, which has not been paid. *Harbach v. Des Moines & K. C. R. Co.*, 43 Am. & Eng. R. Cas. 115, 80 Iowa 593; 44 N. W. Rep. 348.

2. How far Conclusive. *Res Judicata*.

14. Scope and extent of the rule of res judicata.—Where a corporation is made a defendant to a foreclosure suit, and has been recognized by the plaintiffs, and by the trial court, and by the supreme court on appeal, as an existing corporation, it is too late, for the purpose of the suit, to question the legal existence of the corporation, especially on a mere motion. *Howard v. La Crosse & M. R. Co.*, *Woolw.* (U. S.) 49.

Where a company refuses to deliver freights to the proper owner or consignee, on the ground that it has a lien thereon for freight charges and storage, and the owner resorts to a suit to recover possession of the property, it cannot claim judgment on the ground that it has a lien for storage, where it has been decided that it had no lien for freight charges. *Sicard v. Buffalo, N. Y. & P. R. Co.*, 15 Blatchf. (U. S.) 525.

A judgment confirming special assessments upon property benefited by a proposed public improvement is conclusive as to any and all objections and defenses that might have been interposed thereto. On application for judgment against the lands for delinquent assessments, it cannot be shown that the property was exempt, or not benefited, or that the ordinance under which they were made was invalid. All

such matters, after the judgment of confirmation, become *res judicata*. *Chicago & N. W. R. Co. v. People ex rel.*, 31 Am. & Eng. R. Cas. 487, 120 Ill. 104, 11 N. E. Rep. 418.—NOT FOLLOWING *Riverside Co. v. Howell*, 113 Ill. 263.

The question of defendant's liability to erect a crossing having been adjudicated in its favor, an instruction in a subsequent action submitting to the jury the determination of the kind of crossing defendant should provide was held to be erroneous. *Bettys v. Chicago, M. & St. P. R. Co.*, 43 Iowa 602.

Where, in a former case, in the same court, between the same parties, it had been adjudicated that a certain alleged contract relied on by defendant did not exist, it was proper, in a subsequent case, to strike out an answer setting up the same contract, and to exclude evidence offered to prove it. *Estes v. Chicago, I. & D. R. Co.*, 72 Iowa 235, 33 N. W. Rep. 647.—FOLLOWING *Chicago, I. & D. R. Co. v. Estes*, 71 Iowa 603.

On an appeal to the circuit court from an award of commissioners in a proceeding under Ill. Right of Way Act of 1852, by one of several defendants therein, there having been no notice to other parties claiming an interest of the taking of such appeal, or of any proceeding in court to adjudicate upon their interests or upon conflicting interests in the land condemned, and it not appearing that they ever had any notice whatever, or were in any way brought into court, further than the giving of the notice to them of the filing of the petition in the right of way proceeding and of the making of the application for the appointment of the commissioners, there was an adjudication that the condemnation money awarded in respect to certain interests in the land should be paid to the party taking such appeal, as the one entitled thereto. *Held*, that such adjudication, as respects the railroad company in whose interest the condemnation money was paid, was conclusive upon any of the parties to the original right of way proceeding who might claim adversely to the party who was thus adjudged to be entitled to the money. *Chicago, B. & Q. R. Co. v. Chamberlain*, 84 Ill. 333, 16 Am. Ry. Rep. 466.

In action of forcible detainer, by the owner of land over which was constructed a connecting railroad track, to recover pos-

session of the track was but from the owner with him, and by the appeal *Held*, on a bill the judgment in favor of the right of way, conclusive upon contract, but *Nat. Stock Yards v. Wigs*, 113 Ill. 384.—FOLLOWING

15. Its effect.—Where a railroad injunction to the contrary, interfering with the right of the defendant to the right of way, that the company desired to from disturb the company. *D. Co.*, 23 Kan. 5.

Under the injunction granted by the supreme court to corporations, regarded as *res* injunction was and on final decree wrong *phia & R. R.*

The rule that estopped from decision of does not extend setting up in cause of action prior action though the *Co.*, 102 Pa. 5. a judgment of *Co.* for the tax inclusive, at of 1872, it was asserting its suit, brought years. *Phil.* 34 Am. & 484, 21 All. R. *loit v. Morga* v. West, 7 W.

session of the ground upon which the track was constructed, the court found that the track was built under a mere verbal license from the owner, and not under a contract with him, and this judgment was affirmed by the appellate court and by this court. *Held*, on a bill to enjoin proceedings under the judgment, and for a specific performance of an alleged contract to grant the right of way, that such judgment was conclusive upon the parties that there was no contract, but only a mere license. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384.—FOLLOWING *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 102 Ill. 514.

15. Its limits and exceptions.—Where a railroad company applies for an injunction to restrain a defendant from interfering with its right of way, and the injunction is refused upon the ground that the defendant is not likely to interfere with the right of way as charged, it is no adjudication that the property which the company desired to have the defendant enjoined from disturbing does not belong to the company. *Dryden v. St. Joseph & D. C. R. Co.*, 23 Kan. 525.

Under the Pa. practice, a preliminary injunction granted by all the judges of the supreme court, at *nisi prius*, in suits where corporations are parties, is usually regarded as *res judicata*; but not where the injunction was granted by a divided court, and on final hearing a majority think the decree wrong. *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253.

The rule that a party to a judgment is estopped from re-litigating questions the decision of which was involved therein does not extend to estop the plaintiff from setting up in a subsequent action, where the cause of action is not the same, the unconstitutionality of a statute upon which the prior action proceeded. Wherefore, although the city, in *Philadelphia v. Railway Co.*, 102 Pa. St. 190, claimed and recovered a judgment against the Ridge Avenue R. Co. for the taxes of the years 1872 to 1879, inclusive, at the rate prescribed by the act of 1872, it was not thereby estopped from asserting its unconstitutionality in a later suit, brought for the taxes of subsequent years. *Philadelphia v. Ridge Ave. R. Co.*, 54 Am. & Eng. R. Cas. 319; 143 Pa. St. 484, 21 Atl. Rep. 982.—DISTINGUISHING *Berollet v. Morgan*, 7 Wall. (U. S.) 619; *Aurora v. West*, 7 Wall. 85; *Durant v. Essex Co.*, 7

Wall. 107; *Corcoran v. Chesapeake & O. Canal Co.*, 94 U. S. 741; *Wilson v. Deen*, 121 U. S. 525; *Duchess of Kingston's Case*, 2 Sm. Lead. Cas. (8th ed.) 941. QUOTING *Cromwell v. Sac County*, 94 U. S. 352.

The trustees named in a mortgage executed by a railroad company to secure its bonds brought a foreclosure suit, and, under the decree rendered, became the purchasers of the mortgaged property, which they conveyed to a new company chartered by the legislature. In a suit in a state court, to which they were made defendants, they set up that they were entitled to the possession of county bonds voted the original company for delivery to the new company. *Held*, that a decree against them does not estop the creditors of the old company, who were secured by that mortgage, from asserting their right to subject the county bonds to the payment of their claims, the proceeds of the sale of the mortgaged property being insufficient for the purpose. *Morgan County v. Allen*, 3 Am. & Eng. R. Cas. 92, 103 U. S. 498.

A county and a railroad company were made defendants in a suit commenced by citizens of the former to enjoin the conveyance of certain lands by the county to the railroad company. On final hearing the injunction was refused. *Held*, that the judgment in such action did not constitute an adjudication of the question involved as between the defendants, it not appearing that their interests at that time were adverse. *Tama County v. Melendy*, 55 Iowa 395, 7 N. W. Rep. 669.

In an action originally brought to recover the statutory penalty of three times the excess for an exaction of excessive charges for the carriage of goods, it was determined that such an action would not lie, by reason of a repeal of the statute. The prayer of the complaint was then changed so as to demand only the illegal excess. *Held*, that this was in effect an amendment of the complaint itself; and that the question whether the action would lie under such amended complaint was not *res judicata*. *Smith v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 303, 49 Wis. 443, 5 N. W. Rep. 240.—QUOTING *Rood v. Chicago, M. & St. P. R. Co.*, 43 Wis. 146.

16. What actions or proceedings are barred.—In chancery suits adverse interests between codefendants may be decided. So a decree adjudging certain mu-

denying the negligence charged, or "any negligence whereby the plaintiff was injured," such judgment is a bar to a second suit for the same injury, though alleging negligence somewhat different from that charged in the first suit. *McCain v. Louisville & N. R. Co.*, (Ky.) 22 S. W. Rep. 325.

If a servant or agent wrongfully dismissed from service elect to sue for the breach before the termination of the period for which he was hired, and recovers, such recovery will be a bar to any subsequent action upon the same contract. *Booge v. Pacific R. Co.*, 33 Mo. 212.

A decree in a bill by a stockholder, for the benefit of himself and all other stockholders who come in, to enjoin the consummation of an agreement by the corporation is conclusive in a subsequent suit by another stockholder for the same purpose and involving the same question, in the absence of fraud or collusion. *Willoughby v. Chicago J. R. & U. S. Co.*, 50 N. J. Eq. 656, 25 Atl. Rep. 277.—QUOTING *Hill v. Bain*, 15 R. I. 75, 23 Am. Rep. 44; *Gaskell v. Dudley*, 6 Metc. (Mass.) 546; *Dewey v. St. Albans Trust Co.*, 60 Vt. 1, 6 Am. St. Rep. 84; *Dannmeyer v. Coleman*, 11 Fed. Rep. 97; *Harmon v. Auditor*, 123 Ill. 122.

Where a judgment has been obtained against a corporation for the price of goods sold, an action cannot be maintained against it for fraud in obtaining credit for the goods; the judgment for the purchase price is as complete and full a remedy as would be a judgment for damages because of the fraud. *Caylus v. New York, K. & S. R. Co.*, 76 N. Y. 609, 49 How. Pr. 100; affirming *10 Hun* 295.

Where the receiver of a railroad company brings an action, the defendant cannot set up as a defense the invalidity of the receiver's appointment, where it appears that in former litigation between the same parties the same charge had been made and the validity of the appointment sustained; and this is so though the amount of the judgment in the former litigation was too small to entitle defendant to an appeal. *Griffin v. Long Island R. Co.*, 102 N. Y. 449, 7 N. E. Rep. 735, 2 N. Y. S. R. 454.

Where a railroad mortgage is made to a state treasurer in trust to secure the company's bonds, the bondholders are bound by a judgment in a suit to foreclose another mortgage, claiming to constitute a prior

lien, to which the treasurer is made a defendant; and the fact that the bonds contain stipulations which destroy their negotiability would not alter the case where such fact did not appear from the mortgage. *Iowa County v. Mineral Point R. Co.*, 34 Wis. 93.

Plaintiff conveyed a right of way over his land, with a provision in the deed that the company should build a good and lawful fence on both sides of the road and should make a crossing. Afterward he brought an action against the successor of the company for the purpose of having the deed canceled and for general relief, on the ground of failure to build the fence and crossing, claiming that he was entitled to a five-board fence under some understanding when the agreement was made, but his petition was dismissed after a trial on the merits. Held, that the judgment therein was admissible, in a subsequent suit to recover damages for a failure to maintain a five-board fence and two crossings, for the purpose of showing that the deed was sustained in all of its provisions. *Hunter v. Burlington, C. R. & N. R. Co.*, 76 Iowa 490, 41 N. W. Rep. 305.

In an action brought against one of two railroad companies for breach of their joint agreement to carry goods from A. to B., the defendant denied that it had agreed to carry or be responsible for the goods except for part of the distance. The issue thus joined was found for the defendant, and judgment entered thereon. Held, that this judgment was a bar to any subsequent action against both companies upon the same contract. *Reynolds v. Pittsburgh, C. & St. L. R. Co.*, 29 Ohio St. 602.

Defendant having moved the court to direct a verdict in its favor on each of the three causes of action stated in the complaint, the court directed the jury that the damages, if any, assessed against defendant must be confined to the first and third causes of action, as the evidence in relation to the second cause was insufficient to authorize any damages. The jury returned a general verdict for plaintiffs, assessing their damages at a certain sum. Held, that as to the second cause of action this must be treated as a verdict in favor of defendant, and that the judgment thereon was a bar to a subsequent action for that cause. *Morgan v. Chicago, M. & St. P. R. Co.*, 83 Wis. 348, 53 N. W. Rep. 741.

Chesapeake, O. & S. W. R. Co., 38 *Am. & Eng. R. Cas.* 676, 87 *Tenn.* 712, 11 *S. W. Rep.* 943.

(2) *Illustrations.*—A city passed an ordinance granting a street railway company the right to own and operate its road beyond the corporate life of the company. Subsequently the city instituted a proceeding, before the corporate existence of the company had expired, to compel it to pay certain taxes not fixed by ordinance, and a judgment was entered to the effect that the city had the power to fix the amount of the taxes and bind itself as by contract. *Held*, that the question of the validity of the contract for the entire time of the corporate existence was not *res judicata* in a subsequent suit to compel the company to remove its tracks from the street after the full limit of its corporate existence. *Detroit v. Detroit City R. Co.*, 56 *Fed. Rep.* 867.

A railroad company, without obtaining any leave and without instituting condemnation proceedings, constructed its railroad over a public street on which its premises abutted. A. sued and got judgment. Subsequently he brought suit to recover damages for the continuance of the obstruction. *Held*, that the judgment in the former suit was no bar to a judgment in the latter one. *Scott v. Indianapolis & V. R. Co.*, (*Ind.*) 10 *Am. & Eng. R. Cas.* 189.

The plaintiff was entitled in such case to prove and recover the diminution in rental value of his premises, notwithstanding the fact that he himself continued to occupy the same. *Scott v. Indianapolis & V. R. Co.*, (*Ind.*) 10 *Am. & Eng. R. Cas.* 189.—RECONCILING *Hatfield v. Central R. Co.*, 33 *N. J. L.* 251.

Evidence on the part of plaintiff as to certain plans for the improvement of his property adopted prior to the location of the railroad and afterwards abandoned—*held*, inadmissible. *Scott v. Indianapolis & V. R. Co.*, (*Ind.*) 10 *Am. & Eng. R. Cas.* 189.

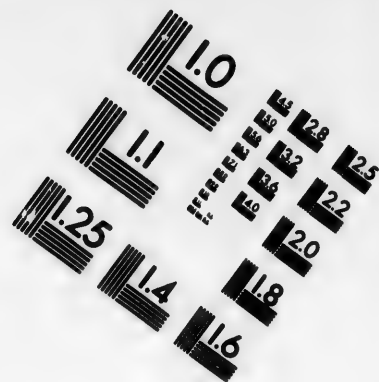
An action to enjoin the auditor of a county from collection of a tax assessed upon railroad lands on the ground of exemption was, on appeal, remanded with instructions to return a judgment for the plaintiff if a certain contract was found as matter of fact to have been intended as a mortgage. On a second trial, the court so found and granted the injunction. A second action was thereafter raised against the auditor of

another county to enjoin the collection of the tax levied in that county. *Held*, that the judgment in the first action did not operate as *res judicata* in the second suit, and that the defendant in the latter was not estopped from litigating the case on its merits, although both defendants were in a certain sense acting on behalf of the public. *St. Paul & S. C. R. Co. v. Robinson*, 39 *Am. & Eng. R. Cas.* 502, 40 *Minn.* 360, 42 *N. W. Rep.* 79.

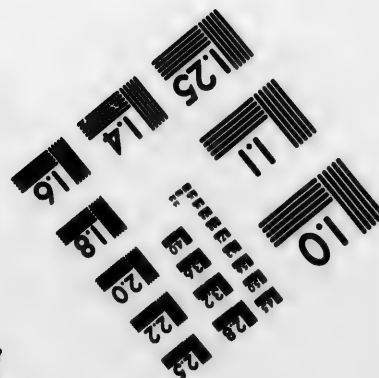
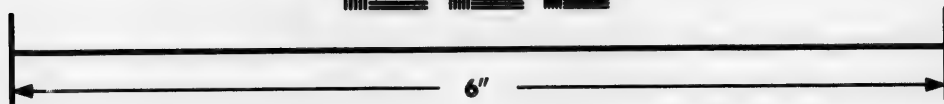
The assignee of a railroad company which had appropriated plaintiff's land was ordered by a court of bankruptcy to pay him a fixed sum as damages upon receiving a deed for the land; but he declined to receive the amount or to make the deed, and subsequently brought an action to recover damages. *Held*, that the order in bankruptcy was no bar to his recovery. *Burnes v. St. Louis, K. C. & N. R. Co.*, 71 *Mo.* 163.

Plaintiff purchased a passenger ticket on defendant's road which entitled him to carry a certain amount of baggage. He had a packing-box or trunk containing merchandise. Upon applying for a check, he advised defendant's agent of this fact, who thereupon refused to check the trunk unless extra compensation was paid for its transportation; plaintiff paid the sum charged; the trunk was destroyed by fire. In a prior action brought to recover for the loss of baggage, the court ruled that plaintiff could not recover for the merchandise, as it was not baggage, and a recovery was had for the baggage. In an action brought to recover for the merchandise—*held*, that the former action was not a bar, as the two actions were not for parts of one entire indivisible demand, but were based upon separate contracts. *Millard v. Missouri, K. & T. R. Co.*, 6 *Am. & Eng. R. Cas.* 311, 86 *N. Y.* 441; *affirming* 20 *Hun* 191.—DISAPPROVED IN *Humphreys v. Perry*, 148 *U. S.* 627.

An agreement was made between three elevated railroads by which the roads of two companies were to be leased for a long term of years to the third company. The lease provided for the payment of a rental equal to a dividend at a certain rate upon the stock of the lessors. Owing to the financial embarrassment of the lessee, an agreement was made which modified and altered the lease, and provided for the payment of a smaller rental. Subsequently one of the compa-



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 4.0.



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nies instituted a suit to set aside the agreement modifying the lease and judgment was rendered in its favor. Thereafter a stockholder in one of the companies brought an action against the company whose stock he held and the lessee to enforce payment of the guaranteed dividend under the lease. *Held*, that the judgment in the suit instituted by the company was not *res judicata* as to any claim by the stockholder against the company in which he held stock. *Beveridge v. New York El. R. Co.*, 39 *Am. & Eng. R. Cas.* 199, 112 *N. Y.* 1, 19 *N. E. Rep.* 489, 20 *N. Y. S. R.* 90; *affirming* 42 *Hun* 656, 5 *N. Y. S. R.* 59.—*DISTINGUISHING Boardman v. Lake Shore El. R. Co.*, 84 *N. Y.* 157; *Parr v. New York, L. E. & W. R. Co.*, 96 *N. Y.* 444.

An abutting owner sued an elevated railway for damages for maintaining its road in the street and recovered a judgment covering about three years, which fixed his damages at \$300 per year; and subsequently brought an action to recover damages for a like cause for several succeeding years. *Held*, that the amount of damages fixed by the judgment in the former suit was not conclusive as to the amount recoverable in the second suit. *Moore v. New York El. R. Co.*, 27 *J. & S.* 32, 36 *N. Y. S. R.* 81, 12 *N. Y. Supp.* 552; *reversed in* 126 *N. Y.* 671, *Mem.*, 27 *N. E. Rep.* 791, 37 *N. Y. S. R.* 777.

Certain individuals engaged in manufacturing, leased grounds to a railroad for the purpose of constructing a side track thereon. Afterwards two suits were brought against the company, growing out of the lease, one in assumpsit and the other in trespass. The action in assumpsit was for an unpaid consideration for the lease and for appropriating lands not included in the lease. The action of trespass was for not constructing a side track according to contract. *Held*, that a judgment in the action of assumpsit was not a bar to the action of trespass. *Middletown Furniture Mfg. Co. v. Philadelphia & R. R. Co.*, 145 *Pa. St.* 187, 22 *Atl. Rep.* 748.

18. Effect of judgment as to third persons, not parties to former suit.—

(1) *General rules.*—Where a railroad company is sued for an injury resulting through the alleged negligence of one of its engineers in failing to sound a whistle or ring a bell at a place where the statute required it, a verdict finding the company free from negligence would seem to bar a recovery

in an action against the engineer. *Chicago & R. I. R. Co. v. Hutchins*, 34 *Ill.* 108.

A decree in a suit on coupons from municipal bonds issued for railroad stock is not binding on those who were not served with process and did not appear, nor on non-resident bondholders, who were only proceeded against by constructive service. *Brooklyn v. Aetna L. Ins. Co.*, 99 *U. S.* 362. *Pana v. Bowler*, 12 *Am. & Eng. R. Cas.* 563, 107 *U. S.* 529, 2 *Sup. Ct. Rep.* 704.

A former mandamus proceeding against certain officers of a corporation to allow a stockholder to inspect its books is not a bar to a subsequent mandamus against the corporation itself. *State ex rel. v. St. Louis & S. F. R. Co.*, 29 *Mo. App.* 301.

In a suit against a company by an assignee of labor claims, the contractor and subcontractor are necessary parties. If they are not made parties, a judgment rendered against the company would be no bar to a subsequent suit by the subcontractor against the contractor or the railway company. In all such actions the judgment rendered should be binding upon the company, the contractor, the subcontractor, and the laborer alike. *Austin & N. W. R. Co. v. Rucker*, 12 *Am. & Eng. R. Cas.* 258, 59 *Tex.* 587.

Where surviving children bring an action against a railroad company for negligently causing the death of their mother, they are not concluded by a judgment in a separate suit brought by their father to which they are not parties. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 *Tex.* 643, 11 *S. W. Rep.* 127.

(2) *Illustrations.*—After an action had been commenced in the name of the people to dissolve a railroad corporation, and a temporary receiver had been appointed, a foreclosure suit was commenced and the receiver in the former action was appointed temporary receiver in the other action. The corporation was the owner of certain stocks and bonds not in terms covered by the mortgage; and an order was made, after notice, in the foreclosure suit that the receiver should hold and deal with the stocks and bonds as a part of the general fund embraced in the mortgage; and by a subsequent judgment it was determined that they were subject to the mortgage, and were ordered to be sold as a part of the mortgaged property, and the sale was made and confirmed. *Held*, that the adjudications so made bound all the parties to the

action, and general creditors of the corporation. *Ham, J.J.*, dissenting. *L. E. & W. R. Co. v. Hutchins*, 34 *Ill.* 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

A bondholder cannot foreclose a mortgage to secure its bonds on all others similar to those among other bondholders retained in a suit. *Held*, that the judgment was conclusive and fair to the benefit of the bondholders brought for fraudulent advertisement and bound thereon. *57 Hun* 498, 3 *N. Y. S. R.* 59.

An abutting owner's suit against a railroad company for equitable relief for interfering with and obtaining possession of land provision that the judgment or tend the execution of the judgment subsequently the judgment after the trial conveyed the land to his grantees. *Held*, that the same as if the release by the railroad company. *57 Hun* 498, 3 *N. Y. S. R.* 59.

Where two living with the railroad crossing with the father and the father's representative company operating with the wages cases being pro-

action, and neither the corporation nor its general creditors could impeach them in collateral proceedings. (Finch and Peckham, JJ., dissenting.) *Herring v. New York, L. E. & W. R. Co.*, 35 *Am. & Eng. R. Cas.* 54, 105 *N. Y.* 340, 19 *Abb. N. Cas.* 340, 12 *N. E. Rep.* 763, 7 *N. Y. S. R.* 547; *affirming* 34 *Hun* 634, *mem.*, 63 *How. Pr.* 497.—FOLLOWED IN *Farmers' L. & T. Co. v. New Rochelle & P. R. Co.*, 32 *N. Y. S. R.* 714, 57 *Hun* 376, 10 *N. Y. Supp.* 810.

A bondholder instituted a proceeding to foreclose a railroad mortgage executed to secure its bonds, on behalf of himself and all others similarly situated; and also prayed, among other things, that a judgment obtained in a somewhat similar proceeding be adjudged fraudulent, and that the lien which plaintiff sought to enforce be given priority. *Held*, that the judgment in the former suit was conclusive, if the suit was representative and fairly brought, and conducted for the benefit of all bondholders; but if it was brought for the purpose of obtaining a fraudulent advantage, then plaintiff was not bound thereby. *Stevens v. Union Trust Co.*, 57 *Hun* 498, 33 *N. Y. S. R.* 130.

An abutting property owner brought a suit against an elevated railway company for equitable relief and to recover damages for interfering with his street easements, and obtained a perpetual injunction with a provision that it should be avoided by payment or tender of specified damages, and the execution by plaintiff of a release. Subsequently the company moved to set aside the judgment on the ground that plaintiff, after the trial and before judgment, had conveyed the fee to the property, and that his grantees refused to execute a release. *Held*, that the pendency of the action acted as a *lis pendens* and bound the grantees the same as if they had been parties; therefore a release by plaintiff was sufficient. *Moss v. New York El. R. Co.*, 27 *Abb. N. Cas.* 318, 17 *N. Y. Supp.* 586.

Where two brothers, both minors and living with their father, were killed at a railroad crossing by a passenger train colliding with the wagon in which they were, and the father took out letters of administration upon the estates of each of his said sons, and brought separate actions, in his representative capacity, against the company operating the train which collided with the wagon, the declarations in the cases being precisely the same, except as to

the names of the intestates—*held*, that a judgment in favor of the plaintiff and against the defendant in one case was no bar to the further prosecution of the other action as the plaintiffs in the two suits were not the same persons in law, and because the evidence in the two cases was not the same in respect to the killing and the care of each intestate. *Illinois C. R. Co. v. Slater*, 139 *Ill.* 190, 28 *N. E. Rep.* 830; *affirming* 39 *Ill. App.* 69.

19. Conclusiveness of judgments on questions of title to land.—In an action against a company to quiet title to land used as a right of way, an easement claimed by the defendant will be cut off by a decree in the plaintiff's favor, unless it be set up and be protected by the decree. *Indiana, B. & W. R. Co. v. Allen*, 113 *Ind.* 308, 15 *N. E. Rep.* 451, 12 *West. Rep.* 910.

A judgment in ejectment against a company for land occupied by it as a right of way, which it had bought and paid for, is no bar to a bill for the specific performance of the contract to convey the right of way. It appeared that the company was, at the time of the recovery, in ignorance of its equitable title, and had used due diligence in seeking to learn the facts, and failed to learn them until after the time had expired for taking a new trial at law. *Chicago & E. I. R. Co. v. Hay*, 119 *Ill.* 493, 10 *N. E. Rep.* 29.—FOLLOWED IN *Chicago & E. I. R. Co. v. Hay*, 119 *Ill.* 507.

A judgment was entered in certain litigation deciding that a company which had acquired property for railroad purposes only had forfeited all its rights thereto by leasing it to an individual. *Held*, that this finding would be accepted and applied in a subsequent action by the owner of the fee against the lessee to recover possession. *Roby v. Yates*, 70 *Hun* 35, 23 *N. Y. Supp.* 1108.

The H., P. & F. R. Co., the road whereof was mortgaged, issued certain shares of preferred stock. Subsequently the company defaulted in payment of interest on the mortgage, whereupon the directors voted to surrender the road to the mortgage trustees, the net earnings to be applied first on account of the mortgages in the manner specified in the mortgage deed of trust, and the surplus to be applied to the payment of unsecured creditors. Subsequently the company made a perpetual lease and grant of its road and franchises to the B., H. & E. Co., who subsequently conveyed to the B.,

H. & E. R. Co. These transfers were sanctioned by legislative enactment. Subsequently the B. H. & E. R. Co. mortgaged its road and defaulted in payment of interest. The mortgagees foreclosed, bought in at the foreclosure sale, and formed the N. Y. & N. E. R. Co. The trustees in the original mortgage then leased the road to the N. Y. & N. E. R. Co. Certain stockholders of the H., P. & F. R. Co. filed a bill to set aside the above agreement and lease on the ground of fraud and *ultra vires*. The bill was dismissed on the ground of laches. A preferred stockholder having subsequently filed another bill alleging that the trustees in the original mortgage had realized from their lease more than enough to pay the interest on the mortgage and seeking to have the surplus applied to arrears of dividends on preferred stock—*held*, that in order to establish his right to relief the complainant was bound to show that the conveyance by the H., P. & F. R. Co. was void, and that, having been a party to the former suit wherein that question was raised and adjudicated, he was precluded from again raising the point, and that the bill must be dismissed. *Emerson v. New York & N. E. R. Co.*, 16 Am. & Eng. R. Cas. 404, 14 R. I. 555.—FOLLOWING Boston & P. R. Corp. v. New York & N. E. R. Co., 13 R. I. 260.

In an action to remove a cloud upon plaintiff's title to certain lots and to a roadway and raceway adjacent thereto, it was adjudged that plaintiff had title to the lots, but had no title to the roadway or raceway. In a subsequent proceeding, by one whose title was derived from the former plaintiff, for the appointment of commissioners to appraise his damages by reason of the laying of railway tracks over said roadway and raceway under a license from the former defendant—*held*, that the former judgment was conclusive against the plaintiff's claim of title to such roadway and raceway. *Smith v. Chicago, M. & St. P. R. Co.*, 83 Wis. 271, 50 N. W. Rep. 497, 53 N. W. Rep. 550.

20. Conclusiveness as respects matters not in issue on former trial.—A judgment on certain railroad coupons is not conclusive in a subsequent suit brought on other coupons cut from the same bonds, where there is nothing to show whether the issues in each suit were the same or not. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358.

The recovery by a passenger of the statutory penalty for an illegal overcharge of fare is no bar to a suit for damages for an unlawful ejection from the train. *St. Louis & S. F. R. Co. v. Trimble*, 54 Ark. 354, 15 S. W. Rep. 899.

An action against a corporation for the loss of goods as a common carrier, in which the company has judgment, is not a bar to a subsequent action against the corporation as a warehouseman for the loss of the same goods. *Kronshage v. Chicago, M. & St. P. R. Co.*, 45 Wis. 500.

A railroad covenanted with a ferry owner to transport all persons and property carried by a river across in the ferry. A suit was afterwards brought against the railroad for diverting freights from the ferry, and on demurrer final judgment was given for the company, on the ground of a variance between the contract and the breach alleged in the declaration. *Held*, that this judgment was a bar to a subsequent suit only as to the exact point raised by the pleadings, and not a bar to a suit for other breaches of the same covenants. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

A mare and colt, belonging to the same person, entered upon a railroad track at the same time and place, and, both running before a train, the colt was first struck and killed, and then the mare was struck and injured, at a point thirty rods from where the colt was struck. An action was brought against the company for the value of the colt, and a judgment was recovered for its value, reasonable attorney's fees, and costs, which were paid. The mare subsequently died from the injuries received, and an action was brought for the value of the mare, and the satisfaction of the judgment for the value of the colt was pleaded in bar of the second action. *Held*, that they were separate and independent causes of action, and that the first judgment and satisfaction did not bar a recovery in the second action. *Missouri Pac. R. Co. v. Scammon*, 41 Kan. 521, 21 Pac. Rep. 590.

Where, in an action brought under the act of 1881 (ch. 531, N. Y. Laws of 1881) by taxpayers of the town of A. against certain holders of bonds of the town, issued in aid of the construction of the D. & M. railroad, it appeared that after its commencement an action was brought ostensibly in the name of a bondholder against the town to recover

interest on it was decreed (93 N. Y. said action the supervest coupon paid for on that the attorney defended the were all other was brought of having so that the action was an estoppel thereto, and re-examination upon which considering other action have led to *Millard*, 12 N. Y. S. Andes, 93 N. Y. Attic.

Four bale railroad company which were the cars, and company sh agent at the to the agent destruction a distinct cause of the other amounted to cause of action former was *Houston & App. (Civ. C.*

21.—former action judicata, that the matter first suit are for determining *Missouri v. Missouri*

A former company against the ground from taxation accruing later and distinct *v. Keokuk & Cas. 694, 9 W. Rep. 29 Chicago, R. Nor will t*

interest on certain of said bonds, in which it was decided that said bonds were void (93 N. Y. 405), but it also appeared that said action was brought at the instance of the supervisor of said town, that the interest coupons on which it was brought were paid for out of the moneys of said town, that the attorneys who prosecuted and defended the action were paid by the town, as were all other expenses, and that the action was brought and defended for the purpose of having said bond declared invalid. *Held*, that the adjudication in the former action was an estoppel only as between the parties thereto, and did not stand in the way of a re-examination by the court of the grounds upon which it proceeded, or prevent it from considering new facts not disclosed in the other action which would, if then disclosed, have led to a different result. *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759.—FOLLOWING *Craig v. Andes*, 93 N. Y. 405. REFERRING TO *Metzger v. Attica & A. R. Co.*, 79 N. Y. 17.

Four bales of cotton were delivered to a railroad company at the same time, two of which were burned before being loaded on the cars, and two months afterwards the company shipped the other two bales to its agent at the place of destination, instead of to the agent of the shipper. *Held*, that the destruction of the first two bales constituted a distinct cause of action, and the shipping of the other two to the wrong person amounted to a conversion and gave another cause of action, and a judgment for the former was not a bar to a suit for the latter. *Houston & T. C. R. Co. v. Perkins*, 2 Tex. App. (Civ. Cas.) 467.

21. — matters not adjudicated in former action.—To sustain a plea of *res judicata*, there must be evidence to show that the matters in issue and decided in the first suit are the same as those presented for determination in the second. *Spurlock v. Missouri Pac. R. Co.*, 76 Mo. 67.

A former judgment in favor of a railroad company against the validity of taxes, on the ground that the property was exempt from taxation, will not bar a suit for taxes accruing later and constituting a separate and distinct cause of action. *State ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.—APPROVING *Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa 633.

Nor will the proposition that the legisla-

ture can, in the face of the constitution of 1865, exempt property from such taxation bar such suit because of a concession to that effect made by counsel in some other case. *State ex rel. v. Keokuk & W. R. Co.*, 41 Am. & Eng. R. Cas. 694, 99 Mo. 30, 6 L. R. A. 222, 12 S. W. Rep. 290.

Where a receiver of a railroad company, appointed and acting under the direction of the circuit court of the United States, in 1877 filed a bill in the circuit court of Peoria county to enjoin the collection of the taxes levied upon the capital stock of the company for the years 1873, 1874, and 1875, which, on a hearing, was dismissed—*held* that the decree in such case was no bar another bill filed by the purchasers of the railroad and its property, under a deed of trust, and whose title was acquired long after the filing of the first bill, to enjoin the collection of the same taxes by the sale of the rolling stock of the railroad company after its purchase, such purchasers not claiming under the receiver, for the reasons that neither the parties nor the subject matter are the same. The latter bill presented the question that the purchasers acquired the property, by their purchase, free and clear of the taxes, which was not litigated in the former suit. *Cooper v. Corbin*, 13 Am. & Eng. R. Cas. 394, 105 Ill. 224.

Where a railroad company had agreed to put in a switch, build a side track and keep the same in repair, and to run its cars regularly thereon to any warehouse that might be built by the plaintiff, for the purpose of receiving or discharging grain—*held*, that the adjudication of a former action to recover damages for a refusal on the part of the company to receive a car-load of freight, would not be a bar to an action to recover damages for a subsequent total abandonment of the side track, unless such refusal to receive was intended as a final abandonment of the contract, and that fact was known to the plaintiff when he commenced his former action. *Amsden v. Dubuque & S. C. R. Co.*, 32 Iowa 288, 10 Am. Ry. Rep. 9.

Partners owning a building brought a joint action against an elevated railway company for unlawful interference with their street easements and recovered damages. *Held*, that this was not a bar to a subsequent action by one of the partners, claiming damages for personal injuries "by reason of the noise caused by operating defendant's road, and the smoke, dust and

dirt, stench and gas, and vapor of steam arising therefrom" entering the same building where he did business, and causing him much personal discomfort and loss of health. *Taylor v. Manhattan R. Co.*, 25 N. Y. S. R. 226, 53 Hun 305, 6 N. Y. Supp. 488.

22. — matters which could have been adjudicated.—Where a railway company, under authority of law, properly constructs a bridge over a watercourse, and suit is brought by the landowner for damages thereby caused to his property, and a judgment is recovered and paid, it will be regarded as in full for all future as well as past damages, and a bar to a second suit for subsequent damages arising from the same cause. *Chicago, B. & Q. R. Co. v. Schaffer*, 31 Am. & Eng. R. Cas. 174, 124 Ill. 112, 14 West. Rep. 139, 16 N. E. Rep. 239; *affirming* 26 Ill. App. 280.—APPLIED IN *Ohio & M. R. Co. v. Thillman*, 143 Ill. 127. QUOTED IN *Ohio & M. R. Co. v. Thillman*, 43 Ill. App. 78.

Where a company erects an embankment so as to throw a stream of water back on plaintiff's land, the injury caused thereby is a permanent one, for which damages might be at once fully recovered; and where one action is brought and a recovery had, the fact that the jury were erroneously instructed not to take into account any future injury would not allow plaintiff to maintain a second action to adjudicate questions that should have been tried in the former one. *Stodghill v. Chicago, B. & Q. R. Co.*, 53 Iowa 341, 5 N. W. Rep. 495. *Fowle v. New Haven & N. Co.*, 107 Mass. 352.—FOLLOWED IN *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568. REVIEWED IN *Wells v. New Haven & N. Co.*, 44 Am. & Eng. R. Cas. 491, 151 Mass. 46.—*Fowle v. New Haven & N. Co.*, 112 Mass. 334.—APPROVED IN *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325.

When a railroad bridge became a permanent embankment, thereby diverting a watercourse and flooding plaintiff's land and destroying his crops, and permanently injuring his lands, plaintiff's right of action for all damages, present and prospective, became complete, and as he elected to sue for the three crops injured before the bridge became a permanent embankment, his recovery therefor would bar an action for the injury to the inheritance. *Buntin v. Chicago, R. I. & P. R. Co.*, 50 Mo. App. 414.

A judgment against a railroad company

for damages for the destruction of a building by fire communicated from a locomotive engine is a bar to a subsequent action by the same plaintiff against the company for damages for the destruction of other buildings by fire communicated from the buildings first destroyed, although the subsequent action is brought and prosecuted for the benefit of an insurance company which has paid to the plaintiff the amount of a policy of insurance upon such other buildings. *Trask v. Hartford & N. H. R. Co.*, 2 Allen (Mass.) 331.—FOLLOWED IN *Knowlton v. New York & N. E. R. Co.*, 40 Am. & Eng. R. Cas. 237, 147 Mass. 606.

A person whose house and furniture is burned through the negligence of a railroad company is entitled to recover the full amount of his loss, notwithstanding an insurance company has paid insurance thereon; but if such person, by mistake, deducts from his claim in a suit the amount of the insurance money, the judgment will bar a further recovery. *Weber v. Morris & E. R. Co.*, 36 N. J. L. 213, 12 Am. Ry. Rep. 411.

Where a railroad engineer sues his company to recover for personal injuries, and one recovery has been had, no further recovery can be had by setting up other matters than those formerly alleged as having caused the injuries. *Davis v. New York, L. E. & W. R. Co.*, 14 N. Y. S. R. 1.

Where a number of sacks of flour carried by a railway company are damaged, the entire injury constitutes one cause of action, and after a recovery is had for injury to some of the sacks a second action is not maintainable for injury to the remainder. *Russell v. Waterford & L. R. Co.*, L. R. 16 Ir. 314.

In 1869 T. mortgaged to B. In 1871, the mortgagor being still in possession, but the mortgage overdue, the E. C. R. R. Co., under some arrangement with the mortgagor, constructed its road across the premises. In 1880 the petitioner succeeded to the rights of the E. C. R. R. Co. In 1864 H. was in adverse possession of a portion of the premises, and continued in such possession until he acquired title, which title he conveyed to the E. C. R. R. Co. before the petitioner succeeded to its rights. In 1883 the defendant became the owner of this mortgage, foreclosed it against the mortgagor and the petitioner, and was put in possession, by virtue of a writ of posses-

sion, in 1886 brought this suit to set aside the judgment that the petitioner had obtained in the H., as that judgment was not judicated in the *bury & L. C.*, 2 L. R. A. 52.

In case of carriers, defense of a judgment in a subsequent action does not bar a new action for the same injury. *Held*, given evidence same matters for, but without absolutely barwards. *Deacon U. C. C. P.*, 24.

23. Conclusion of courts of generally.—recover divided and it appeared that the such dividend not in the stock be followed of a co-when not recovered. *R. Co.*, 21 Fed. year Dental V. & A. 573.

24. — of erally.—In digation growing railway law, accidents, the will endeavor in harmony with supreme court the courts of the American Union do not conflict tional system ana. *William* 33 Am. & Eng. 417, 4 So. Rep.

25. — of sister states petent court of is conclusive o mined between absence of evi-

sion, in 1886. Thereupon the petitioner brought this bill to condemn the land. *Held*, that the petitioner was estopped from setting up in this suit the title derived from H., as that question might have been adjudicated in the foreclosure suit. *St. Johnsbury & L. C. R. Co. v. Willard*, 61 *Vi.* 134, 2 *L. R. A.* 528, 17 *Atl. Rep.* 38.

In case against defendants as common carriers, defendants pleaded that plaintiff sued defendants in the queen's bench for the same identical causes of action and obtained a verdict, which remained unreversed, to which plaintiff replied, denying that the verdict was for the same identical causes of action. *Held*, that if plaintiff could have given evidence at a former trial of the self-same matters which he subsequently sued for, but withheld it altogether, he was not absolutely barred from recovering afterwards. *Deacon v. Great Western R. Co.*, 6 *U. C. C. P.* 241.

23. Conclusiveness of judgments of courts of co-ordinate jurisdiction, generally.—Where a stockholder sues to recover dividends under a lease of the road, and it appears that another court has decided that the right of action to recover such dividends is in the corporation, and not in the stockholders, such decision will be followed on the principle that a judgment of a co-ordinate court will be followed when not reversed. *Reed v. Atlantic & P. R. Co.*, 21 *Fed. Rep.* 283.—**APPROVING** *Good-year Dental Vulcanite Co. v. Willis*, 1 *Bar.* & A. 573.

24. — of foreign judgments, generally.—In dealing with all matters of litigation growing out of the construction of railway law, in connection with railway accidents, the supreme court of Louisiana will endeavor to place its rulings in line and in harmony with the adjudications of the supreme court of the United States, and of the courts of last resort of the states of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana. *Williams v. Pullman Palace Car Co.*, 33 *Am. & Eng. R. Cas.* 414, 40 *La. Ann.* 417, 4 *So. Rep.* 85.

25. — of judgments of courts of sister states.—A final judgment of a competent court of a sister state, after citation, is conclusive of the matters therein determined between the same parties here, in the absence of evidence positively impeaching

it. *West Feliciana R. Co. v. Thornton*, 12 *La. Ann.* 736.

A judgment of a court of another state is only conclusive upon parties where it is a definite judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in this state. *Taylor v. Atlantic & G. W. R. Co.*, 55 *How. Pr. (N. Y.)* 275.

Where the highest court of another state has decided that the purchase of certain railroad bonds was not in violation of a statute of the state providing that railroad directors should not purchase bonds of the company at less than par, the courts of New York will consider the question settled when it arises in subsequent litigation. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co.*, 26 *How. Pr. (N. Y.)* 225, 41 *Barb.* 9; affirming 23 *How. Pr.* 180.

A decree rendered by a court of chancery in Tennessee, in a suit between two railway companies, declaring a lease invalid and ordering an accounting, is a bar to a suit pending in Alabama instituted by a stockholder of the lessor company seeking the cancellation of such lease, and an injunction against a proposed new issue of stock for the purpose of buying in the lease. The fact that the Alabama suit was first instituted does not prevent the cause of action from being merged in the Tennessee judgment, which may be set up as a plea *pais darrein continuance*. *Memphis & C. R. Co. v. Grayson*, 43 *Am. & Eng. R. Cas.* 681, 88 *Ala.* 572, 7 *So. Rep.* 122.

26. — of judgments of state courts in federal courts.—(1) *General rules.*—The decision of the supreme court of the state that a particular corporation is a corporation of that state is binding on the federal court. *Fitzgerald v. Missouri Pac. R. Co.*, 50 *Am. & Eng. R. Cas.* 622, 45 *Fed. Rep.* 812.

When a state court has jurisdiction of the parties and the subject matter, its judgment against a receiver of a United States court is as final and conclusive as it is against any other suitor. *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 42 *Am. & Eng. R. Cas.* 26, 41 *Fed. Rep.* 551.

A party owning county bonds issued for stock in a railroad, and a party to a suit on coupons thereof, is bound by a judgment of the supreme court of the state holding them

invalid, and cannot recover in another suit in the name of a third person. *Bourbon County Com'rs v. Block*, 99 U. S. 686.

Where railroad companies, existing in two or more states, consolidate, a judgment in one of the states against the consolidated corporation is binding on the corporation wherever it exists. *Union Trust Co. v. Rochester & P. R. Co.*, 29 Fed. Rep. 609.—FOLLOWING *Horne v. Boston & M. R. Co.*, 12 Am. & Eng. R. Cas. 287, 18 Fed. Rep. 50; *Nashua & L. R. Co. v. Boston & L. R. Co.*, 16 Am. & Eng. R. Cas. 488, 19 Fed. Rep. 804; *Graham v. Boston, H. & E. R. Co.*, 25 Am. & Eng. R. Cas. 53, 118 U. S. 161, 6 Sup. Ct. Rep. 1009.

A judgment of the highest court of a state as to the right of one railroad to cross the lands of another is conclusive upon a United States circuit court for the state, between the same parties, or involving the same subject matter; and this is so though there be a federal question involved which gives the court jurisdiction. *Pennsylvania R. Co. v. National Docks & N. J. J. Connecting R. Co.*, 51 Fed. Rep. 858.—FOLLOWING *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

Where a suit in a state court has been prosecuted to final judgment, and appealed to the highest court of the state and reversed, the plaintiff therein may dismiss the suit and commence a new one in a federal court for the same cause of action. The opinion of the state court on appeal does not create a legal bar to a new suit, but is binding as to the rules of law laid down therein, where the facts in the second suit are substantially the same. *Hazard v. Chicago, B. & Q. R. Co.*, 4 Biss. (U. S.) 453.

But in such case the plaintiff may introduce evidence showing a different state of facts, and thereby avoid the binding effect of such opinion. *Hazard v. Chicago, B. & Q. R. Co.*, 4 Biss. (U. S.) 453.

(2) *Illustrations.*—Where a receivership formerly existing in a state court had practically ceased prior to the period covered by the accounting claimed in the U. S. circuit court, and the state court had so determined, and the parties themselves had brought the receivership to a close by their own acts, no formal entry in court of such discharge was necessary, and, as the parties to the proceeding in the state court were not the same as the parties in this case, the pendency of such proceedings would be no

bar to this suit. *Andrews v. Smith*, 5 Fed. Rep. 833, 19 Blatchf. (U. S.) 100.

A suit was brought by the state of Florida against a railroad company, alleging default in the payment of interest due on the company's bonds given in exchange for state bonds, and seeking to enforce the statutory lien by the sale of the roads and the application of the proceeds to the holders of the state bonds. The company answered, setting up fraud, the unconstitutionality of the law touching the state bonds, and averring that the railroad bonds were not a lien. The supreme court of the state dismissed the bill because it was not proved that any of the state bonds were in the hands of *bona fide* holders. The point as to the statutory authority, however, to exchange the bonds and create a lien was directly made by the pleadings, and considered by the court. *Held*, that the decision on this point was in no just sense *obiter*. *Florida C. R. Co. v. Schulte*, 3 Am. & Eng. R. Cas. 1, 103 U. S. 118.

A passenger who was injured while traveling in Massachusetts on the Sabbath brought an action against the company in the state court. The jury found that he was traveling on an errand of necessity or charity, and brought in a verdict in his favor. On appeal, the Massachusetts supreme court held that the facts did not show that the errand was one of necessity or charity, and remanded the case. The plaintiff then became nonsuit, and brought a new action in the federal circuit court. *Held*, that the character of the errand was properly excluded from the jury in the federal court, having been passed upon and decided in the state court. *Bucher v. Cheshire R. Co.*, 34 Am. & Eng. R. Cas. 389, 125 U. S. 555, 8 Sup. Ct. Rep. 974.

A mortgage trustee commenced proceedings in a state court to foreclose a mortgage on a street railway. The manager of the road who was also a large stockholder, resided in another state, and was made a party by what is termed "a warning order," and a local attorney was appointed to defend his interest. Pending the suit the manager sold all his interest in the company, including certain overdue coupons, secured by the mortgage, which he warranted to the purchaser to be a first lien. This purchaser bought with a view of bidding in the property when it was sold at the foreclosure sale, which was known to

the manager coupons had was not entered. Subsequent federal court chaser against breach of proceeding in the and estopped the validity of second action. *Co. v. Gest*, 3 Fed. Rep. 307. *v. Duncan*, Com. v. St. Grand Junction Union Trust Co., 63 N. Y.

Interveners short, uncompensated to defendant to receive patentes, the plaintiff to finish the wise the agreed expenditures were not fully covered the interveners elected to treat and demanded company brought tendering the compel specific interveners filed cross-bill, insisting had demanded bill was dismissed except as to the of the agreement to foreclose a interveners appealed and insisted on forfeiture. *Held*, the judgment requiring that it was *Trust Co. v. J* 851.

In a former two land grants to recover land overlapping grants the land as the ing within a section and running townships; and diagram of its be correct. Du

the manager. The court found that the coupons had been paid, and the purchaser was not entitled to come in under the mortgage. Subsequent suit was brought in a federal court in another state by the purchaser against the superintendent for a breach of warranty. *Held*, that the proceeding in the state court was *res judicata*, and estopped the manager from setting up the validity of the bonds as a defense to the second action. *South Covington & C. St. R. Co. v. Gest*, 34 *Fed. Rep.* 628; *affirmed in 36 Fed. Rep.* 307.—DISTINGUISHING *Ketchum v. Duncan*, 96 U. S. 671. FOLLOWING *Com. v. State*, 32 Md. 501; *Haven v. Grand Junction R. & D. Co.*, 109 Mass. 88; *Union Trust Co. v. Monticello & P. J. R. Co.*, 63 N. Y. 311.

Interveners, certain individuals, owned a short, uncompleted railroad, which they sold to defendant company for \$25,000, agreeing to receive payment in transportation certificates, the purchasers binding themselves to finish the road within two years; otherwise the agreement to be void. Large expenditures were made, but the road was not fully completed within the time, and the interveners gave notice that they elected to treat the contract as forfeited, and demanded possession of the road. The company brought suit in a state court, after tendering the transportation certificates, to compel specific performance; and the interveners filed an answer in the nature of a cross-bill, insisting on the relief that they had demanded from the company; but the bill was dismissed, but without prejudice, except as to the right to claim a forfeiture of the agreement. In a subsequent action to foreclose a mortgage on the property, interveners appeared and objected to the sale, and insisted on making a claim for a forfeiture. *Held*, that they were concluded by the judgment in the former suit, it appearing that it was still in full force. *Central Trust Co. v. Iowa C. R. Co.*, 40 *Fed. Rep.* 851.

In a former suit, in a state court, between two land grant railroad companies, by one to recover lands claimed by the other in overlapping grants, plaintiff's bill described the land as the odd-numbered sections lying within a specified distance of its road and running through certain ranges and townships; and annexed to the bill was a diagram of its road which was claimed to be correct. During the proceeding the ac-

curacy of the description was not questioned, and it seemed that a court would have no difficulty in determining what lands were then in controversy from the record. *Held*, that a plea of *res judicata* in a subsequent suit in a federal court to recover the same lands was good. *Southern Minn. R. Extension Co. v. St. Paul & S. C. R. Co.*, 55 *Fed. Rep.* 690.

In such case it was also suggested that a plea of a former adjudication was not tenable, for the reason that the right to relief in the former action was predicated on the alleged fraud of defendants in constructing its road for some distance through the territory where the land grants interfered on a route somewhat different from that indicated by its original map of definite location. *Held*, that this contention was not tenable, if it be assumed that the recovery in the former action was on the sole ground of fraud. If the defendant might have pleaded in the former action the same grounds of recovery which it relies on in the second, and did not do so, it cannot take advantage of such neglect. *Southern Minn. R. Extension Co. v. St. Paul & S. C. R. Co.*, 55 *Fed. Rep.* 690.

In the former suit the referee found that the odd-numbered sections which defendant claimed as indemnity lands were withdrawn from sale before plaintiff's grant; and found, as a question of law, that the withdrawal operated to exclude the lands from the grant. In the subsequent suit certain other additional lands were demanded within defendant's indemnity limits. *Held*, that the former litigation constituted an estoppel as to the additional lands. *Southern Minn. R. Extension Co. v. St. Paul & S. C. R. Co.*, 55 *Fed. Rep.* 690.

27. Conclusiveness of rulings in equity in subsequent action at law.

—Where defendant had purchased a strip of land through the plaintiffs' property and agreed to put in a passageway under the track at a certain place, and it afterward appeared that the road leading to the proposed passageway was cut off and that a passageway at that point would be flooded by tidewater, and the defendant therefore failed to perform its agreement, and the plaintiffs brought suit for specific performance; and it also appeared that the subcontractors who constructed the defendant's road had trespassed upon and wasted the land of the plaintiffs adjacent to the strip purchased, and the plaintiffs also joined

execution had been returned *nulla bona*. *Case v. New Orleans & C. R. Co.*, 2 Woods (U. S.) 236.

Where the owner of property which was destroyed by fire while in the possession of a carrier brought an action the complaint in which contained counts founded not only upon Mass. Pub. St., ch. 112, § 214, which provides that a railroad corporation shall be responsible for property injured by fire communicated by its locomotive engines, but also upon the alleged negligence of the carrier, and such action was dismissed on the ground that the statute did not apply to goods destroyed by fire while in the possession of a railroad company under a contract of carriage, and no evidence was introduced in it as to the negligence of the company, the judgment in that action is a bar to a second suit founded solely upon the alleged negligence of the carrier. *Bassett v. Connecticut River R. Co.*, 40 Am. & Eng. R. Cas. 118, 150 Mass. 178, 22 N. E. Rep. 890.—REFERRING TO *Bassett v. Connecticut River R. Co.*, 145 Mass. 129.

A landing and ferry were leased to a railroad, and afterward the railroad property sold, and the owner of the ferry sued the purchasers at law for a violation of the lease. The court dismissed this action on the ground that the covenants in the lease did not run with the land, and therefore did not bind the purchasers of the railroad. *Held*, that this judgment was not a bar to another equitable proceeding to recover for the use and enjoyment of the property. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

Where a plaintiff brought an action against a railroad company upon an express contract made between him and another company, and dismissed that action after an adjudication by this court that he could not recover therein, the result of that action is no bar to a subsequent suit against the same company, founded upon tort, for unreasonable delay in delivering goods which it had received for transportation from a connecting road, although the goods were the same as those involved in the former action. *Johnson v. East Tenn., V. & G. R. Co.*, 55 Am. & Eng. R. Cas. 446, 90 Ga. 810, 17 S. E. Rep. 121.

31. — of judgments on demurrer.—A judgment on demurrer, where the merits are involved, in a suit on coupons of

bonds issued in aid of a railroad, is a bar to a subsequent suit between the same parties, and involving the same subject matter. *Aurora v. West*, 7 Wall. (U. S.) 82.—DISTINGUISHED IN *Philadelphia v. Ridge Ave. R. Co.*, 142 Pa. St. 484.—*Bissell v. Spring Valley Tp.*, 124 U. S. 225, 8 Sup. Ct. Rep. 495.

In an action to quiet title to land, an order overruling a demurrer to the complaint was affirmed by this court, it being held that the defendant's title was void. After the commencement of that action the defendant railroad company brought a suit against the plaintiff in a federal court to quiet the title to other parcels of land held by it by the same title. The adjudication of this court was not pleaded in the latter suit, and the federal court adjudged the title of the railroad company to be valid. The company then asked leave to file in the first-mentioned action, which had been remanded to the circuit court for trial, an amended answer setting up the judgment of the federal court as a bar by way of estoppel, on the ground that the question of the validity of its title had been adjudged in its favor by a competent court in an action between the same parties. *Held*, that leave to plead such judgment was properly denied, the question being *res judicata* by the decision of this court. *Ellis v. Northern Pac. R. Co.*, 80 Wis. 459, 50 N. W. Rep. 397; former appeal 77 Wis. 114, 45 N. W. Rep. 811.

3. Collateral Impeachment.

32. General rule forbidding it.—

A judgment cannot be collaterally impeached by a party on the mere ground that it is erroneous. *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 308, 15 N. E. Rep. 451, 12 West. Rep. 910.

A judgment of condemnation rendered by a competent court, where all the facts necessary to the exercise of its jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. *Secombe v. Milwaukee & St. P. R. Co.*, 23 Wall. (U. S.) 108, 11 Am. Ry. Rep. 355.—QUOTED IN *Sedalia v. Missouri, K. & T. R. Co.*, 17 Mo. App. 105. REVIEWED IN *Winona & St. P. R. Co. v. Deuel County*, 7 Am. & Eng. R. Cas. 348, 3 Dak. 1.

If in proceedings to foreclose a mortgage upon railroad property the foreclosure

judgment determines that certain stocks and bonds are subject to the mortgage and liable to be sold with the mortgaged premises, such judgment imports absolute verity, and neither the railroad company nor any of its general creditors can be heard to impeach it in a collateral proceeding. *Herring v. New York, L. E. & W. R. Co.*, 35 *Am. & Eng. R. Cas.* 54, 105 *N. Y.* 340, 19 *Abb. N. Cas.* 340, 12 *N. E. Rep.* 763, 7 *N. Y. S. R.* 547; *affirming* 34 *Hun* 634, *mem.*, 63 *How. Pr.* 497.—FOLLOWED IN *Clapp v. Clapp*, 4 *Silv. Sup. Ct.* 379.

33. Various applications of the rule.—A stockholder is a part of a corporation, and is deemed a party to a proceeding against it so far as to estop him from attacking a decree entered therein in a collateral proceeding. *Graham v. Boston, H. & E. R. Co.*, 25 *Am. & Eng. R. Cas.* 53, 118 *U. S.* 161, 6 *Sup. Ct. Rep.* 1009.

A default in a suit against an administrator, to enforce the liability of his intestate as a stockholder of a railway, under Ill. Act of 1849, admits all the facts properly pleaded, and it will be presumed they were sufficient to justify the judgment rendered, when called in question collaterally. *Cutright v. Stanford*, 81 *Ill.* 240.

An order by the board of county commissioners granting the prayer of a petition, under Ind. Rev. St. of 1876, asking for an appropriation in aid of a railway, is a decision or judgment as to all the material questions alleged and presented in the petition, including the due organization of the company and its right to receive aid; and such decision cannot be attacked collaterally in an action by a taxpayer to enjoin a collection of taxes levied to pay such appropriation. *Lawrence County Com'rs v. Hall*, 70 *Ind.* 469. *Shelby County Court v. Cumberland & O. R. Co.*, 8 *Bush (Ky.)* 209. *Louisville & N. R. Co. v. State*, 8 *Heisk. (Tenn.)* 663, 19 *Am. Ry. Rep.* 107.

34. When the rule does not apply.—The act of the county supervisors in levying a tax in aid of a railroad is purely ministerial, and not judicial, and the record thereof is not, like a judicial record, exempt from attack in a collateral proceeding. *Scott v. Union County*, 63 *Iowa* 583, 19 *N. W. Rep.* 667.

35. — cases of lack of jurisdiction.—Where a garnishment in another state is pleaded as a defense to an action on an account, it is competent for the plaintiff

to show that the foreign judgment on which the garnishment was based was void for want of jurisdiction, because of matters extrinsic to the record. *O'Rourke v. Chicago, M. & St. P. R. Co.*, 55 *Iowa* 332, 7 *N. W. Rep.* 582.

36. — fraud.—Where a proceeding is instituted against a mortgage trustee, and a decree is entered declaring the mortgage or trust deed and the bonds which it secures invalid, such decree cannot be attacked collaterally on the ground of fraud and collusion by a bondholder who is not made a party, after the property has been sold and passed to the hands of a purchaser for value without notice. *Beals v. Illinois, M. & T. R. Co.*, 27 *Fed. Rep.* 721.

III. LIEN; PRIORITY.

37. Lien.—A judgment against a railroad corporation becomes a lien upon its road and realty, in the same manner as upon the real estate of a natural person. *Ludlow v. Clinton Line R. Co.*, 1 *Flipp. (U. S.)* 25.—DISTINGUISHING *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.

The lien of a judgment for personal injuries against a railroad company is purely statutory, and the claim becomes a lien upon the road only when reduced to judgment. *White v. Keokuk & D. M. R. Co.*, 52 *Iowa* 97, 2 *N. W. Rep.* 1016.—FOLLOWING *Burlington, C. R. & N. R. Co. v. Verry*, 48 *Iowa* 458.

A judgment for damages for the failure of a railroad company to comply with a contract to construct a crossing in consideration of a grant of a right of way, is a lien on the portion of the road covered by the contract. *Davies v. St. Louis, K. C. & N. R. Co.*, 56 *Iowa* 192, 9 *N. W. Rep.* 117.—FOLLOWING *Varner v. St. Louis & C. R. Co.*, 55 *Iowa* 677.

A statute making a judgment in tort against a railway company a lien on its property in the county where recovered, and making such lien superior to the lien of any mortgage or trust deed executed since July 4, 1862, is constitutional. *Central Trust Co. v. Sloan*, 23 *Am. & Eng. R. Cas.* 398, 65 *Iowa* 655, 22 *N. W. Rep.* 916.—FOLLOWING *Bucklew v. Central Iowa R. Co.*, 64 *Iowa* 603.

Where plaintiff obtained judgment against the defendant company for breach of an agreement, contained in a right of way deed, to fence and build crossings

along and over titled to a lien of the company a lien for a pass, nor for negligence whereby the *Hull v. Chicago, Eng. R. Cas.* *Rep.* 940.

In Wisconsin on real estate of railroads and judgment becomes the time it is under passes the interest of the owner of the rendition.

Waukegan & M. S. 750.—*Ch. New Jersey S.* 311. REVIEW *v. Vermont C.*

Pending the mortgage plaintiff against the receiver to recover for between the defendant and the executor thereon. After and answered was executed, settlement and a judgment against the receiver was entered in the hands of the receiver *v. Keokuk & D. W. Rep.* 1016.—*R. & N. R. Co. VIEWING Ohio Ind.* 553.

38. Priority railroad company for the company a receiver is to be the road, and the priority of payment the road in the out of the company sold. *Central & G. R. Co.*, 30 *Fed. Rep.* 895.

Under Iowa judgment against a personal injuries and damages on the road enforce the lien

along and over the right of way, he was entitled to a lien therefor upon the property of the company; but he was not entitled to a lien for a judgment on account of trespass, nor for a judgment on account of negligence in constructing the road, whereby the premises were overflowed. *Hull v. Chicago, B. & P. R. Co.*, 20 Am. & Eng. R. Cas. 341, 65 Iowa 713, 22 N. W. Rep. 940.

In Wisconsin, where judgments are liens on real estate, and where the rolling stock of railroads are made fixtures by statute, a judgment becomes a lien on the road from the time it is rendered, and a sale thereunder passes to the purchaser the entire interest of the company existing at the time of the rendition of the judgment. *Milwaukee & M. R. Co. v. James*, 6 Wall. (U. S.) 750. — CRITICISED in *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311. REVIEWED in *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 Vt. 500.

Pending the foreclosure of a railway mortgage plaintiff commenced an action against the receiver in charge of the road to recover for personal injuries sustained between the date of the foreclosure sale and the execution of the sheriff's deed thereon. After the receiver had appeared and answered the action, a sheriff's deed was executed, and the receiver made final settlement and was discharged. *Held*, that a judgment subsequently rendered against the receiver was not a lien upon the property in the hands of the purchaser. *White v. Keokuk & D. M. R. Co.*, 52 Iowa 97, 2 N. W. Rep. 1016. — FOLLOWING *Burlington C. R. & N. R. Co. v. Verry*, 48 Iowa 458. REVIEWING *Ohio & M. R. Co. v. Davis*, 23 Ind. 553.

38. Priority.—A judgment against a railroad company for personal injuries before the company went into the hands of a receiver is but a general claim against the road, and the holder is not entitled to priority of payment out of the earnings of the road in the hands of the receiver, nor out of the corpus of the property when it is sold. *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 30 Am. & Eng. R. Cas. 450, 30 Fed. Rep. 895.

Under Iowa Code, § 1309, making a judgment against a railroad company for personal injuries a superior lien to any mortgages on the road, the costs of the suit to enforce the lien are entitled to like priority.

Central Trust Co. v. Central Iowa R. Co., 38 Fed. Rep. 889.

A railway company took title to its property under a decree and order of the circuit court of the United States which bound it to pay defendant's claim. Afterwards, but before defendant had put his claim into judgment against the company, it mortgaged its property to the plaintiff trust company. *Held*, that the trust company knew, or was bound to know, that the title of the railway company was based on the decree and order, and that its mortgage was inferior as a lien to defendant's judgment. *Central Trust Co. v. Sloan*, 23 Am. & Eng. R. Cas. 398, 65 Iowa 653, 22 N. W. Rep. 916.

In view of statutory provisions contained in articles 4930 and 4912, Pasch. Tex. Dig., railroads are not "real estate." *Held*, therefore, that judgments, whether recorded or not, operated no lien on the road of the Southern Pacific R. Co., against which they were rendered; and that the execution first levied was entitled to the proceeds resulting from the sale of the road. *Scogin v. Perry*, 32 Tex. 21.

IV. SATISFACTION AND DISCHARGE.

39. What amounts to satisfaction.

—A decree requiring the defendant to deliver up all the plaintiff's bonds which he held and owned is not complied with if he does not disclose bonds of that character which he purchased while the suit was pending, and which he might have disclosed. *Ashuelot R. Co. v. Cheshire R. Co.*, 60 N. H. 356.

40. Reinstatement of satisfied judgments.—A judgment creditor whose lien is subsequent to that of a trust deed, after the sale of a railroad in foreclosure of the trust, in which he became the purchaser, marked his judgments "satisfied" in order to clear the title of the property, although receiving no consideration for so marking them. Afterwards the validity of the sale at which he purchased was assailed by suit, and the sale decreed to have been invalid for causes not implicating the purchaser. On a bill brought by the judgment creditor to set up his judgments and to annul his cancellation of them—*held*, that the judgments must be set up and constitute liens as they did before they were marked satisfied. *Hay v. Washington & A. R. Co.*, 4 Hughes (U. S.) 327.

41. Recovery over by joint tortfeasor after satisfaction.—Two railway companies discharged a judgment against themselves for injuries to a common employé. One seeking indemnity from the other would be compelled to show that the injury was caused by the exclusive negligence of the defendant sued for such indemnity. *Gulf, C. & S. F. R. Co. v. Galveston, H. & S. A. R. Co.*, 52 Am. & Eng. R. Cas. 99, 83 Tex. 509, 18 S. W. Rep. 956.

Complainants entered into a contract with the defendant railroad companies to build the stone piers for a bridge over the Cumberland river, and, in doing the work, stretched a rope across the river by which the chimneys of a steamboat were knocked down, and for the damages occasioned by which the boat owners recovered a joint judgment against complainants and said defendants. The L. & N. R. Co. paid the judgment, causing the same to be assigned to its president in his individual name and execution to be issued thereon, which was levied on complainants' property. Upon bill filed by the latter to enjoin the execution as extinguished, and by the company to recover the amount of the judgment—*held*: (1) That equity would not, under the circumstances, deprive the company of any legal advantage acquired by the assignment of the judgment; (2) the company is entitled, on the cross-bill, to recover from the complainants any money paid by it in satisfaction of the judgment, and this though one of the complainants was, by clerical misprision, not named in the judgment. *Maxwell v. Louisville & N. R. Co.*, 1 Tenn. Ch. 8.—**QUOTING** *Horne v. Memphis & O. R. Co.*, 1 Coldw. (Tenn.) 76.

V. ARRESTING, AMENDING, OPENING, AND VACATING.

42. Arresting.—Where a verdict is found for an entire amount of damages upon a petition containing several counts, if any of the counts be defective the judgment will be arrested. *Clark v. Hannibal & St. J. R. Co.*, 36 Mo. 202.

Where the same count contains different demands for some of which recovery may be had and others not, it will be presumed on a motion in arrest of judgment that the jury were not allowed to consider those demands for which no recovery could be had. *Bunyea v. Metropolitan R. Co.*, 8 Mackey

(D. C.) 76.—**APPROVING** *Northern C. R. Co. v. Mills*, 61 Md. 355.

The lower court has no power to suspend the operation of an injunction order restraining defendant from doing certain acts, pending an appeal. *Genet v. Delaware & H. Canal Co.*, 21 N. Y. S. R. 455, 4 N. Y. Supp. 633, 24 J. & S. 290.

A motion which, in terms, asks an arrest of judgment, on the ground that there is nothing in the verdict which shows that it was rendered against any party to the suit, is, in legal effect, a motion to set aside the verdict; and the action of the court below, on such a motion, which pronounces the judgment "arrested" leaves the case standing in court as if it had never been tried; such action of the court is not a final judgment from which an appeal can be taken. *Morehead v. International R. Co.*, 46 Tex. 178, 13 Am. Ry. Rep. 314.

43. Amending or modifying.—A judgment against a railroad company cannot be corrected *nunc pro tunc* by striking out the name by which it was sued and served with process, and inserting another corporate name. *Brown v. Terre Haute & I. R. Co.*, 72 Mo. 567.

Where a suit against an elevated railway company is to obtain equitable relief and damages, a decree awarding an injunction, with a provision that it may be avoided by paying to plaintiff certain damages and costs within a fixed time, may be amended, on motion of the company, by providing that such damages and costs may be paid into court, where it appears that, after diligent search, plaintiff cannot be found. *Rauth v. New York El. R. Co.*, 23 N. Y. Supp. 750.

A decree directing the sale of a railroad provided that enough money should be paid to discharge certain judgments, taxes, and other claims, if they should be allowed. By an amendment to the decree made at a subsequent term it was provided that the property should be sold subject to the judgments, taxes, and other claims. *Held*, that it was within the power of the court so to amend the decree. *Turner v. Indianapolis, B. & W. R. Co.*, 8 Biss. (U. S.) 380.

Plaintiff filed a bill to have a receiver for a railroad appointed, and to have a certain claim declared a lien prior to certain mortgages on the road. After the receiver had been appointed and taken charge of the property the court declared plaintiff's claim

a lien, but mortgages. Plaintiff appealed and appealed a subsequent decree by which the mortgage was turned over to the mortgagee. The session upon the appeal was secured. Plaintiff attempted to move for a new term after a vacation. *Morgan's L. R. Co.*, 32 F.

Plaintiff's defendant; the trial judge for the ship (omitted one bale). The After appeal plaintiff objected to amending the value of the refused to receive in the appeal entered was company. For the amended junction was and on hearing error that the not of that claim after the term it was a judgment corrected only by appeal. The explanatory in the motion judgment after can only be heard. The bill for the part of the road could be made. *Haynes*, 82 T.

44. Opening.—A railroad corporation served with a default judgment, the action, the reasonable time, deceived by within the summons and judgment upon motion to bring an in-

a lien, but made it subordinate to the mortgages. Plaintiff gave a supersedeas bond and appealed from the whole decree, and at a subsequent term the court modified the decree by directing the property to be turned over, pending the appeal, to the mortgage trustee under a provision of the mortgage that the trustee might take possession upon default of payment of the debt secured. *Held*, that it was error thus to attempt to modify the decree at a subsequent term after an appeal had been perfected. *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 32 Fed. Rep. 525.

Plaintiff's cotton was burned in cars of defendant; there were several bills of lading for the shipment; judgment for plaintiff. The trial judge, in making up the amount, omitted one of the bills of lading (for six bales). The railroad company appealed. After appeal and at the next term of court plaintiff obtained an order on motion amending the judgment and adding the value of the six bales. The supreme court refused to recognize the amended judgment in the appeal. The judgment as originally entered was affirmed, and paid by the company. Plaintiff obtained execution on the amended judgment for six bales. Injunction was applied for by the company, and on hearing dissolved. *Held*, on writ of error that the oversight of the court was not of that character that could be corrected after the term by motion under the statute; it was a judicial mistake, and could be corrected only by motion for new trial or appeal. The recollection of the trial judge explanatory of the order was not available in the motion to amend. Correction of a judgment after the term, under the statute, can only be by what appears in the record. The bill of lading attached to the petition for the six bales omitted was not a part of the record from which amendment could be made. *Missouri Pac. R. Co. v. Haynes*, 82 Tex. 448, 18 S. W. Rep. 605.

44. Opening.—Where a nonresident railroad corporation has not been personally served with summons within the state, and a default judgment has been entered in the action, the court has power, within a reasonable time, when it finds that it has been deceived by a false return of such service within the state, to quash the service of summons and open the default and judgment upon motion; and it is not necessary to bring an independent action to set aside

the judgment. Any fact going to show the invalidity of the judgment can be presented at the hearing of the motion. *Norton v. Alchison, T. & S. F. R. Co.*, 97 Cal. 388, 30 Pac. Rep. 585, 32 Pac. Rep. 452.

A judgment note was given for money fraudulently abstracted from the treasury of the West Phila. Pass. R. Co. On an application to open the judgment and allow defendants a credit thereon, evidence of payment to officers of the company, who were confederates of the defendants who stole the money, is not proof of payment to the company, and no credit can be claimed for such payments. *West Phila. R. Co. v. Nagle*, 12 Phila. (Pa.) 228.

A referee having reported a schedule of coupons proved before him, and the report in this particular having been confirmed, without exception, on circuit, and then on appeal, it is too late afterwards to raise the point on circuit that certain coupons included in such report had been before that time paid by the debtor corporation—that matter being necessarily involved in the proof of the coupons. The rule is not varied where other issues involved in the litigation are still undecided. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

The application for a recommittal cannot be sustained under the act to vacate erroneous judgments, because not made within two years; nor under section 197 of the code; nor as for a new trial on after-discovered evidence, for the reason that the remittitur of the supreme court had been issued. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

An action was commenced to recover damages for the erection of an elevated railway, and the defendants duly appeared and demanded a copy of the complaint; and the plaintiffs were given two years and a half within which to prepare and serve a complaint. At the end of such time plaintiffs were still in default, and no attempt was made to have the default opened for more than five years longer, when they appeared and moved to open the default on account of the sickness and death of their attorney, alleging that they did not know for several years that a complaint had not been filed. *Held*, that it was error to open the default simply upon the payment of \$10 costs. It should have been allowed only upon a waiver of all claim for damages back of six years from the time it was allowed,

and in addition the payment of the costs of the action and motion. *Ridley v. Manhattan R. Co.*, 25 N. Y. Supp. 380, 72 Hun 164, 55 N. Y. S. R. 473.

An action was commenced against a railroad company for the loss of freights, and the citation was served on the company's local agent, who, by mistake, forwarded it to the company's general freight agent instead of to the vice-president, as he should have done, and by reason of the delay the company was defaulted. *Held*, that the default should be set aside upon the company showing that it had a meritorious defense. *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 59, 55 Tex. 323, 40 Am. Rep. 808.

45. Vacating.—An affidavit filed by a receiver of a railway company to vacate a judgment in ejectment against the company, in which no one appeared for the company at the trial, and which alleges, on information and belief, that plaintiff, by a written agreement, in consideration of the promise of the company to pay him a certain sum, sold the land to the company, and that he has reasonable hopes of obtaining the agreement or proving its contents, but which fails to show that the consideration had been paid, is fatally defective in not positively showing the existence of such agreement, and in not showing payment. *Springfield & N. W. R. Co. v. Ro's*, 88 Ill. 179, 21 Am. Ry. Rep. 295.

A judgment must be for the same cause of action as that declared on. So where a party sues a railroad company to recover for the value of a slave which it was carrying by direction of the owner, and which it is charged with having tortiously lost, a judgment based upon the liability of the carrier under a contract cannot be sustained. *Harris v. Hannibal & St. J. R. Co.*, 37 Mo. 307.

The provision of N. Y. Code Civ. Pro. § 1207 that, "where there is no answer, the judgment shall not be more favorable to the plaintiff than that demanded in the complaint" is intended for the protection of defendants who suffer defaults, and cannot be invoked by one who was not a defendant or interested in the defense. So where an action is brought by a trustee to foreclose a railroad mortgage for the benefit of bondholders, and the amount of outstanding bonds is stated at less than the amount found by the referee, such provision of the

statute is not available to a bondholder who moves to set aside a judgment entered on the report of the referee. *Peck v. New York & N. J. R. Co.*, 7 Am. & Eng. R. Cas. 422, 85 N. Y. 246; *dismissing appeal from 22 Hun 129, mem.*, 59 How. Pr. 419.

A city was made a party to a proceeding to foreclose a railroad mortgage on the supposition that the city had some claim on the property; but the city failed to appear and file an answer. *Held*, that a judgment which assumed to adjudicate certain rights between the city and the company, and reciting that the latter had a right to appropriate parts of certain streets and parks, is properly stricken out, where the complaint contains no allegations as to such matters. *Vandenburgh v. New York City C. U. R. Co.*, 25 J. & S. 285, 28 N. Y. S. R. 578, 5 N. Y. Supp. 664.

A nonresident corporation was sued in a New York court and service was had upon a director, being the only officer of the company found in the state, and judgment was taken against the company. About a year afterward certain directors of the company learned of the judgment, but made no motion to set it aside until some two years thereafter. In the meantime suit had been brought on the judgment in another state, and the company answered, admitting the beginning of the suit in New York, but pleaded payment, but judgment was taken against the company. *Held*, that it was too late to make a motion to set aside the first judgment on the ground that the court did not have jurisdiction. *McElroy v. Continental R. Co.*, 25 N. Y. S. R. 834, 53 Hun 636, *mem.*, 3 Silv. Sup. Ct. 327, 6 N. Y. Supp. 306.

In such case an objection that the service on the director in the first suit was not valid because the company had no property in the state, and that the cause of action presumably arose out of the state, cannot be sustained where it appears that the action was based on a contract which was entered into in the state, without any proof to show that the service rendered and sued for was rendered out of the state. *McElroy v. Continental R. Co.*, 25 N. Y. S. R. 834, 53 Hun 636, *mem.*, 3 Silv. Sup. Ct. 327, 6 N. Y. Supp. 306.

A lot owner sued a railroad company for damages for constructing its track so as to throw the surface water against the lot with a greater force than it had formerly run.

The evidence washing the a damage of Plaintiff adm in a ditch in was construc ground as to but it had be road was co were made. deder in favor nothing to sh fore the cons included in t reason that aside. *Texas 17 S. W. Rep.*

VI. ENFORC

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A judgment recovered aga failing to con the railway en ment creditor, recovered the gation, and als and to pay the within thirty judgment cred so agreed on i ment and costs which the cattl and the payme portant elemen as the company conditions, the liberty to enfor ment of the *Louis & S. F. 359, 16 Pac. Re*

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The evidence showed a damage of \$300 by washing the lot and the fence thereon, and a damage of \$100 to growing trees thereon. Plaintiff admitted that the water had run in a ditch in the same place before the track was constructed and had so washed the ground as to cause the fence to fall down, but it had been repaired, but after the railroad was constructed no further repairs were made. Judgment of \$300 was rendered in favor of the plaintiff. There was nothing to show that the damage done before the construction of the road was not included in the judgment. *Held*, for that reason that the judgment should be set aside. *Texas & P. R. Co. v. Dunn*, (Tex.) 17 S. W. Rep. 822.

VI. ENFORCEMENT; ACTIONS ON JUDGMENTS.

46. Enforcement by execution.—

A personal judgment against a railway company must be enforced against the entire railroad by a sale thereof, and not by a sale of an isolated part. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 Am. & Eng. R. Cas. 271, 127 Ind. 250, 26 N. E. Rep. 784.

A judgment for damages and costs was recovered against a railway company for failing to construct a cattle-guard where the railway enters the premises of the judgment creditor, and when the judgment was recovered the company agreed to end litigation, and also to put in the cattle-guard, and to pay the judgment less a stated sum within thirty days; in which event the judgment creditor was to accept the sum so agreed on in full payment of the judgment and costs. *Held*, that the time within which the cattle-guard was to be constructed and the payment to be made were the important elements of the agreement, and that, as the company failed to comply with these conditions, the judgment creditor was at liberty to enforce by execution the full payment of the judgment as rendered. *St. Louis & S. F. R. Co. v. Rierson*, 38 Kan. 359, 16 Pac. Rep. 443.

A corporation purchased land *ultra vires*, mortgaged all its property, franchises, etc., in trust to secure bonds; a judgment was afterwards recovered; all the property, etc., of the corporation was afterwards sold by the trustee under a decree in equity, and afterwards the land was sold under the judgment. *Held*, that the purchasers under

the judgment took no title. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

47. Actions on judgments, generally.—A shipper who assigns a bill of lading whereby he agrees to deliver certain goods, and for a failure to fulfil his agreement, owing to the default of the carrier, has a judgment rendered against him, cannot maintain an action on such judgment against the carrier, although the carrier was notified of the pendency of the action in which the judgment was rendered, and requested to defend, for the reason that the carrier could not, had it been a party to the action, have set up the defenses available as against the shipper. *Garrison v. Babbage Transp. Co.*, 32 Am. & Eng. R. Cas. 525, 94 Mo. 130, 6 S. W. Rep. 701.

48. Bill to enforce lien.—Where two judgments are obtained against a railroad company, and the assignee of the older judgment files a bill against another company, who has come into possession of the road, to enforce the lien of his judgment, the holder of the junior judgment is not a necessary party, though he has filed and recorded a sheriff's deed for the property made in pursuance of an execution sale under his judgment. *Howard v. Milwaukee & St. P. R. Co.*, 101 U. S. 837.

In such a case the holder of the older judgment cannot maintain ejectment against the purchasers of the road in pursuance of a decree directing its sale to satisfy the senior judgment. *Howard v. Milwaukee & St. P. R. Co.*, 101 U. S. 837.

The purchasers of a railroad at a foreclosure sale filed a bill in a U. S. circuit court to set aside a judgment and a lease of the road, on the ground that the judgment was confessed by the company before the sale to hinder and delay creditors, and that the lease was but to secure the judgment. Another company filed a cross-bill setting up that it had become the owner of the judgment and lease, and asked that the road be sold to satisfy them. The court, among other things, dismissed the cross-bill on the ground that the complainants in both the original and cross bill were residents of the same state. The alleged fraudulent judgment was confessed in the same court. *Held*, that it was error to dismiss the cross-bill. It being filed to enforce the judgment, it must be in the same court. *Milwaukee & M. R. Co. v. Chamberlain*, 6 Wall. (U. S.) 748.

49. Decree directing judicial sale.

—A decree directing a judicial sale of the franchises, etc., of a railroad company provided: "Any purchaser * * * shall take * * * subject to all unpaid purchase money for any of the lands or rights of way herein referred to, as well as also all unpaid claims of landowners for damages for property taken, injured, or destroyed in the construction of the railroad." *Held*, that a judgment against the company whose franchises were thus sold, recovered before the sale, in trespass for entering upon plaintiff's land and constructing its road, cannot be recovered in assumpsit against the company purchasing under said decree, especially when, after the judgment and before the sale, the plaintiff had granted a right of way to the old company. *Campbell v. Pittsburgh & W. R. Co.*, 46 Am. & Eng. R. Cas. 353, 137 Pa. St. 574, 20 Atl. Rep. 949.—**DISTINGUISHING** *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290; *Buffalo, N. Y. & P. R. Co. v. Harvey*, 107 Pa. St. 319.

50. Enjoining enforcement.—Where a judgment is recovered against a mortgaged railroad in a state court, for obligations incurred by the company in operating the road, a federal court will not enjoin a levy of execution upon, and the sale of a portion of, the mortgaged property, on the application of mortgage creditors; but will allow the sale to be made subject to the mortgage. *Eells v. Johann*, 27 Fed. Rep. 327.

A railway company recovered a judgment on a subscription for eight of its bonds, secured by mortgage on forty shares of stock, the company having, before judgment, disposed of all its bonds, so that it was out of its power to deliver the same on payment of the judgment. The company was insolvent. *Held*, that the subscriber had the right to have the market value of the bonds at the time the company put it out of its power to deliver them credited upon the judgment, and if that sum, with other payments or credits, exceeded the judgment, to have its further collection perpetually enjoined. *Galena & S. W. R. Co. v. Ennor*, 123 Ill. 505, 14 N. E. Rep. 673, 12 West. Rep. 761.

JUDGMENT CREDITORS.

Priority of, on distribution in foreclosure, see MORTGAGES, 277, 278.

Relation of directors to, see DIRECTORS, ETC., 64.

When entitled to land damages, see EMINENT DOMAIN, 443.

JUDICIAL NOTICE.

Generally, see EVIDENCE, 98-115.

In actions for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, 474.

—stock-killing cases, see ANIMALS, INJURIES TO, 407.

JUDICIAL SALE.

Enforcement of judgment by decree directing, see also JUDGMENT, 49.

Exemption from taxation, when passes to purchaser at, see TAXATION, 156.

Redemption by purchaser at, see MORTGAGES, 313.

1. When proper—Time of sale.

Where the proceeding is to sell an insolvent railroad, and the rights of the several classes of creditors have been determined, and the condition of the road demands an early sale, it will not be postponed until the interests of the different individual creditors have been determined, and the classes to which their claims belong have been ascertained. *Hand v. Savannah & C. R. Co.*, 12 Am. & Eng. R. Cas. 488, 13 So. Car. 467.

2. What may be sold.—Where the right of the public to maintain the continuity of a public highway (as well as the rights of other parties interested) precludes the right to sell a section of a railroad, a necessity arises to decree the sale of the whole road, in order that equity may be done. *Dayton, X. & B. R. Co. v. Lewton*, 20 Ohio St. 401.

3. Conduct of the sale.—Where an officer, who conducts a public sale, pursuant to an order of the chancellor in the intelligent and *bona fide* exercise of his discretion, refuses an adjournment, his action will not constitute a reason why the sale shall not be confirmed. *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.*, 49 N. J. Eq. 356, 23 Atl. Rep. 1077.

4. Rights of bidders as such.—A bidder at a railway sale will not be deprived of the advantage of his bid because other persons offered to bid, upon a resale, twenty-one per cent. more for the property. *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.*, 49 N. J. Eq. 356, 23 Atl. Rep. 1077.—

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REVIEWING Delaware, L. & W. R. Co. v. Scranton, 34 N. J. Eq. 429.

Upon the sale of a railroad, it is customary and reasonable to require cash sufficient to pay costs and other claims demanding immediate payment. But the officer conducting the sale should not be authorized to exact a cash advance previous to the close of the biddings. *Hand v. Savannah & C. R. Co.*, 12 Am. & Eng. R. Cas. 488, 13 So. Car. 467.

5. Impeaching validity of sale.—A proceeding to homologate a sheriff's sale of a railroad, under the laws of Louisiana, is not conclusive of the question whether the purchasers obtained title by fraud, and only held as trustees *mala fide* for others, when such question is raised by a proceeding in equity to set aside such sale. *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, 6 Am. Ry. Rep. 457.

Mere inadequacy in the price bid at a fairly and regularly conducted judicial sale will not justify refusal to confirm the sale. *Bethlehem Iron Co. v. Philadelphia & S. S. R. Co.*, 49 N. J. Eq. 356, 23 Atl. Rep. 1077.

6. Rights of purchasers.—Purchasers of a railroad at a judicial sale have a right to be heard on matters concerning the confirmation or setting aside the sale, and may appeal from an order touching such matters. *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. (U. S.) 655.—FOLLOWED IN *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

Pending such appeal the trial court may make such orders as are necessary to preserve the property, and order the payment of cost of running, but further than this the property and revenues should be held until a final decree. *Bronson v. La Crosse & M. R. Co.*, 1 Wall. (U. S.) 405.

And equity will not permit a new company, organized by such purchasers, to take a better title than the purchasers had. *Jackson v. Ludeling*, 21 Wall. (U. S.) 616, 6 Am. Ry. Rep. 457.

JUNCTION.

Of two railroads, location of station at, see STATIONS AND DEPOTS, 22.

See CROSSING OF RAILWAYS.

JURISDICTION.

Averment of facts showing, see EMINENT DOMAIN, 312.

Conflict of, as to appointment of receivers, see RECEIVERS, 4.

Demurrer for lack of, see PLEADING, 65.

Denying injunction for want of, see EMINENT DOMAIN, 1039.

Effect of appearance to confer, see APPEARANCE, 3; FOREIGN CORPORATIONS, 16.

— want of leave to sue receiver upon, see RECEIVERS, 125.

Impeaching judgment for lack of, see JUDGMENT, 35.

In attachment, see ATTACHMENT, ETC., 1-5.

— bankruptcy, see BANKRUPTCY, 2.

— condemnation proceedings, petition when sufficient to confer, see EMINENT DOMAIN, 329, 330.

— insolvency, see INSOLVENCY, 1.

— quo warranto, see QUO WARRANTO, 2.

Judgment of no force in absence of, see JUDGMENT, 12.

Judicial notice of matters affecting, see EVIDENCE, 107.

Luring defendant within, in order to serve process, see PROCESS, 21.

Objection to, how to be taken, see APPEAL AND ERROR, 90; EMINENT DOMAIN, 910.

Of actions against carriers, see CARRIAGE OF LIVE STOCK, 134; CARRIAGE OF MERCHANDISE, 693; EXPRESS COMPANIES, 80.

— — — receivers, see RECEIVERS, 131.

— at law, by abutters, for injury sustained by railway in street, see STREETS AND HIGHWAYS, 234.

— by and against foreign corporations, see FOREIGN CORPORATIONS, 15, 16.

— for causing death, see DEATH BY WRONGFUL ACT, 105-124.

— — — damages caused by fires, see FIRES, 136.

— — — infringement of patents, see PATENTS FOR INVENTIONS, 14.

— — — killing or injuring stock, see ANIMALS, INJURIES TO, 289-296.

— — — loss of baggage, see BAGGAGE, 104.

— — — — goods carried, see CARRIAGE OF MERCHANDISE, 124.

— — — specific performance, see SPECIFIC PERFORMANCE, 21.

— — — taxes, see TAXATION, 311.

— — on corporate bonds, see BONDS, 51.

— — — coupons, see COUPONS, 15.

— — — fire policies, see FIRE INSURANCE, 16.

— — to cancel railway aid bonds, see MUNICIPAL AND LOCAL AID, 399.

— — — enforce penalties, see PENALTIES, 9.

— — — — stockholders' liability to creditors, see STOCKHOLDERS, 56.

— — — — subscriptions to stock, see SUBSCRIPTIONS TO STOCK, 80.

- Of actions to enjoin unlawful taxation, see TAXATION, 345, 346.
- — — foreclose mortgages and deeds of trust, see DEEDS OF TRUST, 15; MORTGAGES, 168-174.
 - — — redeem from mortgages, see MORTGAGES, 310.
 - arbitrators, see ARBITRATION AND AWARD, 8.
 - commissioners, to investigate complaints of unjust preference, see RAILWAY COMMISSIONERS, 12.
 - — — under working agreements, see LEASES, ETC., 137, 138.
 - condemnation proceedings, see EMINENT DOMAIN, 238-252.
 - county judge, in municipal aid matters, see MUNICIPAL AND LOCAL AID, 71.
 - courts, effect of submission to arbitration upon, see ARBITRATION AND AWARD, 4; CONSTRUCTION OF RAILWAYS, 67.
 - criminal prosecutions, see CRIMINAL LAW, 4.
 - equity, what is within, see EQUITY, 1-25.
 - federal courts, see FEDERAL COURTS, 1-13; INTERSTATE COMMERCE, 156, 157; MUNICIPAL AND LOCAL AID, 387; PLEADING, 11.
 - justices' courts, see ANIMALS, INJURIES TO, 606-609; JUSTICE OF THE PEACE, 1-10.
 - proceedings by creditors' bill, see CREDITORS' BILL, 4.
 - — — for violation of injunction, see INJUNCTION, 58.
 - — — to condemn right to cross railroad, see CROSSING OF RAILROADS, 25.
 - — — enforce laborer's lien, see LIENS, 56.
 - — — foreclose mechanic's lien, see LIENS, 38.
 - state courts, under interstate commerce law, see INTERSTATE COMMERCE, 158.
 - U. S. supreme court, see FEDERAL COURTS, 17-25.
- On appeal, and how exercised, see APPEAL AND ERROR, 29-128; EMINENT DOMAIN, 802-929.
- from justice, as dependent upon amount, see JUSTICE OF THE PEACE, 12.
 - or error in foreclosure suits, see MORTGAGES, 296.
 - certiorari, see CERTIORARI, 7.
 - error, as dependent on amount, see EMINENT DOMAIN, 964.
- Over ferry-boats, see ADMIRALTY, 1.
- Presumption that common law is enforced in foreign, see EVIDENCE, 132.
- Service of process out of, see PROCESS, 43.
- To call an election, see MUNICIPAL AND LOCAL AID, 99.

- To compel issuance and delivery of railway aid bonds, see MUNICIPAL AND LOCAL AID, 285.
- enforce assessments for local improvements, see STREET RAILWAYS, 297.
 - enjoin nuisances, see NUISANCE, 18-22.
 - grant writs of mandamus, see MANDAMUS, 25.
 - hear applications for new trials, see NEW TRIAL, 98.
 - remove receivers, see RECEIVERS, 166.
 - take receiver's account, see RECEIVERS, 147.

1. Generally.—A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy; but jurisdiction does not become complete until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant. *Waldron v. Chicago & N. W. R. Co.*, 1 *Dak. (Bennett)* 336, 46 *N. W. Rep.* 456.

2. Cannot be conferred by consent.—Consent cannot give courts jurisdiction, but where a suit was begun in a U. S. circuit court to foreclose a railroad mortgage, and all the original parties were citizens of the same state, which would deprive the court of jurisdiction, but no advantage was taken of it, and other parties came in and were made defendants, so that at the time a decree of foreclosure was entered it was "a controversy between citizens of different states," as required by the act of 1875—*held*, that the court had jurisdiction at the time the decree was entered, which was sufficient. *Pacific R. Co. v. Ketchum*, 101 *U. S.* 289.—FOLLOWED IN *Barry v. Missouri, K. & T. R. Co.*, 29 *Am. & Eng. R. Cas.* 384, 27 *Fed. Rep.* 1.

Where the court has not otherwise jurisdiction, the appearance of the defendant corporation and filing an answer on the merits will not give the court jurisdiction, as that would be equivalent to conferring jurisdiction by consent, which cannot be done. *St. Louis R. Co. v. Pacific R. Co.*, 52 *Fed. Rep.* 770.

3. Once obtained will be retained.—The court which first obtains jurisdiction of a controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled; but it is not essential that the court first acquiring jurisdiction of the controversy should also first take possession of the *res*. *Gaylord v. Ft. Wayne, M. & C. R. Co.*, 6 *Biss. (U. S.)* 286.

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There is a manifest propriety, if not necessity, for holding that the court which first acquires jurisdiction over a controversy should maintain it undisturbed by the interference of any other co-ordinate jurisdiction. *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 16 S. W. Rep. 647.

When the jurisdiction of a state court has once attached to a suit, no subsequent change in the condition or residence of a party can oust it without express provision to that effect. Hence the court refused an application to remove into a federal court a suit brought by a citizen of this and a citizen of another state against defendants, some of whom were citizens of this, and some citizens of another, state, made on the ground of the death of the nonresident complainant. *Upton v. New Jersey Southern R. Co.*, 25 N. J. Eq. 372.

4. As dependent upon the residence of the parties.—The Alabama Great Southern R. Co. being a domestic corporation, an action may be maintained against it in Alabama to recover damages for injuries to cattle transported over its road under a contract made in Alabama, although the injury occurred at Meridian, Mississippi, the terminus of its road. *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. Rep. 762.

Where the stock of a foreign railroad company is wrongfully transferred at a transfer office in New York, the courts of that state have jurisdiction of an action based upon the wrongful transfer, under N. Y. Code, § 1780, though the injured party is also a foreign corporation. *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 32 Hun (N. Y.) 190; affirmed in 96 N. Y. 668, mem.

A company having, by contract with other roads, a right of way over their tracks entering Cincinnati, and which has built for itself a side track leading to a depot owned and used by it for the reception of freight in that city, is warranted in locating one of its principal offices there, and is liable to process as a corporation situated in the city of Cincinnati, and subject to the jurisdiction of the Cincinnati superior court. *Athens Branch Bank v. Marietta & C. R. Co.*, 2 Disney (Ohio) 425.

A railroad corporation chartered by the United States has a legal existence everywhere within the United States; and hence has a legal existence in one of the states,

and may be sued in its courts wherever service can be had. *Eby v. Northern Pac. R. Co.*, 13 Phila. (Pa.) 144.—REVIEWING *Lehigh C. & N. Co. v. Lehigh Boom Co.*, 12 Phila. 540.

The defendant corporation exists and is operating its railroad under and by virtue of acts of the legislature of Vermont and Massachusetts respectively. Its railroad is located wholly within the two states, being partially in each. Therefore the courts of Vermont as well as the courts of Massachusetts have jurisdiction of this corporation. *Richardson v. Vermont & M. R. Co.*, 44 Vt. 613, 1 Am. Ry. Rep. 115.

Where a Texas railway corporation, doing business also in the Indian Territory, is guilty of negligence there, the rules of sound policy do not require that the courts of Texas should decline to entertain jurisdiction of a suit brought for damages of a personal character resulting from such negligence, especially where it is not clear that plaintiff is not also a citizen of Texas. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. Rep. 638.

The laws of the Indian Territory, wherein the defendant corporation received for transmission the telegraph message which it negligently failed there to deliver, do not give jurisdiction to any of its courts over suits for damages in such cases; but they do not declare such contracts illegal, or render such act of negligence lawful. Held, that the failure to provide a remedy there will not deprive the injured party of all right and remedy elsewhere for the violation of the contract, or for damages for personal injuries, recognized as such by universal law, resulting from such negligence; and the defendant being a Texas corporation, and the contract with which it identified itself by receiving the message having been entered into by its connecting line in Texas, the courts of this state will not withhold redress for its violation. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608, 21 S. W. Rep. 638.—QUOTING *Willis v. Missouri Pac. R. Co.*, 61 Tex. 433.

Where a person domiciled in Scotland has a cause of action which arose in England against an English railway company, and attaches debts belonging to such company for the purpose of having the question tried in Scotland, the Scotch courts have jurisdiction. *London & N. W. R. Co. v.*

Lindsay, 3 Macq. H. L. Cas. 99, 4 Jur. N. S. 343.

5. As dependent upon the place of business of the defendant.—The provision of N. Y. Act of 1862, § 23, that "no person who shall have a place of business in the city of New York shall be deemed to be a nonresident," includes corporations; and a corporation having such place of business in the city must be sued by what is known as "the long summons." *Jay v. Long Island R. Co., 2 Daly (N. Y.) 401.*

The city court of Brooklyn has no jurisdiction of an action against a corporation for negligence as a common carrier, where the cause of action arose and the business of the corporation was transacted and its offices located outside of the limits of the city. *Landers v. Staten Island R. Co., 53 N. Y. 450, 14 Abb. Pr. N. S. 346; reversing 13 Abb. Pr. N. S. 338.*—FOLLOWED IN *Wheelock v. Lee, 74 N. Y. 495.*

A railway company "dwells" within the meaning of 9 & 10 Vict. c. 95, s. 128, which gives concurrent jurisdiction to the superior courts where the plaintiff dwells more than twenty miles from the defendant at the place where it has its principal station, where the directors meet, the secretary resides, general meetings are held, and whence orders emanate. *Adams v. Great Western R. Co., 6 H. & N. 404, 9 W. R. 254, 3 L. T. 631.*

A railway company carries on business only at the place where the general management is carried on, and a station however important, so long as those under whose supervision it is are themselves under superior control, is not within section 60 of 9 & 10 Vict. c. 95. *Brown v. London & N. W. R. Co., 4 B. & S. 326, 10 Jur. N. S. 234. S. P., Shiels v. Great Northern R. Co., 7 Jur. N. S. 631, 30 L. J. Q. B. 331, 9 W. R. 739.*

A railway company whose principal station and business office is outside the city of London, although it has a station within the city, does not carry on business within the jurisdiction of the Lord Mayor's court within the meaning of section 12 of The Mayor's Court Extension Act 1857. *Le Tailleur v. South Eastern R. Co., L. R. 3 C. P. D. 18.*

A railway company does not carry on business at a booking office kept by an agent for the receipt and booking of packages for all railways. *Minor v. London &*

N. W. R. Co., 1 C. B. N. S. 325, 2 Jur. N. S. 1168, 26 L. J. C. P. 39.

A place where a railway company superintends and manages its business is the place where it carries on business within the meaning of section 12 of the Mayor's Court Procedure Act. This place is not necessarily at its chief office. *Rogers v. London, C. & D. R. Co., 26 W. R. 192.*

A railway company carries on its business at its principal station, and without leave of court cannot be sued in the district of one of its intermediate stations, although the cause of action arises there. *Shiels v. Great Northern R. Co., 7 Jur. N. S. 631, 30 L. J. Q. B. 331, 4 L. T. 479. S. P., Brown v. London & N. W. R. Co., 4 B. & S. 326, 10 Jur. N. S. 234.*

6. As dependent upon state lines.—(1) *Alabama.*—An action cannot be maintained against a railroad corporation in Alabama for a tort committed in Mississippi, unless the tort was actionable at common law, or is shown to be actionable by statute in Mississippi. *Kahl v. Memphis & C. R. Co., 95 Ala. 337, 10 So. Rep. 661. Helton v. Alabama Midland R. Co., 97 Ala. 275, 12 So. Rep. 276.*

A passenger traveling on a railroad in Georgia, where he resided, between the cities of Macon, Georgia, and Eufaula, Alabama, cannot maintain an action in the courts of Alabama, against the Georgia railroad company as a common carrier, for personal injuries sustained in Georgia. *Central R. & B. Co. v. Carr, 23 Am. & Eng. R. Cas. 487, 76 Ala. 388.*

Whether a railroad company, incorporated in Georgia, and extending its business into Alabama, can be there sued for a breach of contract to be performed partly in each state, is not decided. *Central R. & B. Co. v. Carr, 23 Am. & Eng. R. Cas. 487, 76 Ala. 388.*

(2) *Colorado.*—Courts do not take judicial notice of the statutes of other states; they must be proven like other facts. So where a railroad is sued for killing stock in another state, and the common law gives no right of action for the damage claimed, there can be no recovery without proof of a statute in the state where the loss occurred allowing the action. Proof of such statute in the state where the action is brought is not sufficient. *Atchison, T. & S. F. R. Co. v. Betts, 31 Am. & Eng. R. Cas. 563, 10 Colo. 431, 15 Pac. Rep. 821.*—QUOTING

Whitford 465.

(3) *District.*—A corporation can have no boundaries for its jurisdiction. A state was created for a different state having such jurisdiction. A corporation having agency in the business of the state. *Lathrop v. (D. C.) 234.*

A foreign corporation in this court was not an agent and no agent. *Union Pacific*

(4) *Georgia.*—The person superintending the line of the Georgia, to North Georgia, of South Carolina, aboard a train, and while in through the track, the Georgia, of the cause, in that state. *Co., 37 Am. & 660.*—DISTINCTION. *pool, L. & G.*

A court of jurisdiction to go into the execution of a contract on lands, and decree by attachment its property in the state. *R. Co. v. Han*

Under the 464) in relation of Alabama, a business was running over Georgia and maintain an action jury sustained the case being made a corporation. *ghum, 87 Ga.*

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(5) *Maryland.*—owing its corporation state of Maryland in that state from expending

Whitford v. Panama R. Co., 23 N. Y. 465.

(3) *District of Columbia*.—A corporation can have no legal existence out of the boundaries of the sovereignty by which it was created, and can only be sued in a different state by express legislation authorizing such suits against foreign corporations having agents within the state, conducting the business for which it was organized. *Lathrop v. Union Pac. R. Co.*, 1 *MacArth.* (D. C.) 234.

A foreign corporation cannot be sued in this court when it has no place of business and no agent within the district. *Lathrop v. Union Pac. R. Co.*, 7 D. C. 111.

(4) *Georgia*.—Where the record shows that the person served with process was the superintendent and manager of a continuous line of railroad running from Atlanta, Ga., to North Carolina, through the state of South Carolina, and that plaintiff, while aboard a train of cars running over this line and while in the latter state, was injured through the defective condition of the track, the Georgia courts have jurisdiction of the cause, although it did not originate in that state. *Hills v. Richmond & D. R. Co.*, 37 *Am. & Eng. R. Cas.* 44, 37 *Fed. Rep.* 660.—DISTINGUISHING *Bawknight v. Liverpool, L. & G. Ins. Co.*, 55 *Ga.* 194.

A court of chancery in one state has no jurisdiction to compel a domestic corporation to go into another state and specifically execute a contract to make improvements on lands, and, on its default, to enforce the decree by attachment and sequestration of its property in the home state. *Port Royal R. Co. v. Hammond*, 58 *Ga.* 523.

Under the act of 1853 (Acts 1853-4, p. 464) in relation to the Wills Valley R. Co. of Alabama, an employé (a brakeman) whose business was upon one and the same train running over the line of road, partly in Georgia and partly in Alabama, can maintain an action in Georgia for a personal injury sustained in Alabama, service of process being made as upon a domestic railway corporation. *Alabama G. S. R. Co. v. Fulghum*, 87 *Ga.* 263, 13 *S. E. Rep.* 649.—REVIEWED IN *Williams v. East Tenn.*, V. & G. R. Co., 90 *Ga.* 519.

(5) *Maryland*.—A railroad corporation, owing its corporate existence in part to the state of Maryland, and exercising its functions in that state, may be restrained there from expending its funds, for any other than

corporate purposes, anywhere. *State v. Northern C. R. Co.*, 18 *Md.* 193.—RECONCILED IN *Baltimore & O. R. Co. v. Glenn*, 28 *Md.* 287.

(6) *Michigan*.—A Michigan railroad corporation entered into an agreement to build and work a road chartered in Indiana. Another Indiana corporation which claimed an exclusive franchise in that part of the state filed a bill in the United States circuit court for Michigan, praying an injunction to prevent the former company from carrying into effect its agreement. *Held*, that the court had no jurisdiction, as the subject matter of the controversy was beyond the limits of the district, and the process of the court could not reach the *locus in quo*. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 15 *How.* (U. S.) 233.—APPLIED IN *Atlantic & P. Tel. Co. v. Baltimore & O. R. Co.*, 14 J. & S. (N. Y.) 377.

(7) *Missouri*.—The Missouri statutes do not give the courts of that state jurisdiction of an action based upon negligence, against a foreign corporation which has its principal office in another state, and whose track does not reach the state of Missouri, though it maintains an office in the state, where certain business is transacted. *Robb v. Chicago & A. R. Co.*, 47 *Mo.* 540.—REVIEWING *Farnsworth v. Terre Haute, A. & St. L. R. Co.*, 29 *Mo.* 75.

(8) *New Hampshire*.—An action lies in this state for damage caused by an unreasonable discrimination practised in Maine in violation of the law of that state. *McDuffee v. Portland & R. R. Co.*, 52 *N. H.* 430, 2 *Am. Ry. Rep.* 261.—QUOTED IN *Scotfield v. Lake Shore & M. S. R. Co.*, 23 *Am. & Eng. R. Cas.* 612, 43 *Ohio St.* 571, 54 *Am. Rep.* 846.

Buildings standing on the land of another, with the right of removal, are personal property, and the nature of the property is not changed by the fact that its owner may have such an interest in the land by lease or otherwise as enables him to maintain an action of trespass *quare clausum fregit* for an injury to the possession. An action for the recovery of damages for the destruction of such buildings is transitory, and although the buildings are situated and destroyed in Vermont, an action therefor may be brought in New Hampshire. *Laird v. Connecticut & P. R. R. Co.*, 43 *Am. & Eng. R. Cas.* 63, 62 *N. H.* 254, 13 *Am. St. Rep.* 564.—QUOTING *Dennick v. Central R. Co.*, 103 U. S. 11.

(9) *New York*.—Where the bonds and coupons of a foreign corporation are made payable in New York, the cause of action for their nonpayment arises in that state, and the courts may entertain jurisdiction, though the plaintiff is also a nonresident corporation. *Connecticut Mut. L. Ins. Co. v. Cleveland, C. & C. R. Co.*, 26 *How. Pr.* (N. Y.) 225, 41 *Barb.* 9; *affirming* 23 *How. Pr.* 180.

New York courts have jurisdiction of an action by a resident stockholder of a foreign corporation to restrain illegal acts of its directors, where they are personally within the jurisdiction of the court. *Fisk v. Chicago, R. I. & P. R. Co.*, 4 *Abb. Pr. N. S.* (N. Y.) 378, 53 *Barb.* 513, 36 *How. Pr.* 20.

New York courts have jurisdiction of an action by a resident stockholder of a foreign corporation to compel another foreign corporation to issue stock to the plaintiff's company, or its stockholders, in pursuance of an agreement consolidating the two; and as plaintiff's corporation ceased to exist by virtue of the consolidation, it is not necessary to make it or its officers defendants. *Babcock v. Schuylkill & L. V. R. Co.*, 31 *N. Y. S. R.* 643, 9 *N. Y. Supp.* 845, 56 *Hun* 649.

The superior court of New York city has jurisdiction of an action by a citizen of the state against a foreign corporation for personal injuries inflicted in another state, where legal service of process can be had in the county of New York. *Flynn v. Central R. Co.*, 51 *N. Y. S. R.* 84, 22 *N. Y. Supp.* 383, 2 *Misc.* 508; *affirming* 15 *N. Y. Supp.* 328, 27 *Abb. N. Cas.* 31, 20 *Civ. Pro.* 179.

The New York statutes do not go so far as to authorize the courts of the state to regulate the internal affairs of foreign corporations. Such courts possess no visitatorial power over such corporations, can enforce no forfeiture of charter for violation of law, nor remove directors for misconduct. These powers properly belong to the courts of the state in which they derive their existence. *Howell v. Chicago & N. W. R. Co.*, 51 *Barb.* (N. Y.) 378.

And where the only ground of complaint is a supposed error on the part of directors of a foreign corporation in making a dividend, the courts of New York will not award an injunction. The party must seek redress in the courts of the state where the company was incorporated. *Howell v. Chicago & N. W. R. Co.*, 51 *Barb.* (N. Y.) 378.

By the agreement or treaty between the

states of New York and New Jersey in 1833, the line between the states is fixed as the middle of the Hudson river in the 41st degree of north latitude, of the bay of New York, of the waters between Staten Island and New Jersey, and of Raritan bay to the main sea; hence the courts of New York have no jurisdiction of an action on behalf of the state to abate as a nuisance, and cause the removal of, wharves, bulkheads, piers, and railroad tracks in the harbor of New York, but extending from the New Jersey shore, although the court may believe that they injuriously affect the navigation of such waters. *People v. Central R. Co.*, 42 *N. Y.* 283, *reversing* 48 *Barb.* 478, 33 *How. Pr.* 407.—*FOLLOWED IN* *Atlantic & P. Tel. Co. v. Baltimore & O. R. Co.*, 14 *J. & S.* (N. Y.) 377. *REVIEWED IN* *Attorney-General v. Delaware & B. B. R. Co.*, 27 *N. J. Eq.* 1.

A cause of action based upon losses suffered by reason of the negligent manner of working a leased coal mine in another state is an action based upon an injury to land, and the courts of New York have no jurisdiction. *Genet v. Delaware & H. Canal Co.*, 29 *N. Y. S. R.* 954, 8 *N. Y. Supp.* 822, 56 *Hun* 640, *mem.*

(10) *Texas*.—An action for injuries done to land situated beyond the limits of this state, and when no part of the injury was committed or performed within the state, is purely local and cannot be maintained in any court in this state, but the remedy must be had in the jurisdiction where the land is situated. *Missouri Pac. R. Co. v. Cullers*, 81 *Tex.* 382, 17 *S. W. Rep.* 19.

The courts of Texas have jurisdiction in an action against an interstate railroad, for a loss of goods occurring in another state, though the contract of shipment was limited to such other state. *Mayer v. Brown*, 4 *Tex. App. (Civ. Cas.)* 189, 16 *S. W. Rep.* 788.

(11) *Federal courts*.—A railroad corporation is conclusively presumed to be a resident and inhabitant of the state under whose laws it is created. So where a subject of Great Britain and resident of Canada desires to bring suit against such corporation in the circuit court of the United States, he must do so in the district of which the company is an inhabitant, and not in any district in which he may find an agent of the company doing business. *Campbell v. Duluth, S. S. & A. R. Co.*, 50 *Fed. Rep.* 241.

7. As de

—(1) *Calif.* damages is from the company to ket, in cons unable to s profitably o may be bro refusal to c art. 12, § 18 tion may be obligation of principal pl though the e refusal was p into between ber dealers who are not the purpose and giving t oly of the tra R. Co., 42 A 468, 23 *Pac.*

(2) *Georgia* 1854, defining companies of ing live stock such corpora counties in w may occur, is vision of the States which ing any law contracts. *D* 17 *Ga.* 323.— & C. R. Co. v

—APPROVED Oaks, 52 *Ga.* Nor is the that part of th that no person in the county road company the place whe not merely whe *Davis v. Centr*

When a sui pany *ex contr* that in which though the d merits, it is in show that the performed in brought, and to make such move to dismi

7. As dependent upon county lines.

—(1) *California*.—Where an action for damages is brought for injury resulting from the wrongful refusal of a railroad company to carry plaintiffs' lumber to market, in consequence of which plaintiffs were unable to sell their lumber and could not profitably operate their sawmills, the action may be brought in the county where the refusal to carry occurred, under Const. Cal. art. 12, § 18, which provides that a corporation may be sued in the county where the obligation or liability arises, or where its principal place of business is situated, although the complaint also alleges that such refusal was pursuant to a conspiracy entered into between the defendant and other lumber dealers not resident within the county, who are not made parties to the action, for the purpose of inflating the price of lumber and giving the parties concerned a monopoly of the trade. *Chase v. South Pac. Coast R. Co.*, 42 Am. & Eng. R. Cas. 424, 83 Cal. 468, 23 Pac. Rep. 532.

(2) *Georgia*.—The act of February 20, 1854, defining the liabilities of the railroad companies of the state for injuring or killing live stock, in so far as it provides that such corporations shall be suable in the counties in which such injuries or killing may occur, is not in conflict with that provision of the constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts. *Davis v. Central R. & B. Co.*, 17 Ga. 323.—DISTINGUISHING *Louisville, C. & C. R. Co. v. Letson*, 2 How. (U. S.) 558.—APPROVED IN *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410.

Nor is the above statute in conflict with that part of the state constitution declaring that no person shall be sued elsewhere than in the county in which he resides, as a railroad company may be said to "reside" in the place where it operates its road, and not merely where its principal office is kept. *Davis v. Central R. & B. Co.*, 17 Ga. 323.

When a suit is brought against a company *ex contractu* in a county other than that in which it has its principal office, although the defendant may plead to the merits, it is incumbent on the plaintiff to show that the contract was made or to be performed in the county where the suit is brought, and on failure of the plaintiff to make such proof the defendant may move to dismiss for want of jurisdiction.

6 D. R. D.—8.

(Trippe, J., dissenting.) *Georgia R. & B. Co. v. Seymour*, 53 Ga. 499.

Suit may be brought in the county where they are located for an injury to lands by a railroad, under section 3339, Ga. Code, as amended by the act of 1869. *Central R. & B. Co. v. Carswell*, 54 Ga. 251.

Where the action is to recover for goods shipped but never delivered to the consignee, the court of the county of the place of shipment has jurisdiction of the action. *Central R. Co. v. Brunson*, 1 Am. & Eng. R. Cas. 308, 63 Ga. 504.

A railroad company, as such, must be sued in the county of its principal place of business, or in a county where there is jurisdiction by reason of the subject-matter and the locality of the cause of action. If the railroad company, as the lessee of another, has caused damage to a person, ample provision is made for suing it as such. *Central R. Co. v. Flournoy*, 69 Ga. 763.

A railroad company may be sued in any county in which the cause of action originated, by any one whose person or property has been injured by such company, its officers, agents, or employés, for the purpose of recovering damages for such injury, whether there is an agent of the company resident in the county of the suit, and upon whom service may be perfected, or not. *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

Under Ga. Code, § 3406, a railroad company is an inhabitant of all the counties where its road is operated, and may be sued in any of such counties. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. Rep. 608.—FOLLOWING *Davis v. Central R. & B. Co.*, 17 Ga. 323; *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410.

(3) *Illinois*.—In a suit against a corporation an affidavit of claim, filed with the declaration, stating the amount due from defendant to plaintiff, and that the principal office of defendant is in the county where the suit is brought, is sufficient to show that defendant is a resident of that county within the meaning of the act providing for the filing of such affidavit. *Chicago, D. & V. R. Co. v. Bank of North America*, 82 Ill. 493.—QUOTING *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436.

Where a husband and wife sued a railroad in one county, and issue was joined, and the law was afterwards changed so as to require such a suit to be brought in a different county, and the husband was dismissed as

improperly joined, and the declaration amended to show this—*held*, that it was not necessary to refile the declaration, or for a further plea; that, it being the same cause of action, the court did not lose jurisdiction. *Dickson v. Chicago, B. & Q. R. Co.*, 81 Ill. 215.—DISTINGUISHING *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

(4) *Iowa*.—A railroad company has a legal residence in any county in which it operates its road, and may be sued there. *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 518.—FOLLOWING *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436.—DISTINGUISHED IN *Dubuque v. Illinois C. R. Co.*, 39 Iowa 56. FOLLOWED IN *Richardson v. Burlington & M. R. Co.*, 8 Iowa 260. QUOTED IN *McCabe v. Illinois C. R. Co.*, 4 McCrary (U. S.) 492, 13 Fed. Rep. 827; *Harding v. Chicago & A. R. Co.*, 80 Mo. 659.

In an action against a railroad company to recover damages for a personal injury, another railroad company, which had assumed the liabilities of the company causing the injury, was made a co-defendant, jurisdiction of the company assuming the obligation being acquired by reason of its having a line of its road through the county in which the action was brought, though such line was not owned by it when the plaintiff's cause of action accrued, and the liability being joint, the court had jurisdiction of both defendants. *Knott v. Dubuque & S. C. R. Co.*, 84 Iowa 462, 51 N. W. Rep. 57.

(5) *Kentucky*.—A suit to enforce a judgment against a railroad corporation created by the laws of Kentucky, if not brought in the county whence the execution issued, must be brought either in the county in which it has its principal office or place of business, or in the county in which its president or chief officer resides. *McDormant v. Louisville, C. & L. R. Co.*, 11 Bush (Ky.) 386, 14 Am. Ry. Rep. 370.

(6) *Maine*.—Where a railroad passes over parts of two counties, the corporation may maintain an action of assumpsit in that county where they have an office, which is made the depository of the books and records of the company by a vote of the directors, and a place where a large share of the business is transacted; although the company may at the same time have another office in the other county, where the residue of their business is transacted, and in which the treasurer and clerk reside.

Androscoggin & R. R. Co. v. Stevens, 28 Me. 434.

(7) *Missouri*.—The residence of a railroad company is in any county through which its road passes, and in which it has an agent upon whom process can be served, for the purpose of bringing actions under 1 Wagn. Mo. St. 394, §§ 26, 28. *Slavens v. South Pac. R. Co.*, 51 Mo. 308, 3 Am. Ry. Rep. 262.

(8) *Nebraska*.—An action against a company for injuries to real estate which occurred in 1886, from an overflow of the Platte river, caused by the alleged negligent and wrongful construction of a railway bridge across said river, is transitory, and need not be brought in the county where the cause of action arose. The act of 1889 is not involved in the case. *Omaha & R. V. R. Co. v. Brown*, 44 Am. & Eng. R. Cas. 475, 29 Neb. 492, 46 N. W. Rep. 39.

(9) *New York*.—Under the act of December, 1847, providing how corporations may be sued before justices of the peace, a company whose road runs through two or more counties may be sued in either county before a justice, if any "presiding officer, secretary, cashier, treasurer, or any director or trustee thereof" be in the county upon whom process may be served, as provided by the act. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

And the railroad company must be treated as an inhabitant and freeholder of each county where its track is built, within the meaning of 2 Rev. St. 227, §§ 13-15, providing that the first process against freeholders shall be by summons returnable not less than six nor more than twelve days from the time of service; and therefore a summons issued by a justice against a railroad company, returnable in three days is a nullity. *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.

Under Code Civ. Pro. § 341 county courts do not have jurisdiction of actions against a domestic railroad corporation, unless its principal office is in the county where the suit is brought, or unless the summons is served in the county where the company transacts some of its business. *Heenan v. New York, W. S. & B. R. Co.*, 6 Civ. Pro. (N. Y.) 348, 1 How. Pr. N. S. 53; affirmed in 34 Hun 602.

(10) *North Carolina*.—A corporation may be sued in the county court in any county in the state where the plaintiff resides.

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Morehead v. Atlantic & N. C. R. Co., 7 Jones (N. Car.) 500.

The act of 1868-69, ch. 257, providing that "venue in actions against railroad companies shall be laid in some county wherein the track of the company, or some of it, is situated," is not in conflict with the state Constitution, art. 1, § 7, providing that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public service." *Kingsbury v. Chatham R. Co.*, 66 N. Car. 284.—APPROVING *Graham v. Charlotte & S. C. R. Co.*, 64 N. Car. 631.

(11) *Ohio*.—A railroad company may be sued in any county through or into which its road passes, without regard to the nature of the cause of action. *Cincinnati, H. & D. R. Co. v. Jewett*, 8 Am. & Eng. R. Cas. 702, 37 Ohio St. 649.

(12) *Pennsylvania*.—The chancery powers of the supreme court as to supervising and controlling the proceedings of corporations, other than those of a municipal character, by the act of 1836, if not restricted to the city and county of Philadelphia, are not more extensive in any other part of the state than those of a court of common pleas, and therefore the supreme court, when sitting at Harrisburg, cannot supervise and control the proceedings of the Pennsylvania R. Co. beyond the limits of the county of Dauphin. *Hays v. Pennsylvania R. Co.*, 17 Pa. St. 9.

(13) *Texas*.—In a suit by a holder of time checks issued by the subcontractors, against the general contractor for building a railroad through the county where suit is filed, and also against the railway company, to enforce the laborer's lien upon the road, a plea in abatement by a contractor that his residence was in another county was properly stricken out. The right to enforce the lien in the county where the railroad was built gives the jurisdiction. This was not negated in the plea. *San Antonio & A. P. R. Co. v. Cockrill*, 72 Tex. 613, 10 S. W. Rep. 702.

8. As dependent upon amount in controversy.—Where the complaint claims \$60 damages against a company for killing live stock, and the verdict and judgment are for that amount, a motion to dismiss for want of jurisdiction on the ground that the evidence shows the value of the

stock to be less than \$50, the amount necessary to give the court jurisdiction under the statute, is properly overruled. *Memphis & C. R. Co. v. Hembree*, 35 Am. & Eng. R. Cas. 128, 84 Ala. 182, 4 So. Rep. 392.

Where a complaint for the condemnation of land alleges that the compensation and damages for the land taken will not exceed \$2000, the limit of the jurisdiction of the court, but the jury return a verdict for a greater sum, the court is divested of its jurisdiction, and cannot proceed to judgment or award a new trial. *Denver, W. & P. R. Co. v. Church*, 14 Am. & Eng. R. Cas. 320, 7 Colo. 143, 2 Pac. Rep. 218.—EXPLAINING *Louisville, N. A. & C. R. Co. v. Johnson*, 67 Ind. 546.—FOLLOWED IN *Denver & R. G. R. Co. v. Otis*, 25 Am. & Eng. R. Cas. 232, 7 Colo. 198.

A landowner commenced a joint action against a city and an electric railway company to recover land used for a street. The company objected to the jurisdiction of the court on the ground that the land actually necessary for its track and the poles which supported its wires is all that should be considered, as to it, in determining the amount in controversy for the purposes of jurisdiction; but the company did not disclaim as to any part of the demanded premises, but defended for the whole. *Held*, that the value of the entire street was the test of the amount in controversy for the purposes of jurisdiction. *Greene v. Tacoma*, 53 Fed Rep. 562.

S. denied that he was a stockholder in the company; and the controversy involved the validity of his subscription for the whole of five shares, which was \$500. *Held*, that though the judgment against S. for \$300 and interest was less than \$500, yet the subject in controversy was the validity of the subscription for the five shares, and the court of appeals had jurisdiction to hear the case upon appeal. *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

9. Precedence between courts of concurrent jurisdiction.—The pendency of a suit in a state court to settle priorities between lien holders upon property, even though the bill prays the appointment of a receiver, does not defeat the jurisdiction of a United States court brought for a foreclosure of a trust and sale of the property, especially when the proceeding in the state court has been pending for several

years and its object is practically accomplished. *Stewart v. Chesapeake & O. Canal Co.*, 4 *Hughes* (U. S.) 41.

Where a judicial sale of a railroad was made by the Fayette circuit court, and the supervision of the property sold was retained by that court for the purpose of carrying out the terms of sale, the Kenton circuit court has jurisdiction in an original action to charge the purchaser as a trustee for the corporation. Neither court will be required to subordinate itself to the other. *Covington & L. R. Co. v. Bowler*, 9 *Bush* (Ky.) 468.

A Massachusetts court will not entertain a suit by preferred stockholders of a foreign corporation to restrain the issuance by it of bonds secured by mortgage upon property in the state of its organization, and taking precedence of the preferred stock, where a similar suit is pending in such foreign jurisdiction. *Kimball v. St. Louis & S. F. R. Co.*, 157 *Mass.* 7, 31 *N. E. Rep.* 697.

Where the supreme court of Pennsylvania has, by its decree and authorized officers, taken judicial control of the property and franchises of a railroad corporation, and ordered their sale, they cannot be taken in execution by process from any other jurisdiction. *Fox v. Hempfield R. Co.*, 2 *Abb.* (U. S.) 151.

The rule that of two courts of concurrent jurisdiction the one first gaining jurisdiction over the parties and the subject-matter of a suit retains it to the exclusion of the other applies only where the suits brought in the two courts involve the same parties and the same subject-matter. So where stockholders of a railroad corporation file a bill in a state court against another corporation to redeem, and there is a bill pending in a federal court by other stockholders claiming adverse interests, both may retain jurisdiction. *Boston & P. R. Corp. v. New York & N. E. R. Co.*, 12 *R. I.* 220.

The Act of Congress of July 4, 1884, which provides that certain federal courts shall have concurrent jurisdiction over all controversies, irrespective of amount, between the Gulf, Colorado & Santa Fé R. Co., and the Indian tribes and nations, and the inhabitants thereof, through whose territory said railway shall be constructed, does not deprive any other court of any jurisdiction it would have against such railway company, since the act does not confer exclusive jurisdiction on the courts therein named.

Western Union Tel. Co. v. Phillips, 2 *Tex. Civ. App.* 608, 21 *S. W. Rep.* 638.—*DISTINGUISHING* *Morris v. Missouri Pac. R. Co.*, 78 *Tex.* 17.

Where justices are authorized to compel a railway company to construct works requisite for draining adjoining land, the court will refuse to exercise a concurrent jurisdiction as well after the completion of the railway as during its construction. *Hood v. North Eastern R. Co.*, *L. R.* 11 *Eq.* 116, 40 *L. J. Ch.* 17, 23 *L. T.* 433, 19 *W. R.* 266.

During the pendency of a suit in a circuit court of the United States against a railroad company to foreclose a mortgage, the trustee, acting with certain bondholders, but without notice to or permission from the circuit court, filed a bill in the state court to foreclose the same mortgages, and making no reference to the case in the circuit court, upon which a receiver was appointed, foreclosure was ordered, and sale made by the sheriff, who, under order of the court, delivered the road to the purchasers. *Held*, that such an interference on the part of the state court with property at the time within the jurisdiction of the circuit court was unauthorized, and the property was, nevertheless, within the control of the circuit court for the purpose of adjudicating upon the equitable rights of all who had ever been before it. *Bill v. New Albany, etc., R. Co.*, 2 *Biss.* (U. S.) 390.

One who is a bondholder and stockholder is entitled in such a case to the equitable interposition of the circuit court to protect his rights under its decrees, and to demand an account from the trustee or his representatives. *Bill v. New Albany, etc., R. Co.*, 2 *Biss.* (U. S.) 390.

The purchasers and their counsel having had notice of what had occurred in the circuit court cannot claim to be *bona fide* purchasers. *Bill v. New Albany, etc., R. Co.*, 2 *Biss.* (U. S.) 390.

10. Objections to jurisdiction.—Questions of jurisdiction can be raised on appeal; and the appellate court will look to the record and settle the question for itself, even when not otherwise raised. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 *U. S.* 379, 4 *Sup. Ct. Rep.* 510.—*QUOTED IN* *St. Louis, I. M. & S. R. Co. v. Newcom*, 56 *Fed. Rep.* 951.

Where the alleged injury is in one county and the suit is brought in another, and these facts appear on the face of the declaration,

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appearance and pleading to the merits, without objection to the jurisdiction, waive the objection; and the question cannot be raised at a subsequent term by withdrawing the plea and moving to dismiss the action for want of jurisdiction. *East Tenn., V. & G. R. Co. v. Suddeth*, 86 Ga. 388, 12 S. E. Rep. 682.

Where a railroad is chartered in Maryland and in an adjoining state, and exercises its franchises in each, a plea to the jurisdiction of a Maryland court on the ground that the corporate property lies partly in another state, or that its corporate existence is derived in part from a charter of the other state, is not tenable. *State v. Northern C. R. Co.*, 18 Md. 193.

Where a want of jurisdiction does not appear on the face of a complaint, the defendant cannot raise the question by demurrer; and the objection to the jurisdiction is properly taken by answer, and is not waived by appearing and filing an answer setting up want of jurisdiction. *Heenan v. New York, W. S. & B. R. Co.*, 1 How. Pr. N. S. (N. Y.) 53.

A defendant who wishes to attack the jurisdiction of the court on the ground that the plaintiff has committed a fraud on such jurisdiction by placing a larger value on specific articles than was proper, the value of which was sued for, and that this was done to secure jurisdiction improperly, must plead that fact; the issue thus made should be submitted to the jury with the issues involved. On such an issue it does not necessarily follow that because the plaintiff in his petition claimed damages in excess of the minimum jurisdiction of the court, and recovered an amount less than such minimum jurisdiction, the amount claimed was fraudulently stated to secure jurisdiction. *International & G. N. R. Co. v. Nicholson*, 21 Am. & Eng. R. Cas. 122, 61 Tex. 550.

When an action of trespass for false imprisonment was instituted by the plaintiff against McCray and Mitchell and the Southern Express Co. in the county of Sumter, where two of the defendants resided, and the defendants appeared by their counsel and filed their joint plea to the merits of the action, without excepting to the jurisdiction of the court—*held*, that it was too late for the Southern Express Co., one of the defendants, to object to the jurisdiction of the court on the appeal trial of the

cause, although the verdict of the jury on the first trial was against the defendant alone, and it was the only party entering the appeal. *Green v. Southern Exp. Co.*, 41 Ga. 515.

Plaintiffs sought to enjoin defendants from selling the road-bed, right of way, rails, sleepers, rights and privileges, and franchises connected with a line of railway, and to set aside a conveyance in trust made for that purpose. It appearing that the crown was the principal party interested in the conveyance sought to be declared void, and that the injunction was virtually against the crown—*held*, that objections taken to the jurisdiction of the court on the grounds that the crown was not liable to be sued or restrained by injunction, and that plaintiffs' remedy was by petition of right and not otherwise, must prevail. *Montreal & E. S. L. R. Co. v. Stewart*, 20 Nov. Sc. 115.

11. Jurisdiction of particular courts — Admiralty courts. — Goods were shipped on a through bill of lading, to go part of the distance by water and then to be transferred to railroads to be carried to the place of destination; but the bill of lading provided that only the carrier should be liable for a loss, in whose actual custody the freight might be at the time of the loss. . . was lost on the water portion of the route. *Held*, that the contract was several as to the different carriers, so far as a right of action is concerned, and a loss occurring on the water gave a court of admiralty jurisdiction. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18.

The true test of a maritime contract or a maritime service is whether it is to be substantially performed or rendered on navigable waters. If it is, then it is of a maritime character, and a court of admiralty has jurisdiction. If it is not, then the jurisdiction does not attach. *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18.

12. — Chancery Court of New Jersey.—The power of a court of chancery to sell the property of an insolvent corporation, free from incumbrances, under the statute (Nix. Dig. 409, § 24), is not abridged by the dispute as to a mortgage being in reference to the extent to which it is an incumbrance, and not distinctly and solely as to its legality or validity; the legislature intended to include cases in which the objections are to the extent of the lien alone. *Middleton v. New Jersey W. L. R. Co.*, 26

N. J. Eq. 269; reversed on another point in 27 *N. J. Eq.* 557.

13. — Circuit Court of Wisconsin.—The city of Jamesville sued a railroad company in the circuit court of the county to recover a penalty imposed by an ordinance for obstructing streets; and the company objected to the jurisdiction of the court, claiming that the action should have been brought in the police court of the city. Wisconsin Private Laws 1855, § 12, after defining the powers of said police court, provides that nothing therein contained shall be deemed to affect in any manner the power or jurisdiction of the circuit court of the county. *Held*, that the objection to the jurisdiction was not well taken. *Jamesville v. Milwaukee & M. R. Co.*, 7 Wis. 484.

14. — City Court of Selma.—The city court of Selma being by the express terms of the statute creating it clothed with "the authority to issue writs of injunction, mandamus, certiorari, prohibition, *ne exeat*, and all other remedial writs," has, under the well-defined legislative policy of this state, intended to expedite the administration of justice, the authority to issue or order the issue of such writs, returnable into any court of the state having jurisdiction of them. *East & W. R. Co. v. East Tenn., V. & G. R. Co.*, 22 Am. & Eng. R. Cas. 81, 75 Ala. 275.—QUOTED IN *Mobile & G. R. Co. v. Alabama Midland R. Co.*, 39 Am. & Eng. R. Cas. 117, 87 Ala. 520, 6 So. Rep. 407.

15. — County Courts.—County courts can only execute such powers as are conferred by statute expressly or impliedly. *People ex rel. v. Louisville & N. R. Co.*, (Ill.) 25 Am. & Eng. R. Cas. 235, 5 N. E. Rep. 379.

Neither the county nor justices' courts have jurisdiction to foreclose a lien upon the grade or road-bed of a railroad, the same being real estate within the meaning of the law conferring jurisdiction upon those courts. *Texas & P. R. Co. v. McMullen*, 1 Tex. App. (Civ. Cas.) 64.

The county court has jurisdiction where the suit is not for the recovery of land, but for damages for the interruption and destruction of an easement. *Gulf, C. & S. F. R. Co. v. Graves*, (Tex.) 10 Am. & Eng. R. Cas. 199.

A suit by an abutting owner to recover damages caused by the construction and

operation of a railway upon the street is not an action to recover land or an interest in land, but to recover damages for injury done to land; and so far as the subject-matter is concerned a county court has jurisdiction. *Gulf, C. & S. F. R. Co. v. Thompson*, 2 Tex. App. (Civ. Cas.) 500.

16. — County Courts of England.—In an action in a county court against a railway company to recover damages owing to the omission of the company to convey goods on its line, where a question is raised as to the right of the company to charge toll for empty wagons, the title to toll does not thereby come in question within the meaning of the proviso in 9 & 10 Vict. c. 95, s. 58. *Hunt v. Great Northern R. Co.*, 10 C. B. 900, 2 L. M. & P. 268, 15 Jur. 400, 20 L. J. Q. B. 349.

17. — District Courts of Montana Territory.—The organic act of Montana gives to the territorial district courts the same jurisdiction in cases arising under the federal constitution and laws as is vested in the United States district and circuit courts. *Held*, that a territorial district court has jurisdiction of a case involving the right of a county of the territory to tax a corporation chartered by congress, the corporation claiming that its charter exempts it from such taxation. *Northern Pac. R. Co. v. Carland*, 17 Am. & Eng. R. Cas. 364, 5 Mont. 146, 3 Pac. Rep. 134.

18. — District Court of Nebraska.—In trespass against a company for building a railroad over the plaintiff's land without condemning a right of way the company, among other things, pleaded as a defense the previous condemnation of the right of way, and the right to use the same. *Held*, that the issues made by the pleadings raised the question of title to said land, and the action was properly brought in the district court. *Republican Valley R. Co. v. Fink*, 28 Neb. 397, 44 N. W. Rep. 434; former appeal 18 Neb. 82, 24 N. W. Rep. 439.

19. — Illinois Court of Appeals.—Where a bill involves the question of franchise of a railway company, the court of appeals has no appellate jurisdiction. *Belleville v. Illinois & St. L. R. Co.*, 49 Ill. App. 301.

But it has jurisdiction to determine whether a franchise is involved or not. *Citizens' Horse R. Co. v. Belleville*, 47 Ill. App. 388.

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20. — Supreme Court of Massachusetts.—The act of 1877, ch. 234, § 3, providing that any person injured by a defective highway may bring an action in a superior court therefor, does not apply to an action of tort brought under the statute of 1871, ch. 381, § 21, against a street-railroad company for an injury caused by a defective track; and the supreme court of the state has jurisdiction of such an action, if brought prior to the passage of the act of 1880, ch. 28. *Brookhouse v. Union R. Co.*, 132 Mass. 178.

21. — Supreme Court of Missouri.—The question as to the constitutionality of the sale of the North Missouri and that of the Missouri Pacific railroads, under the respective acts of March 17th, 1868, and March 31st, 1868, concerns the property rights of the state and the vested rights of individuals and corporations, and cannot be passed upon by the supreme court in response to resolutions relating thereto by the legislature. *In re North Mo. R. Co.*, 51 Mo. 586.

JURY.

Affidavits of jurors, on motion for new trial, see NEW TRIAL, 101.

Assessment of damages by, see DAMAGES, 99; EMINENT DOMAIN, 1179-1190; STREETS AND HIGHWAYS, 262.

Constitutionality of statute providing for appraisement of damages without jury, see ANIMALS, INJURIES TO, 8.

Costs of inquiry before, in England, see EMINENT DOMAIN, 1146.

Discretionary power of, in assessing damages, see DAMAGES, 102, 109.

— — — **as to amount of damages for causing death,** see DEATH BY WRONGFUL ACT, 374.

— — — **to allow interest as damages,** see DEATH BY WRONGFUL ACT, 438.

Exemplary damages, how far in discretion of, see DAMAGES, 37; DEATH BY WRONGFUL ACT, 422.

Exhibition of wounds to, see EVIDENCE, 41.

Experiments in presence of, see TRIAL, 43.

Instructions calculated to inflame the minds of, see EMPLOYÉS, INJURIES TO, 651.

— **invading the province of,** see ANIMALS, INJURIES TO, 574; APPEAL AND ERROR, 45; CARRIAGE OF PASSENGERS, 600; CHILDREN, INJURIES TO, 176; COMPARATIVE NEGLIGENCE, 19; CONTRIBUTORY NEGLIGENCE, 118; DEATH BY WRONG-

FUL ACT, 335; EMPLOYÉS, INJURIES TO, 650; TRIAL, 144, 169.

Instructions to, in action for damages for wrongful interference with property, see EMINENT DOMAIN, 1007.

— — — **loss of baggage,** see BAGGAGE, 122.

— — **on assessment of land damages,** see EMINENT DOMAIN, 576-594.

Jurors' fees, see EMINENT DOMAIN, 781.

Misconduct of jurors, setting aside verdict for, see NEW TRIAL, 11-13; TRIAL, 199.

Objections to jurors as ground for new trial, see NEW TRIAL, 10-15.

— — — **how to be taken,** see APPEAL AND ERROR, 93.

— — **oath to, how to be taken,** see EMINENT DOMAIN, 913.

Opinion of witness upon question for, see WITNESSES, 89.

Prayers for instructions invading province of, see DEATH BY WRONGFUL ACT, 353.

Questions for, see QUESTIONS OF FACT.

Relative functions of court and, see NEGLIGENCE, 75.

Reversal for urging agreement by, see APPEAL AND ERROR, 52; TRIAL, 147.

Right to submit special questions to, see TRIAL, 202-205.

— — **trial by,** see ANIMALS, INJURIES TO, 524; EMINENT DOMAIN, 516-525; ELEVATED RAILWAYS, 170-173; QUO WARRANTO, 10; TRIAL, 1-4.

Sufficiency of evidence to go to, see EVIDENCE, 81, 286.

Summoning and impaneling, see TRIAL, 27-35.

Taking objections to counsel's address to, see APPEAL AND ERROR, 97.

— **out papers, deliberation, etc.,** see TRIAL, 186-188.

To examine proposed route, see LOCATION OF ROUTE, 9.

Verdict of, in condemnation proceedings, see EMINENT DOMAIN, 817-841.

View of premises by, see VIEW.

Withdrawing evidence from, see ANIMALS, INJURIES TO, 529.

JUSTICE OF THE PEACE.

Actions in courts of, for killing stock, see ANIMALS, INJURIES TO, 605-641.

Appeals from, in stock-killing cases, see ANIMALS, INJURIES TO, 632-638.

Assessment of compensation by, in England, see EMINENT DOMAIN, 1166.

Discretion of, in stock-killing cases, see ANIMALS, INJURIES TO, 614.

charter did not give justices of the peace jurisdiction of actions against the company. *Fatchell v. St. Louis & I. M. R. Co.*, 28 Mo. 178.

The statute does not confer upon justices of the peace jurisdiction of suits to enforce liens for labor done upon a railroad. A lien for labor done on a railroad must be enforced against the whole road, not against so much only of the road as is benefited by the labor. *Cranston v. Union Trust Co.*, 11 Am. & Eng. R. Cas. 638, 75 Mo. 29.—FOLLOWED IN *Ireland v. Atchison, T. & S. F. R. Co.*, 20 Am. & Eng. R. Cas. 493, 79 Mo. 572.

A justice of the peace has no jurisdiction of proceedings of forcible entry and detainer, under N. C. Rev. Code, ch. 49. *Atlantic, T. & O. R. Co. v. Sharpe*, 70 N. Car. 509.

By N. C. Const. art. 4, § 33, justices of the peace have no jurisdiction of actions founded in tort. *Nance v. Carolina C. R. Co.*, 76 N. Car. 9.

3. Jurisdiction as dependent on amount.—Under the constitution and statutes of Alabama the jurisdiction of justices of the peace in actions of tort is limited to \$50; and therefore Ala. Code 1886, § 1149, giving a justice jurisdiction of an action against a railroad for tort, where the sum in controversy does not exceed \$100, is a discrimination between a railroad company and other parties, and is unconstitutional. *Brown v. Alabama G. S. R. Co.*, 87 Ala. 370, 6 So. Rep. 295.

Where the action is to recover the value of live stock killed, the test of the jurisdiction of a justice's court is the value of the property sued for, unless the court or jury is satisfied that the amount has been intentionally diminished for the purpose of giving the justice jurisdiction; but an honest mistake of the plaintiff as to the value will not defeat the action; but the verdict must be limited to the amount of the justice's jurisdiction, with interest. *Ross v. Natchez, J. & C. R. Co.*, 61 Miss. 12.

In Missouri justices of the peace now have jurisdiction over contracts of affreightment made by railroad companies to the extent of \$90. *Williams v. North Mo. R. Co.*, 50 Mo. 433, 3 Am. Ry. Rep. 258.

An action to recover the penalty imposed upon a company for failure to forward freight, by N. C. Laws 1874-75, ch. 240, is an action *ex contractu*; and when the sum demanded does not exceed \$200, a justice of

the peace has jurisdiction. *Katsenstein v. Raleigh & G. R. Co.*, 6 Am. & Eng. R. Cas. 464, 84 N. Car. 688.

An action by a passenger against a company for violation of a contract of carriage is cognizable in a justice's court, where the complaint shows upon its face that the claim asserted is less than \$200; and the court will *ex mero motu* take notice of the want of jurisdiction. *Hannah v. Richmond & D. R. Co.*, 10 Am. & Eng. R. Cas. 737, 87 N. Car. 351.

In determining the question of jurisdiction in an action for a wrong before a justice of the peace, the amount claimed in the summons, and not the damage shown by the testimony, must control. *Stewart v. Baltimore & O. R. Co.*, 33 W. Va. 88, 10 S. E. Rep. 26.

4. — or on locality.—The provision of La. Code of Prac. art. 165, No. 9, making corporations committing trespass or doing damage "liable to be sued in the parish where such damage is done or trespass committed," does not confer jurisdiction of such action upon justices of the peace away from the corporate domicile, as the provision of the article is limited by Title 4 of the Code, arts. 1069, 1070, which expressly forbid justices from exercising jurisdiction over defendants domiciled in the state, outside of their territorial limits. *State ex rel. v. Huft*, 39 La. Ann. 990, 3 So. Rep. 180.

Such case is not affected by the fact that the provision of the above art. 165, No. 9, is also embodied in the Rev. St., § 725. The same legislature adopted the revised statutes and the code of practice, and in cases of conflict gave precedence to the latter. By embodying the provision as an amendment to art. 165, and by leaving arts. 1069, 1070, unchanged, the legislative intent is fully indicated to maintain the latter in full force. *State ex rel. v. Huft*, 39 La. Ann. 990, 3 So. Rep. 180.

5. Process, and service thereof.—Where a declaration in a justice's court sets out fully a cause of action against a railroad company for damages to personalty, and a summons and copy of the declaration attached thereto and referred to therein were served on the agent of the road, the action against the company was not fatally defective because the summons was directed to the agent as such, instead of being to the road itself. *Western & A. R. Co. v. Kirkpatrick*, 66 Ga. 86.

In the absence of statutory regulations to the contrary the ordinary long summons is the proper process for a justice's court. In cases of corporations no provision is made for process by warrant, or attachment, or short summons. The provisions of process by warrant, attachment, and short summons are for suits against natural persons and not corporations. *Johnson v. Cayuga & S. R. Co.*, 11 Barb. (N. Y.) 621.—FOLLOWED IN *Belden v. New York & H. R. Co.*, 15 How. Pr. (N. Y.) 17.

A constable returned a summons issued by a justice against a railroad company, indorsed "personally served and by copy on E. L. W., managing agent of the defendants." Held, that this was sufficient to give the justice jurisdiction, as the constable was not bound to require evidence that such person was an agent of the company; and such return could not be attacked collaterally for the purpose of defeating the judgment. *New York & E. R. Co. v. Purdy*, 18 Barb. (N. Y.) 574.

A judgment pronounced by a justice without service of process upon or notice to the defendant is void. But as such judgment may be set aside, even when rendered upon the verdict of a jury, by the circuit court upon certiorari, the defendant in the judgment cannot obtain relief against it in a court of equity. *Kanawha & O. R. Co. v. Ryan*, 31 W. Va. 364, 6 S. E. Rep. 924.

6. Pleading, generally.*—Where a company is sued before a justice for killing live stock at a public crossing, it is competent for the plaintiff to unite in one statement negligence on the part of the company in failing to ring a bell or sound a whistle as required by statute, and also negligence in the manner of running the train, and recovery may be had under either or both upon proof that the injury was caused thereby. *Lynn v. Chicago, R. I. & P. R. Co.*, 75 Mo. 167.

In a suit against a company in a justice's court it is not required that plaintiff should allege, as is required in district and county courts in such suits, that defendant "was a corporation duly incorporated." *Texas & P. R. Co. v. Miller*, 1 Tex. App. (Civ. Cas.) 104.

7. Complaint or petition.—In justices' courts pleadings in actions to recover

on accounts may be oral, and the plaintiff at the trial may prove such facts as will entitle him to recover without alleging them in a written complaint. So a railroad company cannot take advantage of a suit before a justice, where it is sued on an account that merely shows on its face that the suit is for services rendered another company. *Gulf, C. & S. F. R. Co. v. Hutcheson*, 3 Tex. App. (Civ. Cas.) 120.

The Alabama statute of amendments is exceedingly liberal, but it is never permissible to strike out a party, either plaintiff or defendant, and insert another. So where an individual is sued as president of a designated railroad company, a complaint filed against the railroad company itself, on appeal to the circuit court, should have been stricken out. *Davis Ave. R. Co. v. Mallon*, 57 Ala. 168, 20 Am. Ry. Rep. 405.

A complaint before a justice claimed a certain sum of money from defendant company "for the loss of a trunk and the contents of it," and the company denied the claim made by the petition generally and went to trial. At the trial the company objected to evidence of plaintiff to prove that the trunk was delivered to an officer of the company to be transported as baggage. Held, that it was not necessary to set out the particular manner of the loss, or how the trunk came to the hands of defendants, to authorize the proof, but plaintiff might prove whatever was necessary to establish the cause of action alleged. If the statement or complaint was not sufficiently specific, the company should have moved to make it more specific instead of pleading generally. *Byers v. Des Moines Valley R. Co.*, 21 Iowa 54.

8. Statement.—The same completeness requisite to a petition in the circuit court has never been required in an action before a justice. It is sufficient if the statement in such an action advise the opposite party of the nature of the claim, and be sufficiently specific to be a bar to another action. *Razor v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 562, 73 Mo. 471.—FOLLOWED IN *Key v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 565, 73 Mo. 475.—*Key v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 565, 73 Mo. 475.—FOLLOWED IN *Clardy v. St. Louis, I. M. & S. R. Co.*, 7 Am. & Eng. R. Cas. 555, 73 Mo. 576.—*Gibbs v. Missouri Pac. R. Co.*, 11 Mo. App. 459.

* Pleading in actions before justices of the peace, see note, 19 AM. & ENG. R. CAS. 605.

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A statement for damages to plaintiff's hay caused by fire emitted from the defendant company's railroad train is sufficient after verdict, although it contains no allegation of negligence. *Polhans v. Atchison, T. & S. F. R. Co.*, 115 Mo. 535, 22 S. W. Rep. 478; affirming 45 Mo. App. 153.

A statement as follows: "St. Louis and San Francisco Railway Company to Theo. J. Witting, Dr. To damages in negligently breaking soda apparatus shipped May 2, 1884, from Oswego, Kansas, to St. Louis, Missouri, two hundred dollars," is sufficient, as it not only informed the defendant of the nature of plaintiff's claim, but a judgment on it would bar another action. *Witting v. St. Louis & S. F. R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743.

But a statement: "Pacific Express Company, bought of George Leas, one crank shaft for four by six engine, \$18. This shaft was shipped, C. O. D., to Frank E. Wells, Eufala, Indian Territory, May 31. Broken by Pacific Company," is insufficient, as it does not appear whether it is based on contract or negligence. *Leas v. Pacific Exp. Co.*, 45 Mo. App. 598.

Although particularity of statement is not required, yet where, in the statement of his cause of action, the plaintiff chooses his ground he is properly confined to that ground. *Held*, accordingly, that, having merely alleged that the defendant had been guilty of negligence in not giving her time to alight, the plaintiff could not depend upon the fact that the door of the car had been left ajar and unfastened as an act of negligence. *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666.

9. Account.—An account filed as the basis of a suit before a justice, and purporting to be for a certain amount "for wages as common laborer, ten days," is sufficient; the designation of the time of the rendition of the services is not essential. *Grabbe v. St. Louis Drayage Co.*, 42 Mo. App. 522.

A suit before a justice against a company to recover damages for failing to deliver goods is sufficient where it is presented as an account against the company and dated, "To amount of draft paid C. S. & Co. for the detention of goods, as per attached invoice, and interest and damages, \$195." The law does not require any written statement in such suits before a justice, and one having been made, if it was imperfect, it could be

amended orally, either before the justice or in court on appeal. *Texas & P. R. Co. v. Wright*, 2 Tex. App. (Civ. Cas.) 292.

10. Procedure under English statutes.—In proceedings before a justice, under the Railway Clauses Act 1845, it is not necessary to negative the fact that he is interested, and the objection may be waived by the party against whom the interest is alleged to exist. *Wakefield v. West Riding & G. R. Co.*, 10 Cox C. C. 162, 6 B. & S. 794, 12 Jur. N. S. 160, 13 L. T. 590, 35 L. J. M. C. 69, 14 W. R. 100.

An order by justices under 8 & 9 Vict. c. 20, s. 58, to compel a railway company to repair highways, describing the justices as justices "in and for the said borough of W.," is sufficient. *Wakefield v. West Riding & G. R. Co.*, 6 B. & S. 794.

II. APPEALS FROM JUSTICES' COURTS.

11. What is appealable—Right to appeal.—The decision of the county court on an appeal from a justice of the peace is final, and a writ of error will not lie to the high court of errors and appeals to review the decision of the county court on such appeal. *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 551.

Payment of costs is not a prerequisite to the right of appeal from a justice, where a motion to set aside a default has been filed and overruled. The filing and overruling of the motion is all that is necessary to the right under the statute, and the statute of 1855 (Wagn. Mo. St. 832, § 17) in no way abridges the right of appeal. The intent of the statute is merely to prevent a justice from prescribing any other conditions than payment of costs for setting aside a default. *Palmer v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 249.—FOLLOWED IN *Hooker v. Atlantic & P. R. Co.*, 63 Mo. 449.

An agent may appear before a justice and take an appeal. The justice is the judge of the agent's authority, which, it must be presumed, was satisfactorily shown. *Jones v. Delaware & H. Canal Co.*, 10 Phila. (Pa.) 570.

Defendants subscribed to a share of stock in plaintiff's company, amounting to \$100, to be paid in ten equal instalments, at periods of at least sixty days, no part to be payable until the road had been located and a certain portion of it put under contract. The declaration, in a suit before a justice, averred performance of the condition, and

claimed to recover one of the instalments under an *ad damnum* of \$10. *Held*, that the action was appealable. *Connecticut & P. R. Co., v. Bates*, 32 *Vt.* 420.

12. Jurisdictional amount.—Where the amount in controversy and the judgment in a justice's court is less than \$20, the statutory attorney fee allowed (in damage suits against a railway company) cannot be added to the judgment, and thus confer jurisdiction on appeal. *Gulf, C. & S. F. R. Co. v. Farmer*, 3 *Tex. Civ. App.* 458, 22 *S. W. Rep.* 515.

13. Time within which to appeal.—A corporation, although chartered in another state, which keeps an office or agent in Missouri for the transaction of its usual and customary business has a legal residence there in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof. *Harding v. Chicago & A. R. Co.*, 80 *Mo.* 659.—*QUOTING Baldwin v. Mississippi & M. R. Co.*, 5 *Iowa* 518; *St. Louis v. Wiggins Ferry Co.*, 40 *Mo.* 581.—*Crutsinger v. Missouri Pac. R. Co.*, 82 *Mo.* 64.

14. The bond.—A company in appealing from a justice to the county court gave bond which described the judgment as against the "Texas Pacific R. Co."; the transcript showed that the judgment was against "The Texas and Pacific R. Co." *Held*, that it was apparent that the omission of the word "and" from the corporate name was a mere clerical error, and did not affect the validity of the bond. *Texas & P. R. Co. v. McCumsey*, 3 *Tex. App. (Civ. Cas.)* 321.

15. Notice of appeal.—When an appeal from the judgment of a justice is not taken on the same day that it was rendered, and no notice of such appeal is given, it cannot be tried at the first term of the appellate court unless by the consent of both parties, or unless the appellee shall enter his appearance on or before the second day of such term. *Blakely v. Missouri Pac. R. Co.*, 79 *Mo.* 342.

The proof filed with a justice of the service of a notice of appeal from a judgment rendered by such justice is of no effect if it shows only a delivery of the notice to the wife of the person upon whom service should be made, without showing that such substituted service was "at the residence" of such person. *Stolt v. Chicago, M. & St.*

P. R. Co., 49 *Minn.* 353, 51 *N. W. Rep.* 1103.

16. Justice's return—Allowance of appeal.—Where a company is sued before a justice for killing live stock, and the error assigned is that the court below failed to grant a certiorari to the judgment of the justice, the return of the justice is necessary to enable the appellate court to determine whether there is error or not. *Georgia R. Co. v. Fisk*, 65 *Ga.* 714.

Mandamus will not lie to compel a justice of the peace to grant an appeal. The remedy in such a case, under *Wagn. Mo. Stat.* 849, § 10, is by rule and attachment from the circuit court. *Chicago, R. I. & P. R. Co. v. Franks*, 55 *Mo.* 325.

17. Trial de novo in appellate court.—On appeal from a justice, where the matter in controversy exceeds the sum of twenty dollars, the parties are entitled to a jury trial, and a statement of cause of action must be filed, and issue formed, which can be submitted to the jury. *Mobile & O. R. Co. v. Williams*, 53 *Ala.* 595, 13 *Am. Ry. Rep.* 153.

Where on an appeal to the circuit court from a justice the appellant fails to give notice of the appeal, and the appellee enters his appearance on or before the second day of the term, the latter is not then entitled to a simple affirmance of judgment. If he desires a determination of the cause at that term, he must offer evidence and try the case *de novo*. *Priest v. Missouri Pac. R. Co.*, 85 *Mo.* 521.—*REVIEWING Noy v. Hannibal & St. J. R. Co.*, 51 *Mo.* 575.—*OVER- RULED IN Holloman v. St. Louis, I. M. & S. R. Co.*, 92 *Mo.* 284.

The judgment of a justice when entered upon the verdict of six jurors, in an action by a passenger for personal injuries, in which no defense is made, cannot be tried *de novo* on appeal to the circuit court, under a provision of the W. Va. constitution providing that in suits at common law, where value in controversy exceeds \$20, exclusive of interest and costs, the right of trial by jury shall be preserved, and that a fact tried by a jury shall not be otherwise re-examined than according to the rules of the common law. *Hickman v. Baltimore & O. R. Co.*, 30 *W. Va.* 296, 4 *S. E. Rep.* 654.

18. Striking out plea—Dismissal of appeal.—Where an appeal is taken from a judgment by default before a justice, without the party aggrieved having,

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within ten days from the rendition of the judgment, moved to set the same aside, it is properly dismissed, on motion, in the circuit court. *Mo. Rev. St. § 3040.* The justice, in such case, having no power to grant the appeal, the appeal bond is void, so far as the sureties are concerned, and the circuit court cannot enter judgment against them, but can only dismiss the appeal and enter judgment for costs against the appellant. *Brown v. Missouri Pac. R. R. Co.*, 85 *Mo.* 123.

Suit was instituted to recover \$19.50, the value of a steer killed. Under a plea of recollection the company claimed \$25 actual and \$80 exemplary damages upon the ground that the suit was instituted without probable cause, and with the intent to vex, harass, and annoy the company. On appeal to the county court the plaintiff moved to strike out the plea on the ground that it presented no cause of action, and that it was pleaded in order to give the county court jurisdiction. *Held*, that it was correct to strike out the plea and dismiss the appeal. *Gulf, C. & S. F. R. Co. v. Hewson*, 3 *Tex. App. (Civ. Cas.)* 303.

Suit was instituted before a justice to recover \$19.50 for the value of a steer killed. Among other things the company set up the plea that it was damaged in the sum of \$25 for loss of steam and air and momentum in stopping the train to try to avoid the killing, and \$10 for loss of time of the trainmen, and \$25 for damages to the locomotive. On appeal to the county court the plea was stricken out, and the appeal dismissed. *Held*, error. As the matter grew out of the same transaction, and the facts alleged in the plea constituted a valid cause of action, the plea should have been sustained, and as the amount claimed gave the county court jurisdiction, the case should have been tried *de novo*. *Gulf, C. & S. F. R. Co. v. Taquard*, 3 *Tex. App. (Civ. Cas.)* 305.

19. What irregularities will be disregarded.—The failure of a defendant to interpose a defense in the justice's court does not preclude him from defending in the circuit court on appeal. *Illinois C. R. Co. v. Andrews*, 61 *Miss.* 474.

In an action for an injury which must have been committed either in the township where the justice resides, or in adjoining township, if the necessary jurisdictional fact was clearly proved in the circuit court,

and the same fact is admitted by counsel for the appellant in their printed argument before the appellate court, there can be no reversal on the sole ground that such jurisdictional fact did not appear in the statement filed with the justice. *Fitzpatrick v. Missouri Pac. R. Co.*, 34 *Mo. App.* 280.

20. Errors waived by appealing.—A defendant in a case before a justice by appealing waives all errors in the summons and its service, *e. g.*, that a copy of the statement filed with the justice was not served on the defendant. *Witting v. St. Louis & S. F. R. Co.*, 45 *Am. & Eng. R. Cas.* 369, 101 *Mo.* 631, 14 *S. W. Rep.* 743.

The taking of an appeal is equivalent to a general appearance to the merits in the circuit court. *Rice v. St. Louis, I. M. & S. R. Co.*, 30 *Mo. App.* 110. *Fitzpatrick v. Missouri Pac. R. Co.*, 34 *Mo. App.* 280.

21. Review by certiorari.—Where a justice in a suit involving a matter merely pecuniary has jurisdiction of the subject-matter and of the person, and renders a *bona fide* judgment on the merits clearly wrong, but within the scope of his legitimate powers, the circuit court will not, upon a *certiorari* issued in the exercise of its original supervisory jurisdiction conferred by the constitution, review and reverse such judgment, but will dismiss the writ as improvidently awarded. *Wilson v. West Virginia C. & P. R. Co.*, 38 *W. Va.* 212, 18 *S. E. Rep.* 577.

22. Amendments on appeal.—Where a suit is commenced against a company before a justice in assumpsit, upon "an account stated, \$10," an amendment cannot be allowed, upon its removal to a court where a trial *de novo* is had, so as to convert it into an action for a tort for negligently killing stock. *Smith v. East Tenn., V. & G. R. Co.*, 98 *Ala.* 154, 13 *So. Rep.* 784.

23. Errors not properly objected to below.—A point of law involved in a cause before a justice cannot be reviewed on writ of error unless it was in some proper way raised before the justice and ruled on by him. And when the question was as to the right of plaintiff to recover exemplary damages, as claimed by him in his petition, but no ruling on the point was asked or secured until after a verdict had been returned awarding such damages, it was then too late to raise the point; for the justice had no power to set the verdict aside or to arrest the judgment, and he had

no alternative but to render judgment on the verdict. *Atkinson v. Chicago & N. W. R. Co.*, 70 Iowa 68, 29 N. W. Rep. 808.

It is not enough, in order to overthrow a judgment of the circuit court affirming a judgment of a justice's court when notice of appeal to the circuit court was not given, that the petition filed in the justice's court shows on its face that the cause of action was barred by the statute of limitations. To avail himself of this in the circuit court, the appellant must bring the opposite party there by complying with the statute, and plead the statute or file a motion to dismiss the cause, or, in case of a trial *de novo* in the circuit court, ask an instruction covering

the point. If he fails to prosecute his appeal, he is not in a situation to raise the question in the circuit court. *Cooksey v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 132.—FOLLOWING *Revelle v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 438.

24. Affirmance for want of prosecution.—An appellee, in a cause appealed to the circuit court from a justice, is entitled, where the cause is ready for trial and the appellant fails to prosecute his appeal, to a judgment of affirmance. *Holloman v. St. Louis, I. M. & S. R. Co.*, 92 Mo. 284, 5 S. W. Rep. 1.—OVERRULING *Berry v. Union Trust Co.*, 75 Mo. 439; *Priest v. Missouri Pac. R. Co.*, 85 Mo. 521.

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Constitutionality of statutes of, as to condemnation of land, see EMINENT DOMAIN, 30.

— — — — — municipal aid for railways, see MUNICIPAL AND LOCAL AID, 32.

— — — — — tax laws of, see TAXATION, 27.

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— — — — — to fence in, see FENCES, 24.

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KANSAS PACIFIC R. CO.

1. Subsidy bonds — Settlements with government.—The Act of Congress of July 1, 1862, granting bonds to the Kansas Pacific railroad, to aid in building a road to the Pacific coast, provided that after the road was completed the company should pay five per cent. of its net earnings to the government on said bonds. In making a settlement with the road to ascertain the net earnings—held, that the following items should be excluded: Money needed to place it in proper repair, but not actually expended for that purpose; the expenses of the land department; the interest on the funded debt, which has priority over the lien of the United States; and the fifty per cent. retained by the latter from the amount due for services rendered to it. The following are to be allowed, provided they were actually paid out of the earnings of the road, and not raised by bonds or stock: The equipment account, or replacing and rebuilding rolling stock, machinery, etc.; the amounts paid for depot grounds, and the

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expenses of same; and the construction account, or improvements and additions to the track, etc. *United States v. Kansas Pac. R. Co.*, 99 U. S. 455.—FOLLOWED IN *Alabama G. S. R. Co. v. United States*, 25 Ct. of Cl. 30.

2. Lien of the bonds.—Such bonds are not a lien on what was known as the Denver Pacific Railway and Telegraph company, nor on any part of the line west of the one hundredth meridian; nor is the company liable to pay to the government five per cent. annually on said divisions of its road, as is required by said act as to the part east of said meridian. *United States v. Kansas Pac. R. Co.*, 99 U. S. 455.—FOLLOWED IN *United States v. Denver Pac. R. Co.*, 99 U. S. 460; *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353; *United States v. Central Pac. R. Co.*, 118 U. S. 235.—*United States v. Denver Pac. R. Co.*, 99 U. S. 460.—FOLLOWING *United States v. Kansas Pac. R. Co.*, 99 U. S. 455.—FOLLOWED IN *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353.

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 ——— granting remedy for causing death, see **DEATH BY WRONGFUL ACT**, 8.
 ——— relative to condemnation of land, see **EMINENT DOMAIN**, 31.
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——— to servant for injuries caused by negligence of fellow-servants, see **FELLOW-SERVANTS**, 183.

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Removal
CARRIAGE

LADIES

1. The government acts of co-roads "sh- way for th- from all tol- tion of any States," m- use the roa- tenances, b- roads to t- without co- M. R. Co. v- The Pacifi- continuous railroads of and they co- in pari mat- together as United State- IN Denver P- Ct. of Cl. 382- A railroad participate in pu- to a state f- "land-grant- the act of Jul- Chicago, M- States, 14 Cl- The land- the nature o- so received" p- as the benefi- N. W. R. Co- 232. The Pacific St. at L. 493 companies th- tract which United States lished by due R. Co. v. Uni- 2. Obligat- generally, — and the oblig- concerning th- pended by the of interest on roads, must b- principles of la- of the statute 6 D. R. I-

Removal of disorderly passenger from, see
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LAND-GRANT RAILROADS.

1. The statutory contract with government.—The provisions of various acts of congress that the land-grant railroads "shall be and remain a public highway for the use of the government, free from all toll or other charge for transportation of any property or troops of the United States," means that the government may use the roads, with all fixtures and appurtenances, but not that it may compel the roads to transport property and troops without compensation. *Lake Superior & M. R. Co. v. United States*, 12 Ct. of Cl. 35.

The Pacific Railroad acts contemplate a continuous line of road formed by local railroads owned by different companies; and they constitute a system of enactments, *in pari materia*, which are to be construed together as one act. *Denver Pac. R. Co. v. United States*, 12 Ct. of Cl. 237.—FOLLOWED IN *Denver Pac. R. Co. v. United States*, 13 Ct. of Cl. 382.

A railroad which did not receive or participate in public lands granted by congress to a state for railroad purposes is not a "land-grant road" within the meaning of the act of July 12, 1876, 19 St. at L. 82, § 13. *Chicago, M. & St. P. R. Co. v. United States*, 14 Ct. of Cl. 125.

The land-grant railroad statutes are in the nature of grants, and the roads which so received public lands are to be regarded as the beneficiaries of a grant. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.

The Pacific Railroad Acts, 1862, 1864, 12 St. at L. 493, 13 *Id.* 356, accepted by the companies therein named, constitute a contract which cannot be impaired by the United States without compensation established by due process of law. *Central Pac. R. Co. v. United States*, 21 Ct. of Cl. 180.

2. Obligations to the government, generally.—The rights of the government, and the obligations of the Pacific railroads concerning the repayment of moneys expended by the government in the payment of interest on the subsidy bonds loaned the roads, must be determined, not by general principles of law or equity, but by the terms of the statutes which authorized the loan.

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Union Pac. R. Co. v. United States, 16 Ct. of Cl. 353.

3. When road deemed "completed."—The Act of Congress of July 1, 1862, to aid in the construction of a railroad to the Pacific ocean, after granting certain lands and a loan of government bonds to be received by the Union Pacific and other companies from time to time as successive sections of road should be completed, required the companies to perform all government transportation of mails, troops, etc., and to credit the compensation therefor on the government loan; and then added "that after the road is completed, until said bonds and interest are paid, at least five per cent. of the net earnings of said road shall also be annually applied to the payment thereof." *Held*, that the road was completed for the purpose of this payment to begin when reported by the company to be completed, and accepted by the president of the United States for the purpose of issuing the government bonds, though the acceptance was provisional, and security was required that all deficiencies in construction should be supplied. *Union Pac. R. Co. v. United States*, 99 U. S. 402.—FOLLOWED IN *United States v. Central Pac. R. Co.*, 99 U. S. 449.

The company having duly presented its road as completed, and having obtained the subsidy, and agreed that security should be retained by the government for the ultimate completion of defective parts, was held to be estopped from denying that the road was completed. *Union Pac. R. Co. v. United States*, 99 U. S. 402.

4. Carriage of freight.—A land-grant railroad in a suit against the government for freight earnings can recover for its services as a carrier, but not for the use of its road. Its ordinary tariff rates embrace compensation for both. Therefore, if they be taken as a basis of computation, there should be such deduction made as would reduce the rate to what another carrier would charge for carrying the freight on the government's railroad free of rent. *Atchison, T. & S. F. R. Co. v. United States*, 12 Ct. of Cl. 295.

The act of March 3, 1875, 18 St. at L. 453, took away from the quartermaster-general the power to agree upon rates for transportation of government freight on land-grant railroads, and left the court of claims to determine the principles upon which such

demands should be determined. The prohibition of the statute extends to lessees operating a land-grant road. *Northern Pac. R. Co. v. United States*, 15 Ct. of Cl. 428.

A contract made since the statute by a quartermaster with lessees operating a land-grant road, for the transportation of government freight over it, is absolutely void. *Northern Pac. R. Co. v. United States*, 15 Ct. of Cl. 428.

Where the court of claims is satisfied that a contract fixing the rates for the transportation of government freight was made, and has been carried out in good faith, it will not go into the examination of voluminous testimony to ascertain whether, in trifling particulars, the rates charged exceeded the legal limitation attached to the grant of the road. *Northern Pac. R. Co. v. United States*, 15 Ct. of Cl. 428.

The invalidity of part of a contract, even where it exists by virtue of a statute, does not destroy the whole, if the remainder, being legal and distinct is capable of separation from the illegal provision. So where a quartermaster contracts with a land-grant railroad for the transportation of government supplies, and agrees upon the rate after the statute has taken away his power to agree upon the rate, the contract is invalid only as to the rate agreed upon. *Northern Pac. R. Co. v. United States*, 15 Ct. of Cl. 428.

5. Carriage of the mails.*—A "land-grant road" is under a perpetual contract made by the Land-grant Act of May 17, 1856 (11 St. at L. § 5, p. 15), to carry the mails at such rates as congress may by law direct or the postmaster-general determine. *Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. of Cl. 155.

A land-grant road carrying the mails without an express contract with the postmaster-general was subject to the reductions of compensation ordered by the acts of July 12, 1876, and June 17, 1878. *Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. of Cl. 155.

Subsidized roads are bound to transport them at fair and reasonable rates not in excess of those charged to private parties for the same kind of service; other railroads are not bound to perform the service, but if they do, under an implied contract, the rate of compensation must be ascertained from

the statutes, the regulations, orders, and practice of the department, and the attending circumstances. *Jacksonville, P. & M. R. Co. v. United States*, 21 Ct. of Cl. 155.

If land granted by congress in trust to the state of Wisconsin, to be applied to the construction of a railroad, be subsequently diverted to another purpose with the consent of congress, viz., to the payment of debts contracted by individuals in a futile attempt to build the road, so that the company which in fact constructs the road never derives a benefit from the land, they will not be bound by a condition in the original statutory grant that the mail shall be carried at such rates as congress or the post-office department may prescribe. *Chicago, M. & St. P. R. Co. v. United States*, 14 Ct. of Cl. 125.—FOLLOWED IN *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 569.

By the terms of the grant (acts May 15, June 3, 1856, 11 St. at L. p. 9, § 5, p. 20, § 5) the mail is to be transported over the roads "at such price as congress may by law direct," and "until such price is fixed by law the postmaster-general shall have the power to determine the same." An agreement with the postmaster-general, fixing a rate of compensation for a specific period, must be held to be subject to the power of congress to interpose and prescribe a different rate. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.—FOLLOWED IN *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 569.

The Revised Post-office Act of 1872 (17 St. at L. p. 283, §§ 212, 256, 265), which authorizes the postmaster-general to make mail transportation contracts generally for periods of four years, does not operate to relieve the land-grant roads from the terms and conditions of their antecedent grants. But other mail transportation services are not subject to the terms of the grant, and may be the subject of a contract with the postmaster-general—*ex. gr.*, furnishing a car suitably fitted and warmed; carrying the mails from the train to the post-office, etc. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.

Where the postmaster-general unites in one contract the statutory obligation to carry the mail, and the voluntary obligation to furnish a car suitably fitted, warmed, etc., and congress order a reduction of the rate, the road may throw up the contract.

* See title CARRIAGE OF MAILS.

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7. Car supplies. 1864, mak Minnesota plaintiff's road shall for the use States, free the transp of the Uni vision only right to th free of toll desire to u but it did right to fr troops or expense of portation to the use of the con

But if the road continues to perform and accepts the reduced compensation, it must be deemed to have acceded to the reduction. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.

When congress, by statute, order a reduction of the compensation of existing railway mail transportation contracts, the contractors must elect whether they will perform at the reduced compensation, or treat the service as discontinued. A protest to the postmaster-general against the reduction effects nothing if they continue to perform. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.

In the case of railway mail transportation contracts, congress must be deemed the principal, the postmaster-general their agent, and a statute reducing compensation a notice to the contractors limiting the authority of the agent. *Chicago & N. W. R. Co. v. United States*, 15 Ct. of Cl. 232.

6. Carriage of passengers.—The government is not entitled under 12 St. at L. p. 489, § 6, to through rates for local passengers, i. e., to rates which the railroad receives in its division with other companies for transportation over its own and other roads. *Union Pac. R. Co. v. United States*, 20 Ct. of Cl. 70.

The same provision governs the fare over the Omaha bridge. The act Feb. 24, 1871 (16 St. at L. p. 439), under which the bridge was built, does not supersede or modify it. *Union Pac. R. Co. v. United States*, 20 Ct. of Cl. 70.

7. Carriage of troops and army supplies.—The Act of Congress of May 5, 1864, making a land grant to the state of Minnesota to aid in the construction of plaintiff's road, provides that "said railroad shall be and remain a public highway for the use of the government of the United States, free from all toll or other charge for the transportation of any property or troops of the United States." *Held*, that this provision only secured to the government the right to the use of the road as a highway, free of toll or other charge, when it might desire to use it in its own transportation; but it did not secure to the government the right to free transportation of government troops or property in the cars, and at the expense of the company. The free transportation to the government only extends to the use of the track, and not to the use of the company's cars and other agencies.

Lake Superior & M. R. Co. v. United States, 93 U. S. 442; *affirming* 12 Ct. of Cl. 35.

A railroad of Iowa was authorized by Act of Congress July 2, 1864, to extend its road through Nebraska, and an unconditional grant of lands was made to it April 10, 1869. Congress authorized it to assign and convey to a railroad company, to be organized under the laws of Nebraska, all the rights, powers, and privileges granted by the act of 1864, and subject to all conditions and requirements therein contained. *Held*, that the unconditional grant of lands by the Iowa corporation to the claimant corporation in Nebraska does not bring the Nebraska company within the terms of the act of March 3, 1875, which prohibits the payment to any railroad company for the transportation of any property or troops of the United States over such road, which in whole or in part was constructed by the aid of a grant of public land on the condition that the same should be a public highway for the use of the government, free from toll or other charge. *Burlington & M. R. Co. v. United States*, 18 Ct. of Cl. 618.

8. Accounting with the government, generally.—A statement of the indebtedness of a railroad by the commissioner of railroads and the accounting officers of the treasury is neither an account stated nor an award. The officers are not arbitrators, nor have they power to make admissions against the government. *Central Pac. R. Co. v. United States*, 24 Ct. of Cl. 145.

9. Valuation of the governmental right to use the roads.—No theoretical formula can be adopted in the land-grant railroad cases as a rule for the measure of damages which disregards the legal rights of the parties, and seeks to make them, on equitable considerations, participators in each other's gains and losses. The practical question must always be, what is the market value of the government's right to the free use of the road? *Atchison, T. & S. F. R. Co. v. United States*, 12 Ct. of Cl. 295.

A custom prior to the acts 1874, 1875 (18 St. at L. p. 74; *Id.* p. 453), of allowing land-grant railroads 66 per cent. of their ordinary tariff rates does not furnish a rule for the measure of damages as to services subsequent to those statutes. Nor can a conjectural deduction or generalization, made by experts, based upon the operations of

other railroads, be admitted to show the worth of the government's right to use the claimants' road. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

The worth of the government's right to use a land-grant railroad should not be determined from leases of branch roads rented and operated by the claimants. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

The advantages which the government may reap from the claimants' transportation services in not being obliged to procure rolling stock and servants, and thereby operate a land-grant railroad, do not form a basis for computing the measure of damage in such a case. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

10. Compensation for services rendered to government.—Where the war department by a general order settled what was a fair deduction for the use of all land-grant railroads, it did not bind the roads; but where one voluntarily rendered service accordingly, acquiesced in that rate of deduction, and seeks only that compensation, the acts of the parties may be taken as the best evidence of what was a fair deduction for the use of that road. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 295.

The method for computing the damages to be awarded a land-grant railroad for government service should be based on the actual elements of cost which went into the special service, and the actual charges made for similar services rendered to the public. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

In computing the compensation the government must be regarded as the owner of the road, the company as the owner of its equipment, both species of property as on an equality, and entitled to share proportionately in the net earnings. The method for computing and ascertaining damages in such a case, stated and explained. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

Where the nominal cost of road includes a discount in the sale of stock and securities, it is for the claimants to show the amount of the discount. If they do not, the nominal will be treated as the actual cost of the road. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

By 20 U. S. St. 390 congress practically agreed that, irrespective of the particular

relations between the cost of a road and the cost of its equipment, fifty per cent. of its gross earnings is a fair compensation for the actual cost of transportation, and the company's proportional share in the profits. *Atchison, T. & S. F. R. Co. v. United States*, 15 Ct. of Cl. 126.

11. "Operating expenses," "earnings," "net earnings."—The earnings of the road include all the receipts arising from the company's operations as a railroad company, but not its receipts from the public lands granted, nor fictitious receipts for the transportation of its own property. "Net earnings," within the meaning of the law, are ascertained by deducting from gross earnings all ordinary expenses of organization and of operating the road, and expenditures *bona fide* made in improvements, and paid out of earnings, and not by the issue of bonds or stock; but not deducting interest paid on any of the bonded debt of the company. *Union Pac. R. Co. v. United States*, 99 U. S. 402.—FOLLOWED IN *Union Pac. R. Co. v. United States*, 20 Ct. of Cl. 70; *Barry v. Missouri, K. & T. R. Co.*, 29 Am. & Eng. R. Cas. 384, 27 Fed. Rep. 1. QUOTED IN *Nickals v. New York, L. E. & W. R. Co.*, 13 Am. & Eng. R. Cas. 139, 21 Blatchf. (U. S.) 177, 15 Fed. Rep. 575; *Dardanelle & R. R. Co. v. Shinn*, 40 Am. & Eng. R. Cas. 570, 52 Ark. 93.

The words "necessary expenses of operating" in the Thurman Act, 1878 (20 St. at L. p. 56, § 1), extend to the expenses of operating the road in accordance with the demands of the business coming to it, but limit the expenses to such as are conducive to that end, and exclude those that are not. *Union Pac. R. Co. v. United States*, 20 Ct. of Cl. 70.—FOLLOWING *Union Pac. R. Co. v. United States*, 99 U. S. 402.

12. Right to withhold moneys, and apply them to subsidy bonds.

—That part of the Union Pacific railroad known as the Denver Pacific Railroad and Telegraph company is bound to perform the government service stipulated by the Pacific railroad acts at the rates therein fixed, and is subject to their provisions so far as applicable, yet no part of the compensation due it for such services can be retained by the United States, and applied to payment of the government subsidy bonds granted the Kansas Pacific division by the act of July 1, 1862. Said act does not apply to said Denver Pacific division.

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United States v. Denver Pac. R. Co., 99 U. S. 460.—FOLLOWED IN *United States v. Central Pac. R. Co.*, 118 U. S. 235.—*Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353.

The Act of Congress of May 7, 1878, providing for a retention by the United States of moneys due railroads that had received governmental aid, for services rendered the government, does not include branches of such roads not receiving aid. *United States v. Central Pac. R. Co.*, 24 Am. & Eng. R. Cas. 257, 118 U. S. 235, 6 Sup. Ct. Rep. 1038.—FOLLOWING *United States v. Kansas Pac. R. Co.*, 99 U. S. 455; *United States v. Denver Pac. R. Co.*, 99 U. S. 460.—QUOTED IN *Re Pacific R. Commission*, 12 Sawy. (U. S.) 559.—*Central Pac. R. Co. v. United States*, 21 Ct. of Cl. 180. *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353.—FOLLOWING *United States v. Kansas Pac. R. Co.*, 99 U. S. 455; *United States v. Denver Pac. R. Co.*, 99 U. S. 460.

Where a road was not aided by the government, the government is not authorized by the Thurman Act (20 St. at L. 56) to withhold compensation. The rule for the construction of the act stated, and the decisions relating to the Pacific railroad system reviewed. *Central Pac. R. Co. v. United States*, 21 Ct. of Cl. 180.

Where a railway company has constantly recurring claims for services against the government, and the government has claims against the company for interest advanced to its use, an act of congress (act March 3, 1871, 16 St. at L. p. 525, § 9) which provides that "the secretary of the treasury is hereby directed to pay over in money to the said company" the compensation agreed upon for its services does not affect or change the rights or agreements of the parties. It merely directs the secretary not to assert the government's right of set-off. *Union Pac. R. Co. v. United States*, 10 Ct. of Cl. 548.

The right of the government under the Pacific Railroad Acts 1862, 1864, 12 St. at L. 489; 13 Id. 356, to withhold freight moneys earned in carrying the mails, etc., and apply them to the payment of the bonds loaned the companies to aid them in the construction of the roads, is not a condition attached to the franchise nor an obligation springing out of the land grants conferred upon the companies, but simply a specific mode of payment upon the mortgage created by those statutes. *Denver Pac. R. Co.*

v. United States, 12 Ct. of Cl. 237.—FOLLOWED IN *Denver Pac. R. Co. v. United States*, 13 Ct. of Cl. 382.

The right of the government to withhold moneys due to the Pacific railroads for services rendered, and apply them upon the subsidy bonds loaned the roads, not yet due, rests, not upon any general principle of law, but upon the statute. *Union Pac. R. Co. v. United States*, 16 Ct. of Cl. 353.

13. Suits for money improperly withheld.—The right of one of the Pacific railroads to bring suit for money improperly withheld by the secretary of the treasury as net earnings, under the Thurman act, requiring one fourth of the net earnings of the road to be paid into the treasury as a sinking fund (20 St. at L. 56), accrues at the time the money is so applied. *Central Pac. R. Co. v. United States*, 24 Ct. of Cl. 145.

And where the action of the secretary of the treasury was taken on December 31, 1881, for the year then ending, and the suit was brought on October 31, 1887, the demand for earnings between July 1 and October 31, 1881, is not barred by the statute of limitations. *Central Pac. R. Co. v. United States*, 24 Ct. of Cl. 145.

LAND GRANTS.

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I. GENERAL PRINCIPLES.

1. Definition—Notice.—The word "grant" is not a technical word like the word "enfeoff," and although, if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted. *Rice v. Minnesota & N. W. R. Co.*, 1 *Black* (U. S.) 358.

Grants made by a legislature are not warranties; and the rule universally applied in determining their effect is, that if the thing granted is not in the grantor at the time of the grant, no estate passes to the grantee. This is the rule at common law, and the same rule applies in construing grants made by congress for purposes of internal improvements. *Rice v. Minnesota & N. W. R. Co.*, 1 *Black* (U. S.) 358.

All the world must take notice of statutory grants of land clearly defined on the face of the statute, and other public records indicated by the statute. *Southern Pac. R. Co. v. Dull*, 10 *Sawyer*, (U. S.) 506, 22 *Fed. Rep.* 489.—*APPROVING Ryan v. Central Pac. R. Co.*, 5 *Sawyer*, 260, 99 U. S. 382.

Distinction between grants of land to aid in construction of railroads and grants of right of way, commented upon. *Hamilton v. Spokane & P. R. Co.*, 51 *Am. & Eng. R. Cas.* 352, 2 *Idaho* 898, 28 *Pac. Rep.* 408.—*REFERRING TO Denver & R. G. R. Co. v. Alling*, 99 U. S. 475; *Doran v. Central Pac. R. Co.*, 24 *Cal.* 259; *Western Pac. R. Co. v. Tevis*, 41 *Cal.* 493; *United States v. Garretson*, 42 *Fed. Rep.* 22; *Turner v. American B. M. Union*, 5 *McLean* (U. S.) 344; *Northern Pac. R. Co. v. Meadows*, 46 *Fed. Rep.* 254; *Bybee v. Oregon & C. R. Co.*, 26 *Fed. Rep.* 589.

2. Powers of the legislature—Second grant.—When the right to property is vested by grant for a particular purpose, by legislative authority or otherwise, the legislature cannot vest it for another. If the legislature declares the purpose to which the subject-matter of a grant shall be applied, its power over it is exhausted, and it cannot by legislative grant be appropriated for another and different purpose,

except in case of a grant with conditions subsequent, where there is a clear forfeiture by the grantee of the conditions annexed to the grant. *Koenig v. Omaha & N. W. R. Co.*, 3 *Neb.* 373.

Where congress makes a grant of lands to a company existing under a state charter, but which will not enable it to obtain the benefit of the grant, still the grant takes the lands out of the public lands so that they will not pass under a subsequent grant to another company. *United States v. Northern Pac. R. Co.*, 152 U. S. 284, 14 *Sup. Ct. Rep.* 598.

3. How construed, generally.*—It is always to be borne in mind in construing a congressional grant that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress; and this intent should not be defeated by applying to the grant the common law rule making grants applicable only to transfers between private parties. *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491.—*FOLLOWED IN Nash v. Sullivan*, 10 *Am. & Eng. R. Cas.* 552, 29 *Minn.* 206; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1. *QUOTED IN Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 25 *Am. & Eng. R. Cas.* 99, 26 *Fed. Rep.* 551; *Northern Pac. R. Co. v. Majors*, 5 *Mont.* 111.—*Jackson, L. & S. R. Co. v. Davison*, 65 *Mich.* 416, 14 *West. Rep.* 65, 32 *N. W. Rep.* 726.—*QUOTING Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 65.

To ascertain that intent courts will look to the condition of the country at the time of making the grants, as well as the purpose of the grants as expressed on their face. *Winona & St. P. R. Co. v. Barney*, 26 *Am. & Eng. R. Cas.* 513, 113 U. S. 618, 5 *Sup. Ct. Rep.* 606.

The means reasonably necessary for the enjoyment of a granted property or rights, the exercise of the granted power, and the accomplishment of the object of the grant, are given by implication. *Burke v. Concord R. Co.*, 8 *Am. & Eng. R. Cas.* 552, 61 *N. H.* 160.

In a conveyance by the sovereign, of property which is usually the subject of private ownership, the extent of the thing

* Various land grants to railroads construed, see note, 57 *AM. & ENG. R. CAS.* 338.

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granted is to be ascertained by the rules of construction applicable to private deeds. *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 631.—QUOTED IN *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566; *Stockton v. Central R. Co.*, 50 N. J. Eq. 52.

4. Rule of strict construction.—All government grants are to be strictly construed against the grantees. Nothing passes but what is conveyed in clear and explicit language, and nothing can be implied. *Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66. *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.—FOLLOWING *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 372. QUOTING *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339.

Where the provision of an act clearly shows that it was intended that the road authorized by it should be constructed outside of a river, no necessity to go into the river for the construction of it will, by implication, confer authority to construct it in the river. The grant must fail if the road cannot be built outside of the river. *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259.

5. When title vests—Priority.*—Where congress grants the odd-numbered sections of land for a given distance on each side of a railroad, before the road is located, the title does not pass to any particular sections until the line of the road is made certain, which makes certain also the sections granted. *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95.—FOLLOWING *Wolcott v. Des Moines Co.*, 5 Wall. 681; *Burlington & M. R. R. Co. v. Fremont County*, 9 Wall. 89.—FOLLOWED IN *Clarkson v. Buchanan*, 53 Mo. 563. REVIEWED IN *Palmer v. Boorn*, 80 Mo. 99.—*New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364.—REFERRING TO *New Orleans Pac. R. Co. v. United States*, 124 U. S. 124; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241.

When the surveys are made and the line of the road laid down by protraction through these surveys, the sections are determined, or "selected," and no further

choice or selection is to be made. *Hunnewell v. Cass County*, 22 Wall. (U. S.) 464.

Where an act of congress makes a grant of land of the odd-numbered sections within a certain distance of a railroad, the title of the corporation to the land vests at once, and can only be thereafter divested by the government for a failure to perform conditions imposed, or upon a proper proceeding instituted to revest the title in the government. *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457.

An act enacting that "there be and is hereby granted" five alternate sections per mile on each side of a railroad, notwithstanding it provided for the issue of patents as fast as portions of the road twenty miles long were constructed, and reserved a right of forfeiture on the land not patented, and withheld patents until the expenses of surveying were paid, conveyed a title from the date of the act on which the company could sue for possession, or lease or grant the land without proof of any deed or patent. *Deseret Salt Co. v. Tarpey*, 51 Am. & Eng. R. Cas. 276, 142 U. S. 241, 12 Sup. Ct. Rep. 158.—QUOTED IN *Jatunn v. Smith*, 95 Cal. 154. REFERRED TO IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364.

The words "that there be and is hereby granted," employed by congress in granting lands to railroads, imply a grant *in presenti*, and not a promise of a grant *in futuro*. *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491.—FOLLOWING *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.—FOLLOWED IN *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426.—*Wood v. Burlington & M. R. R. Co.*, 10 Am. & Eng. R. Cas. 611, 104 U. S. 329.

The Act of Congress of March 3, 1865, extending the time for the completion of certain land-grant railroads in the states of Minnesota and Iowa, and increasing a prior grant to Minnesota, and the act of March 3, 1871, authorizing the St. Paul & Pacific railroad to change its route—held, to be independent acts, and not amendments of prior acts, and therefore only conveying title to lands claimed thereunder from their date. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389.

The grant to the Minnesota & Pacific R. Co. in 1857, which company was succeeded

* When title to land grant vests, see note, 14 AM. & ENG. R. CAS. 503.

When title vests. Performance of conditions. Donation of swamp land to company, see 51 AM. & ENG. R. CAS. 285, *abstr.*

by the St. Paul & Pacific R. Co., which was itself succeeded by the St. Paul, M. & M. R. Co., has been surrendered, and in lieu thereof a new one has been taken, which new grant is subsequent to the rights conferred by the land grant to the Northern Pacific R. Co. Hence the last-named company hold by priority of right the lands at the intersection of the two roads at Glyn-don. *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 25 *Am. & Eng. R. Cas.* 9 *Fed. Rep.* 551.—APPLYING *Leavenworth & G. R. Co. v. United States*, 92 U. S. 741, *Van Wyck v. Knevals*, 106 U. S. 365, 1 *Sup. Ct. Rep.* 336; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 475; *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 498. DISTINGUISHING *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27, 3 *Sup. Ct. Rep.* 485; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 *Sup. Ct. Rep.* 566. QUOTING *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 497.

Under the Act of Congress of March 3, 1871, entitled "An act to incorporate the Texas Pacific railroad company, and to aid in the construction of its road, and for other purposes," the full equitable title to the land passed when the company filed a map of a definite location of its road; and no adverse rights could attach to the land between the date of filing such definite location and an order of the proper government officer withdrawing the land from sale. *Southern Pac. R. Co. v. Stanley*, 49 *Fed. Rep.* 263.

An act granting lands in aid of a railway provided that patents should issue therefor as each twenty miles of the road should be completed; and that the lands when patented should be subject to the disposal of the company for the purposes of construction and equipment of the road, and no other. The company claimed that these lands were only held in trust by it for the government to secure the purpose of the grant, and were therefore not subject to taxation. *Held*, that the patents vested the complete title to the land in the company, and that its claim of exemption from taxation was not well taken. *North Wis. R. Co. v. Barron County Sup'rs*, 8 *Biss. (U. S.)* 414.

Plaintiff, who held land granted under the Pacific railroad grant of the act of congress of 1862, as amended in 1864, commenced a proceeding against defendants to

abate a ditch which had been cut across the public domain, under the act of congress of July 26, 1866. Section 4 of the act of 1862 provides that when forty miles of the road is completed three commissioners shall be appointed to examine the same and report to the president of the United States, who should thereupon issue a patent for the lands opposite the forty miles, if the report was approved. And it appeared that a patent for the land in controversy was issued June 27, 1867, and it did not appear that the certificate was made by said commissioners prior to the passage of the act of 1866, authorizing the ditch. *Held*, that the company had no vested equity which could be recognized by the state courts until said commissioners made their report; and therefore neither the company nor one holding under it acquired the right to abate ditches lawfully on the land at the time it acquired title. *Broder v. Natoma W. & M. Co.*, 50 *Cal.* 621.

6. Determination of conflicting claims.—Where land is granted to a railroad company before its track is located, the title to the specific land attaches by a location of the road, and takes effect by relation as of the date of the grant, so as to cut off intervening claims of other roads, claiming under other grants, unless the lands are specially reserved in the statute. *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491.—FOLLOWED IN *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720.

In case of conflict between railroad land grants the elder title must prevail. *So held*, where the Northern Pacific railroad claimed land in Minnesota under a grant of July 2, 1864, and the St. Paul & Pacific railroad claimed part of the same lands under Acts of Congress of March 3, 1865, and March 3, 1871. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 *Sup. Ct. Rep.* 389.—REVIEWED IN *Northern Pac. R. Co. v. Barnes*, 2 *N. Dak.* 310.

Where the United States sue to invalidate the claim of a company to certain lands, and to annul patents which had been issued for a part of the lands, and certain contracts and deeds entered into between the company and individual purchasers, who were parties to the suit, an injunction will not issue to restrain the cutting of timber on the land before a hearing on the merits, and after answers have been filed setting up such facts as to sustain the com-

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pany's title, if found true at the trial. *United States v. Southern Pac. R. Co.*, 55 Fed. Rep. 566.—QUOTING *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. Rep. 152.

A state and its grantees claimed title to lands under the United States, as did also a railroad company and its grantees. The lands in controversy fell within the limits of a grant to the railroad company, but by mistake and inadvertence of the land department they were listed to the state. Discovering its mistake, the land department refused to issue to the company a patent for the lands until the erroneous listing to the state was set aside. The state granted these lands to individuals and issued patents therefor. *Held*, that the relative rights of the parties could be determined by proceedings in the courts on behalf of the grantees of the company against the grantees of the state, and that the United States had no such interest in the subject-matter of the controversy as warranted their filing a bill for setting aside and canceling the erroneous listing to the state. *Curtner v. United States*, 57 Am. & Eng. R. Cas. 383, 149 U. S. 662, 13 Sup. Ct. Rep. 1041.

Plaintiff company claimed certain lands under the Act of Congress of July 2, 1864, and set up that defendants had procured a patent to the lands, through falsely representing that they were mineral lands, in 1879, and prayed for a decree that the defendants be declared as holding as trustees for plaintiff, and be required to convey the land to plaintiff. *Held*, that if plaintiff's contention was correct it already had the legal title prior to that of defendants, and it could recover the lands in ejectment, and that a decree directing defendants to convey the land to plaintiff would not take the place of patents from the United States, and that a bill for such relief could not be maintained. *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 237.—QUOTING *Wisconsin C. R. Co. v. Price County*, 133 U. S. 510, 10 Sup. Ct. Rep. 341.

Neither could the company, in such case, when out of possession of the land, maintain a bill on the ground of preventing a multiplicity of actions, as it could join any number of parties in an action of ejectment. *Northern Pac. R. Co. v. Amacker*, 46 Fed. Rep. 233.—APPLYING *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 224.

7. Conflicting and overlapping grants.*—In grants of lands to aid in building railroads the title to the lands within the primary limits within which all the odd or even sections are granted relates, after the road is located according to law, to the date of the grant; and in cases where these limits, as between different roads, conflict or encroach on each other, priority of location of the line of road gives priority of title. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334.—FOLLOWING *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 501; *Van Wyck v. Knevals*, 106 U. S. 360; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27; *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739.—FOLLOWED IN *Barney v. Winona & St. P. R. Co.*, 24 Fed. Rep. 889, 117 U. S. 228, 6 Sup. Ct. Rep. 654.

When the acts of congress in such cases are of the same date, or grants are made for different roads by the same statute, priority of location gives no priority of right; but where the limits of the primary grants which are settled by the location conflict, as by crossing or lapping, the parties building the roads under those grants take the sections within the conflicting limits of primary location in equal undivided moieties, without regard to priority of location of the line of the road or priority of construction. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334.—FOLLOWED IN *St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563. QUOTED IN *Southern Pac. R. Co. v. Araiza*, 57 Fed. Rep. 98.

A different rule prevails in case of lands to be selected in lieu of those within the limits of primary location, which have been sold or pre-empted before the location is made, where the limits of selection interfere or overlap. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334.

In such cases neither priority of grant nor priority of location nor priority of construction give priority of right; but this is determined by priority of selection, where the selection is made according to law. *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334.—FOLLOWING *Ryan v. Central Pac. R. Co.*,

* Conflicting and overlapping railroad land grants, see note, 46 AM. & ENG. R. CAS. 430.

99 U. S. 382; *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414.—*Hastings & D. R. Co. v. St. Paul, S. & T. F. R. Co.*, 44 *Fed. Rep.* 817; *affirming* 32 *Fed. Rep.* 821.

The lands which the Union Pacific R. Co. was entitled to under the Act of Congress of 1862, as amended in 1864, and those that the company, constructing what is known as the Sioux City branch of the road, were entitled to, conflicted or overlapped, and the government issued patents to the two companies jointly as tenants in common. *Held*, that such patents were properly issued, and that neither company was the exclusive owner of the lands, but might have partition thereof as between themselves. *Sioux City & P. R. Co. v. Union Pac. R. Co.*, 4 *Dill. (U. S.)* 307.

8. Conflict with homestead claims.*

—Lands selected by a railroad under an indemnity grant to it, after a patent issued therefor, conveys a title superior to a patent subsequently issued under the Homestead Act of 1862. *Ryan v. Central Pac. R. Co.*, 99 U. S. 382.—*FOLLOWED IN St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720.

The line of definite location of a railroad, which determines the rights of companies to land under land-grant acts of congress, is definitely fixed, within the meaning of those acts, by filing the map of its location with the commissioner of the general land office at Washington. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 *Sup. Ct. Rep.* 566.—*APPROVED IN Sioux City & I. F. T. L. & L. Co. v. Griffey*, 72 Iowa 505, 34 N. W. Rep. 304. *DISTINGUISHED IN Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 25 *Am. & Eng. R. Cas.* 99, 26 *Fed. Rep.* 551; *Young v. Goss*, 40 *Am. & Eng. R. Cas.* 435, 42 *Kan.* 502, 22 *Pac. Rep.* 572. *FOLLOWED IN Brown v. Corson*, 16 *Oreg.* 388. *QUOTED IN McIntyre v. Roeschlaub*, 37 *Fed. Rep.* 556; *Whitney v. Taylor*, 45 *Fed. Rep.* 616. *REVIEWED IN Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 *Sup. Ct. Rep.* 856.—*St. Paul & S. C. R. Co. v. Ward*, 51 *Am.*

& Eng. R. Cas. 325, 47 *Minn.* 40, 49 *N. W. Rep.* 401.

Under the acts granting lands to aid in the construction of a line of railroad from the Missouri river to the Pacific ocean, the claim of a homestead, or pre-emption entry, made at any time before the filing of that map in the general land office will attach, within the meaning of those statutes, and no land to which such right has attached comes within the grant. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 *Sup. Ct. Rep.* 566.—*APPLIED IN Burr v. Greeley*, 52 *Fed. Rep.* 926. *FOLLOWED IN Glidden v. Union Pac. R. Co.*, 30 *Fed. Rep.* 660; *Northern Pac. R. Co. v. Wright*, 51 *Fed. Rep.* 68. *QUOTED IN Northern Pac. R. Co. v. Sanders*, 47 *Fed. Rep.* 604; *Weeks v. Bridgman*, 41 *Minn.* 352, 43 *N. W. Rep.* 81. *REAFFIRMED IN Walden v. Knevals*, 114 U. S. 373.

The subsequent failure of the person making such claim to comply with the acts of congress concerning residence, cultivation, and building on the land, or his actual abandonment of the claim, does not cause it to revert to the railroad company and become a part of the grant. The claim having attached at the time of filing the definite line of the road, it did not pass by the grant, but was, by its express terms, excluded, and the company had no interest, reversionary or otherwise, in it. *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 *Sup. Ct. Rep.* 566.

Where the location of a railroad line is approved by the department of the interior, a reservation of public land from entry, made by the department of the interior as coming within the limits of a railroad grant, operates to withdraw the land from homestead entries, although it is afterwards found that the location of the railroad is invalid, so that the lands thus reserved do not come within such limits. *Hamblin v. Western Land Co.*, 57 *Am. & Eng. R. Cas.* 376, 147 U. S. 531, 13 *Sup. Ct. Rep.* 353.

Where land was patented to a state for the benefit and use of one railroad company, and the circuit court afterwards decreed that the said patents should have been issued for the benefit of another company which had previously located its route, a third party is in no position to question the force and effect of that decision, and he cannot make a valid homestead entry upon such lands. *Hamblin v. Western Land Co.*,

* Granting lands to a railroad excepting such as a pre-emption or homestead claim may have attached to. When claim is considered as attached to the land, see 46 *AM. & ENG. R. CAS.* 446, *abstr.*

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A homestead entry made before the definite location of a railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not canceled until after the location, did not operate to except the land from the grant to the railroad company, under the provisions of the Act of Congress of March 3, 1863, donating to the state of Kansas lands to aid in the construction of certain railroads and telegraphs. *Emslie v. Young*, 5 *Am. & Eng. R. Cas.* 422, 24 *Kan.* 732.—QUOTED IN *Young v. Goss*, 40 *Am. & Eng. R. Cas.* 435, 42 *Kan.* 502, 22 *Pac. Rep.* 572.

Under the Act of Congress of July 26, 1866, granting lands to the state of Kansas to aid in the construction of the southern branch of the Union Pacific Railway and Telegraph when the line of the railroad was definitely located, the title of the company to the odd-numbered sections within the ten-mile limit of the grant became absolutely fixed; but as to any indemnity lands to which the company was entitled, the grant was only a float, and did not attach to the specific lands until a selection was made. *Missouri, K. & T. R. Co. v. Noyes*, 5 *Am. & Eng. R. Cas.* 440, 25 *Kan.* 340.—FOLLOWED IN *Missouri, K. & T. R. Co. v. Watson*, 25 *Kan.* 387.

Therefore, where plaintiff made a lawful homestead entry of public land within the indemnity territory of the company, prior to any withdrawal of the lands from market or entry, and before such tract had been selected as indemnity lands, a selection of such tract by the secretary of the interior and granting a patent to the company as indemnity lands, after plaintiff had complied with all the provisions of the homestead act, would not give the company title as against plaintiff. *Missouri, K. & T. R. Co. v. Noyes*, 5 *Am. & Eng. R. Cas.* 440, 25 *Kan.* 340.

A person engaged in actual service in the United States made affidavit pursuant to section 2293, *U. S. Rev. St.*, stating that he was the head of a family, a citizen of the United States, and a resident of Franklin Co., N. Y. The affidavit did not state that the affiant's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and, as matter of fact, no member of his family was then residing or ever had resided on the

land, and no improvement had been made upon it. The applicant paid the fees and the entry was allowed by the register, and received in the local land office and recorded. *Held*, that the entry having been made and recorded, the defects were not sufficient to render it absolutely void, and that a "right of homestead settlement" had attached within the meaning of the exception in an act granting lands in aid of a railroad. *Hastings & D. R. Co. v. Whitney*, 40 *Am. & Eng. R. Cas.* 426, 132 *U. S.* 357, 10 *Sup. Ct. Rep.* 112.—QUOTED IN *Whitney v. Taylor*, 45 *Fed. Rep.* 616.

The Union Pacific land-grant act (12 *U. S. St. at L.*, 492) provides that the original grant to the company is of land "to which a pre-emption or homestead claim may not have attached at the time that the line of such road is definitely fixed." *Held*, that the word "attached" means when a settler has filed a homestead entry in regular form; and the fact that such entry is subsequently set aside because the party is not entitled to a homestead will not give the company title to the land. *McIntyre v. Roeschlaub*, 37 *Fed. Rep.* 556.—QUOTING *Kansas Pac. R. Co. v. Dunmeyer*, 113 *U. S.* 629, 5 *Sup. Ct. Rep.* 566.

In an action by plaintiff to recover lands alleged to have been included in its grant, but claimed by defendant under homestead entries—*held*, that under the amendatory Act of Congress of June, 1864, the grant of 1856, which was a grant *in present* in the nature of a float, was made definite and certain by reference to the line of said railroad as then located, and the lands granted became susceptible of accurate, certain, and determinate designation; that the entries of the lands in controversy in October, 1864, were not valid, because the grant had already attached to those identical lands; and that the right thus acquired could not be impaired by subsequent legislation, state or national. *Burlington & M. R. R. Co. v. Lawson*, 10 *Am. & Eng. R. Cas.* 655, 58 *Iowa* 145, 12 *N. W. Rep.* 229.

The Act of Congress of 1876 is not applicable in this case. The right of the plaintiff did not depend upon the withdrawal of the lands from sale, or notice thereof. After the line of the road was definitely fixed the lands included were not subject to homestead entry, and an enterer could acquire no rights thereby. *Burlington & M. R. R. Co. v. Lawson*, 10 *Am. &*

Eng. R. Cas. 655, 58 *Iowa* 145, 12 *N. W. Rep.* 229.

8a. Reversion for breach of condition.—Where a land grant to a railroad company does not attach to certain lands by reason of a former grant to another company, a failure on the part of the first chartered company to earn its lands will not allow the other company's grant to attach thereto, but the lands will revert to the United States. *United States v. Northern Pac. R. Co.*, 57 *Am. & Eng. R. Cas.* 362, 152 *U. S.* 284, 14 *Sup. Ct. Rep.* 598.

Where lands are granted to a railroad company on condition that it shall construct a certain portion of its road in a given time, and upon a failure to do so that the land shall revert to the grantor, a failure to comply with such condition will authorize the grantor to repossess himself of the lands, and he will take them free from the debts of the company, contracted while it was in possession. *Schlesinger v. Kansas City & S. R. Co.*, 152 *U. S.* 444, 14 *Sup. Ct. Rep.* 647.

Where the condition upon which a grant of land is based has been altered by a verbal agreement subsequently made, but the grantee fails to comply with it, either as originally expressed or as altered, the grantor has the right to be reinvested with the title to the land, if it does not appear that he waived or dispensed with the condition of the grant. *Ragsdale v. Vicksburg & M. R. Co.*, 62 *Miss.* 480.

9. Long possession—Presuming a grant.—An uninterrupted and undisputed possession and use of the *locus in quo* for the purposes of a railroad during thirty years, by the company, is presumptive evidence that it has complied with the requirements of the law and thereby acquired the fee simple in the land, or at all events it would be presumptive evidence of a grant of the right of way over the land for the purposes of a railroad. *Ogle v. Philadelphia, W. & B. R. Co.*, 3 *Houst. (Del.)* 302; *affirming* 3 *Houst.* 267.

10. Grants of Indian lands.—Under the rule of strict construction of grants, a naked grant of "land" could not operate to include Indian lands which were specially reserved to the Indians by treaty; and the provision of the grant which excluded "all lands heretofore reserved to the United

States for any purpose whatever" would operate to exclude such Indian lands. *Leavenworth, L. & G. R. Co. v. United States*, 92 *U. S.* 733; *affirming* 1 *McCrory (U. S.)* 610.—FOLLOWED IN *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 *U. S.* 491; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 *U. S.* 426. QUOTED IN *Northern Pac. R. Co. v. Majors*, 5 *Mont.* 111.

The Act of Congress of March 3, 1863, granting lands to Kansas to aid in the construction of certain railroads, did not include any lands held by the Osage Indian tribes. *Leavenworth, L. & G. R. Co. v. United States*, 92 *U. S.* 733; *affirming* 1 *McCrory (U. S.)* 610.—APPLIED IN *Bardon v. Northern Pac. R. Co.*, 145 *U. S.* 535, 12 *Sup. Ct. Rep.* 856. FOLLOWED IN *Missouri, K. & T. R. Co. v. United States*, 92 *U. S.* 760, *n.* QUOTED IN *Roberts v. Missouri, K. & T. R. Co.*, 43 *Am. & Eng. R. Cas.* 532, 43 *Kan.* 102, 22 *Pac. Rep.* 1006. REFERRED TO IN *Union Pac. R. Co. v. Douglas Co.*, 31 *Fed. Rep.* 540.

The Osage Indian lands were lands "otherwise appropriated," and were not included in the grant of 1866 for railroad purposes. The effect on this case is the same, whether the act of 1866 is treated as taking effect before or after the treaty with the Indians came into operation by the proclamation of the president on Jan. 21, 1867. *Missouri, K. & T. R. Co. v. United States*, 92 *U. S.* 760, *n.*

Lands ceded by congress to a railroad within an Indian reservation are thereby withdrawn from the reservation, and become subject to the laws of the state or territory where situate. *Utah & N. R. Co. v. Fisher*, 24 *Am. & Eng. R. Cas.* 116, 116 *U. S.* 28, 6 *Sup. Ct. Rep.* 246.

The grant by the Act of Congress of July 2, 1864, to the Northern Pacific Railroad Co., of lands to which the Indian title had not been extinguished, operated to convey the fee to the company, subject to the right of occupancy by the Indians. The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the government, and could not be interfered with nor put in contest by private parties. *Bulls v. Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 455, 119 *U. S.* 55, 7 *Sup. Ct. Rep.* 100.—FOLLOWED IN *St. Paul, M. & M. R. Co. v. Phelps*, 137 *U. S.* 528; *Northern Pac. R. Co. v. Wright*, 51 *Fed. Rep.* 68.

* Forfeiture of land grant, see notes, 14 *Am. & Eng. R. Cas.* 504; 24 *Id.* 509; 26 *Id.* 531.

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The agreement of the Sisseton and Wahpeton bands of Dakota or Sioux Indians for the relinquishment of their title was accepted on the part of the United States when it was approved by the secretary of the interior, on June 19, 1873. That agreement stipulating to be binding from its date, May 19, 1873, and the Indians having retired from the lands to their reservations, the relinquishment of their title, so far as the United States are concerned, is held to have then taken place. *Butts v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 455, 119 U. S. 55, 7 Sup. Ct. Rep. 100.

Upon the definite location of the line of the Northern Pacific railroad, on May 26, 1873, the right of the company, freed from any incumbrance of the Indian title, immediately attached to the alternate sections; and no pre-emptive right could be initiated to the land so long as the Indian title was unextinguished. *Butts v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 455, 119 U. S. 55, 7 Sup. Ct. Rep. 100.

The swamp-land act of congress, passed September 28, 1850, vested the fee to the lands affected thereby in the state immediately upon its taking effect, notwithstanding the Indian title was not then extinguished. The state and its grantees held the fee subject to the Indian right of occupation up to such time as that right was relinquished, when the right of possession vested in the owner of the fee. *Snell v. Dubuque & S. C. R. Co.*, 78 Iowa 88, 42 N. W. Rep. 588.—FOLLOWED IN *Snell v. Dubuque & S. C. R. Co.*, 80 Iowa 767.

II. FEDERAL GRANTS TO STATES.

1. In General.

11. Grant to territory inures to state when admitted to Union.—Congress has the power to authorize the construction of railroads in a territory and to make land grants thereto, and such grants will be valid after such territory, or a part of it, is admitted as a state. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 11 Sup. Ct. Rep. 168.

12. Title of state before survey, etc.—The words "there be and is hereby granted," as used in the act of congress granting certain sections of land to a state in aid of railways, imply absolute donation, and import a grant *in presenti*, and vest a present title in the state, though a survey

and location are necessary to give precision to it and attach it to any particular tract. After the location of the road the grant becomes certain, and by relation has the same effect upon the selected parcels as if they had been specifically named at the date of the grant; but the grant only applies to such public lands as are owned absolutely by the United States, as no others are subject to survey and selection. *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.—APPLIED IN *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 25 Am. & Eng. R. Cas. 99, 26 Fed. Rep. 551. DISTINGUISHED IN *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618. FOLLOWED IN *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1. QUOTED IN *Denny v. Dodson*, 13 Sawy. (U. S.) 68.

13. Legislative control, generally.—The fact that land is donated to the state by congress upon trust to aid in the construction of railroads does not impair the legislative control over it. It is the sole judge of the measures appropriate to effect the object of the grant, and to enable the state to discharge the trust reposed in it by congress. *Little Rock & Ft. S. R. Co. v. Howell*, 31 Ark. 119.

14. — power to declare forfeiture for non-completion of road.—In case the federal government, neither by legislative enactment nor judicial construction, has declared the forfeiture of a grant of lands to a railroad corporation, the legislature of the state, which is designated as the trustee in the granting act of congress, can—if she has done no act to estop her from setting up an adverse claim to a present grantee—forfeit such grant on the ground of the non-fulfilment of the condition subsequent to said grant—the completion of the railroad within the fixed period of ten years. *Mower v. Kemp*, 46 Am. & Eng. R. Cas. 480, 42 La. Ann. 1007, 8 So. Rep. 830.—DISTINGUISHING *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 49.

So long as a railroad company is permitted to retain the occupancy of such granted lands and to exercise the franchises it has thus acquired, and the grantor shall forbear to forfeit the grant, the corporation is entitled to proceed with the construction of its railroad to completion "out of time," and thus fulfil the condition subsequent that is attached to the grant. *Mower v.*

Kemp, 46 *Am. & Eng. R. Cas.* 480, 42 *La. Ann.* 1007, 8 *So. Rep.* 830.

At most, an intervening, repealing statute, enacted by a legislature of the state as trustee, could repeal and avoid its own donation to the railroad company; but it containing only like conditions as those prescribed in the granting act of congress, left the grant as it was originally. And it having never been revoked by act of congress or judicial decree, a mere possessor of the granted lands, without title from any source, can take nothing by the effect of the repealing statute, the condition subsequent having been intermediately fulfilled. *Mower v. Kemp*, 46 *Am. & Eng. R. Cas.* 480, 42 *La. Ann.* 1007, 8 *So. Rep.* 830.

15. Reversion for condition broken.—In order that an act of congress should work a reversion to the United States, for condition broken, of lands granted by them to a state to aid in internal improvements, the legislation must directly, positively, and with freedom from all doubt or ambiguity, manifest the intention of congress to reassert title and resume possession. No such intention is manifested in the act of July 28, 1866 (14 *St. at L.* 338), so far as it affects the lands granted to the states of Arkansas and Missouri by the act of February 9, 1853 (10 *St. at L.* 155), except as to mineral lands. *St. Louis, I. M. & S. R. Co. v. McGee*, 26 *Am. & Eng. R. Cas.* 525, 115 *U. S.* 469, 6 *Sup. Ct. Rep.* 123.—**DISTINGUISHED IN** *Miller v. Swann*, 89 *Ala.* 631. **FOLLOWED IN** *Doe v. Larmore*, 116 *U. S.* 198.

2. Alabama.

16. In general.—Under the acts of congress granting lands to the state in aid of certain railroads (11 *U. S. St. at L.* p. 17; 16 *Id.* 45), as heretofore construed, the legal title to the lands granted at once vested in the state for the use and benefit of the designated railroad companies; and it continued in the state, except as to the lands sold during the construction of the road, in continuous sections of twenty miles, until the construction of the road was completed; and while the title thus continued in the state the statute of limitations did not begin to run in favor of an adverse possessor under color of title. *Swann v. Gaston*, 87 *Ala.* 569, 6 *So. Rep.* 386.

But the state having conveyed the lands subject to the restrictions imposed by the

statute, which gave a conditional right of sale, it could not ratify and sanction a sale made in violation of those conditions, nor has it done so in regard to the lands acquired by the Alabama & Chattanooga R. Co., some of which were afterwards sold by the agents of that company without authority; and subpurchasers of those lands, being sued by the railroad trustees, cannot enjoin the action in equity on the ground that the purchase money paid was used in completing the road. *Miller v. Swann*, 89 *Ala.* 631, 7 *So. Rep.* 771.—**DISTINGUISHING** *St. Louis, I. M. & S. R. Co. v. McGee*, 115 *U. S.* 469.

17. Act of June 3, 1856.—Under the provisions of the Act of Congress approved June 3, 1856, "granting public lands in alternate sections to the state of Alabama, to aid in the construction of certain railroads," a present title to the lands passed to the state, subject to be divested, by proper action taken, for breach of the condition subsequent annexed to the grant; and though this title did not attach to any specific sections of land until the route of the particular railroad, to aid in the construction of which the grant was made, was definitely located within the time allowed by said acts of congress, no title remained in the United States subject to entry or sale. *Swann v. Lindsey*, 14 *Am. & Eng. R. Cas.* 504, 70 *Ala.* 507.—**DISTINGUISHING** *Alabama & F. R. Co. v. Burkett*, 46 *Ala.* 569. **QUOTING** *Schulenberg v. Harriman*, 21 *Wall.* (U. S.) 44.—*Swann v. Larmore*, 14 *Am. & Eng. R. Cas.* 519, 70 *Ala.* 555.—**QUOTING** *Schulenberg v. Harriman*, 21 *Wall.* 44.

Under said act the state held the lands so granted in trust for the purposes specified, limited by the restrictions and conditions expressed in the grant; having absolute power to sell one hundred and twenty sections, within a continuous length of twenty miles of the road, before any work was done on it, and the further power to sell, as the work progressed, the same number of additional sections, within other twenty continuous miles, on the governor's certificate to the secretary of the interior that such twenty continuous miles of the road were completed; and when any of the lands were sold and conveyed in pursuance of these powers, the purchaser acquired an absolute title whether the railroad was ever completed or not. *Swann v. Lindsey*, 14 *Am. & Eng. R. Cas.* 504, 70 *Ala.* 507. *Swann v. Larmore*, 14 *Am. & Eng. R. Cas.* 519, 70

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Beyond the first one hundred and twenty sections, as to which an absolute power of sale was given, the state had no authority to sell or dispose of any of these lands, even to the railroad company itself, except in portions of twenty miles as the road progressed, and could not convey to its grantee or appointee any greater power or interest than was vested in itself. The joint resolutions of the general assembly, approved January 30, 1858, by which it was declared that the lands "are hereby disposed of, granted to, and conferred upon" the railroad particularly designated, "to be used and applied by said company upon the terms, conditions, and restrictions in said act of congress contained," although strong words of grant and disposition are used, "which would, ordinarily, convey all the title of the grantor," must be construed in connection with the act of congress, and do not convey to the railroad company any greater power or interest than the state itself had; and notwithstanding these joint resolutions, the legal title to said lands, beyond the first one hundred and twenty sections, remained in the state until the railroad was completed. *Swann v. Lindsey*, 14 Am. & Eng. R. Cas. 504, 70 Ala. 507.—QUOTING *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 49.

Statutes of limitation do not, unless so expressed, run against the state, or the United States, nor does the statute begin to run until there is some one entitled to sue; and the title to these lands remaining in the state until the railroad was completed, less than ten years before the suit was brought, the statute of limitations is no defense to the action. *Swann v. Lindsey*, 14 Am. & Eng. R. Cas. 504, 70 Ala. 507.

By joint resolutions of the general assembly, approved January 30, 1858, it was declared "that so much of said lands, interest, rights, powers, and privileges as are or may be granted and conferred, in pursuance of the said act of congress, to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee line of railroads, through Chattanooga, Wills, and Lookout valleys, are hereby disposed of, granted to, and conferred upon the Wills Valley R. R. Co., to be used and applied by said company upon the terms, conditions, and under the restrictions in said act of congress contained." In 1861 said railroad

company sold the lands here sued for, which are within six miles of the railroad, and within twenty miles of the point where it crosses the boundary line of Georgia, but more than twenty miles from Gadsden, and more than twenty miles from Wauhatchie in Tennessee, where work on the road was commenced, five miles from Chattanooga, where the Georgia and Tennessee railroads meet and intersect; and the purchase money paid was used by the company in the construction of the road. Held, that the sale was authorized by the said acts of congress and joint resolutions of the general assembly; and there being no proof of any other sale having been made by the company, that the court would not presume that the absolute power of sale had been previously exhausted. *Swann v. Larmore*, 14 Am. & Eng. R. Cas. 519, 70 Ala. 555.

The supreme court of Alabama will take judicial knowledge of the fact that the United States has never taken any action declaring the forfeiture of the lands conveyed by the above grant, and which has been set apart by the state to a certain railroad. *Mathis v. Tennessee & C. R. R. Co.*, 83 Ala. 411, 3 So. Rep. 793.

On a sale by a railroad company (one of the beneficiaries under the above grant) of any of the lands allotted to it by the state, if located beyond the limits of the first twenty miles of the road, no title passes to the purchaser. *Mathis v. Tennessee & C. R. R. Co.*, 83 Ala. 411, 3 So. Rep. 793.

18. Act of April 10, 1860.—The Act of Congress of April 10, 1869, renewing certain land grants to the state for railroad purposes, made by the act of June 3, 1856, is not a new grant, but an extension of the time for completion of the road as fixed by the original grant. *Doe v. Larmore*, 116 U. S. 198, 6 Sup. Ct. Rep. 365.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 469.

In such case the completion of the road within the time fixed by the act of 1869 perfected the title of the railroad company under the grant of 1856, which would inure to the benefit of the grantees of the railroad. *Doe v. Larmore*, 116 U. S. 198, 6 Sup. Ct. Rep. 365.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. McGee*, 115 U. S. 469.

The grant by the act of 1869 does not embrace all odd sections of land which are within six miles of that portion of the road which has been constructed through the

state of Georgia. *Swann v. Jenkins*, 82 Ala. 478, 2 So. Rep. 136.

The grant of lands by the act of June 3, 1856, expired by its own terms in ten years, and all lands unsold by a railroad company whose road was not then completed reverted to the United States; and although the grant was afterwards revived and renewed by the Act of Congress, approved April 10, 1869, the renewal was made subject to all pre-emption rights which had attached in the meantime; and these pre-emption rights and homestead entries, being confirmed by the subsequent act approved April 21, 1876, must prevail over the claim of the railroad company under the renewed grant. *South & N. Ala. R. Co. v. Gilliam*, 85 Ala. 171, 4 So. Rep. 694.

3. California. Florida. Illinois.

19. California.—The Act of Congress of July 23, 1866, confirming selections of public land made by or on behalf of the state under grants of congress, which selections were void when the act passed, did not have the effect of confirming the title of the state to a selection of an odd section within the belt granted to the Central Pacific R. Co. by acts of July 1, 1862, and July 2, 1864. *Central Pac. R. Co. v. Robinson*, 49 Cal. 446. —FOLLOWING *Central Pac. R. Co. v. Yoland*, 49 Cal. 438. —FOLLOWED IN *Kaiser v. McLaughlin*, 49 Cal. 449. OVERRULED IN *McLaughlin v. Fowler*, 53 Cal. 203.

20. Florida.—The trustees of the Florida internal improvement fund, created to aid in building railroads and internal improvements, are but agents of the state, holding the legal title to the lands for convenience, while the state is the beneficial proprietor. *Union Trust Co. v. Southern Inland N. & I. Co.*, 130 U. S. 565, 9 Sup. Ct. Rep. 606. —QUOTING *Florida v. Anderson*, 91 U. S. 667.

Under the Act of Congress of May 17, 1855, granting certain public lands to the state for railroad purposes, and providing for an agent to be appointed by the governor of the state to select other lands in lieu of any that might have been selected or pre-empted before the route of a railroad might be fixed, which should be subject to the approval of the secretary of the interior, no title passes to the state for such indemnity lands until the selection is approved by such secretary. *Davis v. Capitol Phosphate Co.*, 57 Fed. Rep. 118. —FOLLOWING

Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 10 Sup. Ct. Rep. 341.

21. Illinois.—The act of congress granting lands to the state, donating lands in aid of the Central railroad, and the certified schedules issued by the secretary of the interior and the commissioner of the general land office, are evidence of title. *Sawyer v. Cox*, 63 Ill. 130.

Swamp and overflowed lands selected by the Illinois Central R. Co. in lieu of other lands sold or pre-empted after the list thereof, properly certified, was filed for record in the proper county, cannot be recovered by the county in which they lie, as the legal title to such lands is in the railroad company and not in the county. *Illinois C. R. Co. v. Union County*, 94 Ill. 70.

Under the two grants to the state, of lands for the purpose of constructing a railroad, and that of swamp and overflowed lands, the state took the whole legal title, with full power of disposition, without regard to the uses for which the lands were granted. *Illinois C. R. Co. v. Union County*, 94 Ill. 70.

Upon the selection of the lands granted the state for railroad purposes, by the Illinois Central R. Co., as provided in the statute, the grant to the state under the Act of Congress of September 20, 1850, became certain, and the grant attached to the particular lands selected, and the title to them vested in the railroad company. *Illinois C. R. Co. v. Union County*, 94 Ill. 70.

4. Iowa.

22. Act of August 8, 1846. — The Act of Congress of Aug. 8, 1846, granting land to Iowa to aid in improving the Des Moines river, and in time conveyed to a railroad and improvement company, did not embrace any land above the Racoon fork, nor authorize any location upon lands out of Iowa. *Dubuque & P. R. Co. v. Litchfield*, 23 How. (U. S.) 66. —FOLLOWED IN *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 109 U. S. 329; *United States v. Des Moines N. & R. Co.*, 142 U. S. 510. QUOTED IN *Northern Pac. R. Co. v. Sanders*, 46 Am. & Eng. R. Cas. 431, 46 Fed. Rep. 239. RECONCILED IN *Courtright v. Cedar Rapids & M. R. R. Co.*, 35 Iowa 386. REVIEWED IN *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 54 Iowa 89; *Bullard v. Des Moines & Ft. D. R. Co.*, 14 Am. & Eng. R. Cas. 520, 62 Iowa 21.

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Dubuque & S. C. R. Co. v. Des Moines Valley R. Co., 14 *Am. & Eng. R. Cas.* 532, 109 *U. S.* 329, 3 *Sup. Ct. Rep.* 188.—FOLLOWING *Dubuque & P. R. Co. v. Litchfield*, 23 *How.* 66.—FOLLOWED IN *United States v. Des Moines N. & R. Co.*, 142 *U. S.* 510.

But by the joint resolution of congress of March 2, 1861, and the act of July 12, 1862, the title of the state to the odd-numbered sections above that fork, within five miles of the river, was recognized and perfected. Said lands were "reserved" to the United States, within the meaning of another act of May 15, 1856, making a grant of certain lands above the Racoon fork to Iowa to aid in building railroads, and no title thereto passed under said latter act. *Wolcott v. Des Moines N. & R. Co.*, 5 *Wall. (U. S.)* 681.—FOLLOWED IN *Hannibal & St. J. R. Co. v. Smith*, 9 *Wall.* 95; *United States v. Des Moines N. & R. Co.*, 142 *U. S.* 510; *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 54 *Iowa* 89. REAFFIRMED IN *Williams v. Baker*, 17 *Wall.* 144. REVIEWED IN *Bullard v. Des Moines & Ft. D. R. Co.* 14 *Am. & Eng. R. Cas.* 529, 62 *Iowa* 382.—*Williams v. Baker*, 17 *Wall. (U. S.)* 144.—REAFFIRMING *Wolcott v. Des Moines N. & R. Co.*, 5 *Wall.* 681; *Litchfield v. Dubuque & P. R. Co.*, 7 *Wall.* 270.—FOLLOWED IN *Iowa Homestead Co. v. Des Moines N. & R. Co.*, 17 *Wall. (U. S.)* 153; *United States v. Des Moines N. & R. Co.*, 142 *U. S.* 510; *Davenport v. Sebring*, 52 *Iowa* 354; *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 54 *Iowa* 89.

Under the act of August 8, 1846, the title of the Des Moines Navigation & Railroad Co. to lands granted to Iowa for the improvement of the navigation of the Des Moines river is good as against the state and other railroad companies, under what is known as the railroad grant of 1856, and as against presumptive rights after 1855, under the act of 1841. *Wolsey v. Chapman*, 101 *U. S.* 755.—FOLLOWED IN *United States v. Des Moines N. & R. Co.*, 142 *U. S.* 510. QUOTED IN *Wood v. Beach*, 43 *Kan.* 427.

By a contract between Iowa and the Des Moines Navigation & Railroad Co. of 1854 the state was to convey to the company all lands granted it for the improvement of the Des Moines river and not sold prior to December 23, 1853. The contract was confirmed by a joint resolution in 1858. *Held*, that the governor was authorized to convey land to the company, it having been certified

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as part of the land conveyed to the state for the improvement of said river. *Wolsey v. Chapman*, 101 *U. S.* 755.

The Acts of Congress of August 8, 1846, March 2, 1861, and July 12, 1862, granting title to lands to the Des Moines Navigation & Railway Company, and to the state of Iowa for the purpose of aiding in the improvement of navigation of the Des Moines river, conveyed a valid title as against the United States, as a grant *in presenti*. *United States v. Des Moines N. & R. Co.*, 142 *U. S.* 510, 12 *Sup. Ct. Rep.* 308.—FOLLOWING *Dubuque & P. R. Co. v. Litchfield*, 23 *How.* 66; *Wolcott v. Des Moines Co.*, 5 *Wall.* 681; *Williams v. Baker*, 17 *Wall.* 144; *Iowa Homestead Co. v. Valley R. Co.*, 17 *Wall.* 153; *Wolsey v. Chapman*, 101 *U. S.* 755; *Litchfield v. Webster County*, 101 *U. S.* 773; *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 109 *U. S.* 329; *Bullard v. Des Moines & Ft. D. R. Co.*, 122 *U. S.* 167.

For the purpose of determining the extent of the original grant of lands to Iowa, under the act of August 8, 1846, the northern terminal line adopted by the government is one drawn at right angles with the general direction of the Des Moines river. *Des Moines N. & R. Co. v. Cooper*, 41 *Iowa* 275.

23. Act of May 15, 1856.—The Act of Congress of May 15, 1856, provided that "a quantity of land, not exceeding 120 sections, and included within a continuous length of twenty miles of the road, might be sold; and when the governor of the state should certify to the secretary of the interior that any continuous twenty miles of road were completed, then another like quantity of land might be sold." *Held*, that the act authorized a sale of 120 sections in advance of the construction of any part of the road; but as to the remainder, sales were to be made as each twenty miles was completed. *Cedar Rapids & M. R. Co. v. Courtright*, 21 *Wall. (U. S.)* 310; *affirming* 35 *Iowa* 386, 5 *Am. Ry. Rep.* 67.

There was no restriction upon the state as to the place where the 120 sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side; and they might be selected from lands adjoining the eastern end of the road, or the western end, or along the central portion. *Cedar Rapids & M. R. Co. v.*

Courtright, 21 Wall. (U. S.) 310; affirming 35 Iowa 386, 5 Am. Ry. Rep. 67.

The Iowa Central Air Line R. Co. mentioned in the act of the state of July 14, 1856, took the title and interests of the state upon the terms, conditions, and restrictions expressed in the act of congress, and the further conditions as to the completion of the road imposed by the state were conditions subsequent. *Cedar Rapids & M. R. Co. v. Courtright*, 21 Wall. (U. S.) 310; affirming 35 Iowa 386, 5 Am. Ry. Rep. 67.

The purchasers of the first 120 sections took a good title to the property, although no part of the road was constructed at the time. *Cedar Rapids & M. R. Co. v. Courtright*, 21 Wall. (U. S.) 310; affirming 35 Iowa 386, 5 Am. Ry. Rep. 67.

The land grant by the act of May 15, 1856, was a grant *in presenti*, attaching to the land only on filing of the map of the definite location of the roads, although the beneficiary company may have made a survey and staked out the line of its road before filing such map. *Sioux City & I. F. T. L. & L. Co. v. Griffey*, 143 U. S. 32, 12 Sup. Ct. Rep. 362.—FOLLOWING *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566; *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358, 12 Sup. Ct. Rep. 13.

Under the Act of Congress of May 15, 1856, and the act of June 2, 1864, extending the grant from fifteen to twenty miles of the line of the proposed road, the grant was *in presenti*, vesting title to the lands, which was not forfeited by a subsequent change of the location of the road by act of congress. But even if such change worked a forfeiture it could not be taken advantage of at the suit of an individual. *Grinnell v. Chicago, R. I. & P. R. Co.*, 5 Am. & Eng. R. Cas. 447, 103 U. S. 739; affirming 51 Iowa 476.—APPROVED IN *Sioux City & I. F. T. L. & L. Co. v. Griffey*, 72 Iowa 505, 34 N. W. Rep. 304. FOLLOWED IN *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720.

The odd-numbered sections of land within five miles of the Des Moines river in Iowa, above the Raccoon fork and below the east branch, did not pass to the state under the Act of Congress of May 15, 1856. *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 14 Am. & Eng. R. Cas. 532, 109

U. S. 329, 3 Sup. Ct. Rep. 188; affirming 54 Iowa 89, 6 N. W. Rep. 157.

The state selected certain indemnity lands under the act of May 15, 1856, and the United States conveyed title to the railroad designated, which built its road according to law. Held, that such action on the part of the state defeated its right to subsequently claim the same lands under the Swamp-land Act of 1850. *Hough v. Buchanan*, 27 Fed. Rep. 328.

The governor of Iowa will not be compelled by mandamus to issue any certificate to the Cedar Rapids & Missouri River R. Co. which will enable said corporation to acquire any title to any of the lands embraced in the grant of lands to the state by act of May 15, 1856, prior to a compliance with the conditions expressed in sections 6 and 7 of chapter 37 of the Laws of 1860. *State ex rel. v. Kirkwood*, 14 Iowa 162.—DISTINGUISHED IN *Courtright v. Cedar Rapids & M. R. R. Co.*, 35 Iowa 386. RECORDED IN *Cedar Rapids & M. R. R. Co. v. Carroll Co.*, 41 Iowa 153.

The act of May 15, 1856, having reserved from its operation all lands that had been before appropriated for any other purpose whatsoever, or which should have been granted when the lines of said road should be definitely fixed, did not disturb or affect the title to the swamp and overflowed lands in Fremont and Mills counties that had been confirmed to the state prior to the time when the final location of the line of the Burlington & Missouri River railroad was definitely determined. The act of the commissioner of the general land office, of March 25, 1862, certifying these lands to the Burlington & Missouri River railroad company, being in contravention of the vested rights of the counties, was ineffectual and void, and the same may be inquired into and so declared by the courts. *Fremont & M. Counties v. Burlington & M. R. R. Co.*, 22 Iowa 91.—FOLLOWED IN *Montgomery County v. Burlington & M. R. R. Co.*, 38 Iowa 208; *American Emigrant Co. v. Chicago, R. I. & P. R. Co.*, 47 Iowa 515.

In an action to recover land claimed to have passed to the plaintiff's grantor under act of May 15, 1856, as deficiency lands selected within fifteen-mile limits—held, that the certificate of the governor that the plaintiff's grantor had completed its road in compliance with the Act of Congress of June 2, 1864, § 8, and the resolutions of March 3,

1865, and Chicago, 101, 4 N. Johnson also *Dubuque & M. R. 91, 66 Iowa VIEWING R. Co.*, 4. 24. A tiff claim under A granting construct act of the cepting th the Dubu railroad land upon of the line the survey office at V so entitle tion. An filed, the pre-empti wards prom ment—he *Sioux City fey*, 72 Iowa PROVING 360; Kan U. S. 629 R. Co., cago, R. 476; Iowa Iowa 421. 25. A the Act the state along the fork to t indian t guished, obtained being th & S. C. 14 Am. 3 Sup. Ch Where purposes officers river, and not chan according R. Co. v.

1865, and Feb. 10, 1866, was admissible. *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. Rep. 842.—FOLLOWED IN *Johnson v. Thornton*, 54 Iowa 144. See also *Dubuque S. W. R. Co. v. Cedar Rapids & M. R. R. Co.*, 25 Am. & Eng. R. Cas. 91, 66 Iowa 366, 23 N. W. Rep. 758.—REVIEWING *Smith v. Cedar Rapids & M. R. R. Co.*, 43 Iowa 239.

24. Act of May 26, 1856.—Plaintiff claims title to the land in question under Act of Congress of May 26, 1856, granting to the state lands in aid of the construction of certain railroads, and the act of the general assembly of Iowa accepting the trust and granting said lands to the Dubuque & Pacific R. Co. But the railroad company was not entitled to the land upon the mere survey and staking out of the line of its road, nor until the plat of the survey was filed in the general land office at Washington; and until it became so entitled the land was open to pre-emption. And since, before such plat was so filed, the defendant had obtained a valid pre-emption right upon which he afterwards procured a patent from the government—held, that his was the better title. *Sioux City & I. F. T. L. & L. Co. v. Griffee*, 72 Iowa 505, 34 N. W. Rep. 304.—APPROVING *Van Wyck v. Knevals*, 106 U. S. 360; *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629; *Grinnell v. Chicago, R. I. & P. R. Co.*, 103 U. S. 739. FOLLOWING *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa 476; *Iowa Falls & S. C. R. Co. v. Beck*, 67 Iowa 421.

25. Act of July 12, 1862.—Under the Act of Congress of 1862, granting to the state of Iowa and its grantees lands along the Des Moines river from Racoon fork to the northern line of the state, the indian title thereto having been extinguished, the Des Moines Valley railroad obtained a perfect title to such lands, it being the grantee of the state. *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 14 Am. & Eng. R. Cas. 532, 109 U. S. 329, 3 Sup. Ct. Rep. 188.

Where lands are granted "for railroad purposes "along a river," a mistake of officers in taking a branch for the main river, and locating lands accordingly, does not change the grant. It will take effect according to its terms. *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 14 Am.

& Eng. R. Cas. 532, 109 U. S. 329, 3 Sup. Ct. Rep. 188.

A claim to such lands based on settlements made on the lands, before or after the passage of the act of July 12, 1862, granting them to the state for railroad and navigation purposes, is invalid. *Bullard v. Des Moines & Ft. D. R. Co.*, 122 U. S. 167, 7 Sup. Ct. Rep. 1149; affirming 62 Iowa 382, 17 N. W. Rep. 609.—FOLLOWED IN *United States v. Des Moines N. & R. Co.*, 142 U. S. 510.

The act of July 12, 1862, was a grant *in presenti* of the alternate sections of land lying within five miles of the Des Moines river, between the Racoon forks and the northern boundary of the state, although the grant was made for a designated purpose, and the lands were not certified by the secretary of the interior until April 24, 1875. And said lands became the property of the Des Moines Valley R. Co. under chapter 57, Laws of 1868, and became taxable, as soon as the said company had complied with the conditions of said act, which was January 1, 1871, although the secretary of the interior had not yet certified them to the state, and although the governor refused to execute patents therefor to said company until some years thereafter. *Whitehead v. Plummer*, 76 Iowa 181, 40 N. W. Rep. 709.—FOLLOWED IN *Cole v. Des Moines Valley R. Co.*, 76 Iowa 185, 40 N. W. Rep. 711.

26. Act of May 12, 1864.—The Act of Congress of May 12, 1864, granted certain lands to the state to aid in constructing railroads, (1) from Sioux City on the western border of the state to the Minnesota state line, and (2) from a point on such road to South McGregor on the eastern border of the state, with right to claim indemnity lands for such as had already been disposed of within the ten-mile limit of the roads. A part of the former road through a section where all the public land had been granted was never built. Held, that the company could not equitably demand payment for more than the number of miles actually constructed. *United States v. Sioux City & St. P. R. Co.*, 43 Fed. Rep. 617.

But where it has been determined in prior litigation that the former company is only entitled to one half of the land granted to the two, it is entitled to indemnity lands for the one half thus lost.

United States v. Sioux City & St. P. R. Co., 43 *Fed. Rep.* 617.

The act of May 12, 1864, did not specify any beneficiary corporation, but conferred the lands upon the state as trustee, charged with the duty of appropriating them for the purpose and under the conditions specified in the act. The title was not to pass until the issuance of the patents, after they had been earned by the construction of certain specified portions of the road, and prior to that the lands could not be disposed of nor encumbered. *Sioux City & St. P. R. Co. v. Osceola County*, 43 *Iowa* 318, 14 *Am. Ry. Rep.* 450.—FOLLOWED IN *Sioux City & St. P. R. Co. v. Lyon County*, 43 *Iowa* 683.

By that act the United States granted to the state certain lands in said state to aid in the construction of a railroad from Sioux City to a point on the south line of the state of Minnesota, the lands to be subject to the disposal of the legislature for that purpose and no other. By chapter 134 of the Acts of the General Assembly of 1866 the state accepted said grant, and conferred the lands granted upon a certain railroad, subject to the conditions named in the grant, which grant was accepted by the railroad on September 20, 1866. *Held*, that the grant did not operate to vest the legal title to the lands in the railroad company, and that the road not having been completed September 20, 1881, all of said lands not then patented in the manner aforesaid nor otherwise disposed of reverted to the United States. *Bowne v. Bilsland*, 83 *Iowa* 162, 49 *N. W. Rep.* 161.

By that act the United States granted to Iowa, to aid in the construction of railroads, every alternate section of land designated by odd numbers for ten sections in width on each side of said roads. Patents for one hundred sections of said lands were to be issued to the companies whenever the governor should certify that any section of ten consecutive miles of either of said roads was completed, etc. If the roads were not completed within ten years from the time of their acceptance of the grant, the lands thereby granted and not patented were to revert to the state for the purpose of securing the completion of said roads, and should the state fail to complete said roads within five years thereafter the lands undisposed of were to revert to the United States. The state accepted the grant, and conferred

the lands and interests granted upon the plaintiff; and in September, 1866, the plaintiff accepted the grant from the state. *Held*, that the grant from the state to the plaintiff was necessarily limited to the conditions imposed by the act of congress, and that the right remained in the state to resume control of all lands not earned by the plaintiff within ten years from the acceptance of the grant, although such right was not specifically reserved by the state, and that the state had properly relinquished its title to the United States. *Sioux City & St. P. R. Co. v. Countryman*, 83 *Iowa* 172, 49 *N. W. Rep.* 72.

The plaintiff having failed to complete its road to Sioux City as provided by said act of congress, and until completion being entitled only to land for each completed section of ten consecutive miles of built road—*held*, that it was not entitled to the lands in controversy on account of the last six and a quarter miles of road constructed on its line to Le Mars, nor for the part of the road and improvements built in Sioux City. Neither could the plaintiff claim said lands as a part of the indemnity lands, which it had earned by the construction of the fifty miles of road, upon the ground that the award of a portion of said lands to the Chicago, Milwaukee & St. Paul Railway Company was a sale or appropriation within the meaning of a provision of said act of congress that, if it should appear that the United States had sold any part of the lands granted by said act, or that they had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause to be selected other lands in lieu thereof. *Sioux City & St. P. R. Co. v. Countryman*, 83 *Iowa* 172, 49 *N. W. Rep.* 72.

5. Kansas.

27. In general.—The Acts of Congress of March 3, 1863 (12 *St. at L.* 772); July 1, 1864 (13 *St. at L.* 339); and July 26, 1866 (14 *St. at L.* 289), granting lands to the state for railroad purposes, are to be construed as *in pari materia*, and as having the one purpose of building a single road from Fort Riley, down the Neosho valley, to the southern line of the state, and not as distinct grants for different roads, which may come in conflict in the claims under them in regard to the lands granted. *Kansas City, L. & S. K. R. Co. v. Attorney-General*,

29 *Am. & Eng. L. & Ry. J.* 7 *Sup. Ct. R.* 243, 27 *K. R. Co. v. States v.* S. 358.

The judgment from Leavenworth, the direct in the act, the very reached convenient p row valley point has building officers of indemnity son to be vacate the state for t road and *Kansas City, L. & S. K. R. Co. v. Attorney-General*, 2 *S. 682*, 7 *S. Rep.* 243.

Nor is found in t aside the issued to t within the proval of whose pri lands, and their pow *Co. v. Atto Cas.* 467, reversing t

Where constructi pany to th its road is pre-empto same has company t *ison, T. & S. K. R. Co. v. Beach*, 1 *Quoting*

28. Ac the act of title could as indem and no se appropriated prior to th *Pac. R. Co. Am. & Eng. L. & Ry. J.*

29 *Am. & Eng. R. Cas.* 467, 118 U. S. 682, 7 *Sup. Ct. Rep.* 66; *reversing* 25 *Fed. Rep.* 243, 27 *Kan.* 1.—DISTINGUISHED IN *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358.

The junction of this road with the one from Leavenworth by way of Lawrence, in the direction of Galveston bay, as provided in the act of 1863, was not required to be on the very crest of the Neosho valley, as reached by the latter road, but at a convenient point for such crossing in the narrow valley of the Neosho river; and as this point has been adopted by the companies building both roads, and accepted by the officers of the land department in selecting indemnity lands, there is no sufficient reason to be found in the point of junction to vacate the certification of these lands to the state for the company which has built the road and received the patents of the state. *Kansas City, L. & S. K. R. Co. v. Attorney-General*, 29 *Am. & Eng. R. Cas.* 467, 118 U. S. 682, 7 *Sup. Ct. Rep.* 66; *reversing* 25 *Fed. Rep.* 243, 27 *Kan.* 1.

Nor is there any other sufficient reason found in the record in this case for setting aside the evidences of title to these lands issued to the corporation which built the road within the time required by law, to the approval of the officers of the government, whose primary duty it was to certify these lands, and who did so within the scope of their powers. *Kansas City, L. & S. K. R. Co. v. Attorney-General*, 29 *Am. & Eng. R. Cas.* 467, 118 U. S. 682, 7 *Sup. Ct. Rep.* 66; *reversing* 25 *Fed. Rep.* 243, 27 *Kan.* 1.

Where land is granted to a state to aid in constructing railroads, the title of a company to the particular land attaches when its road is definitely located, and where a pre-emptor goes upon the land after the same has been withdrawn from market, the company takes the paramount title. *Atchison, T. & S. F. R. Co. v. Rockwood*, 5 *Am. & Eng. R. Cas.* 432, 25 *Kan.* 292. *Wood v. Beach*, 43 *Kan.* 427, 23 *Pac. Rep.* 649.—QUOTING *Wolsey v. Chapman*, 101 U. S. 755.

28. Act of March 3, 1863.—Under the act of March 3, 1863 (12 St. at L. 772), no title could be acquired in any specific tracts as indemnity lands until actual selection; and no selection could be made of lands appropriated by congress to other purposes prior to the date of the selection. *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 26 *Am. & Eng. R. Cas.* 506, 112 U. S. 414, 5

Sup. Ct. Rep. 208.—APPLIED IN *Hastings & D. R. Co. v. Whitney*, 24 *Am. & Eng. R. Cas.* 106, 34 *Minn.* 538. FOLLOWED IN *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406; *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358.—*Atchison, T. & S. F. R. Co. v. Rockwood*, 5 *Am. & Eng. R. Cas.* 432, 25 *Kan.* 292.

Under the act of March 3, 1863, granting alternate odd-numbered sections, the even-numbered sections along the place limits of the Leavenworth, Lawrence & Ft. Gibson railroad, claiming under said grant, were reserved to the United States, and could not be claimed by the Missouri, Kansas & Texas railroad under the grant of July 16, 1866. *United States v. Missouri, K. & T. R. Co.*, 51 *Am. & Eng. R. Cas.* 305, 141 U. S. 358, 12 *Sup. Ct. Rep.* 13.—DISTINGUISHING *Kansas City, L. & S. K. R. Co. v. Attorney-General*, 118 U. S. 682.

Grants made by the acts of March 3, 1863, and July 26, 1866, did not include such lands as had been set apart and reserved for the Osage Indians under former treaties. *United States v. Leavenworth, L. & G. R. Co.*, 1 *McCrary (U. S.)* 610; *affirmed* in 92 U. S. 733.—FOLLOWED IN *United States v. Missouri, K. & T. R. Co.*, 1 *McCrary* 624.

And the United States may maintain a bill in equity to annul patents which had been issued for such Indian lands under the erroneous belief that they were embraced in the grant. *United States v. Leavenworth, L. & G. R. Co.*, 1 *McCrary (U. S.)* 610; *affirmed* in 92 U. S. 733.

Plaintiff company was a beneficiary of the land granted by congress March 3, 1863. Its road was definitely located through a certain county in 1870, but no order was made by the secretary of the interior withdrawing the lands from homestead or pre-emption until during the following year. *Held*, that the title to the land passed when a location of the road was definitely fixed, and a settlement made thereon after that time, under the homestead exemption laws, gave no title to the party. *Atchison, T. & S. F. R. Co. v. Bobb*, 5 *Am. & Eng. R. Cas.* 412, 24 *Kan.* 673.

29. Act of July 23, 1866.—The Act of Congress of July 23, 1866, granting certain lands to the state, construed to be a grant *in presenti*, and to vest the right of way in the railroads from the date of the

passage of the act, and not merely from the date of the location of the road, and that subsequent settlers on the land granted took subject to this right of way. *St. Joseph & D. C. R. Co. v. Baldwin*, 2 *Am. & Eng. R. Cas.* 510, 5 *Am. & Eng. R. Cas.* 408, 103 *U. S.* 426.—FOLLOWING *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 *U. S.* 497; *Leavenworth, L. & G. R. Co. v. United States*, 92 *U. S.* 733.—APPROVED IN *Rider v. Burlington & M. R. R. Co.*, 10 *Am. & Eng. R. Cas.* 688, 14 *Neb.* 120. DISTINGUISHED IN *Red River & L. of W. R. Co. v. Sture*, 32 *Minn.* 95; *Winona & St. P. R. Co. v. Barney*, 113 *U. S.* 618. FOLLOWED IN *Bybee v. Oregon & C. R. Co.*, 24 *Am. & Eng. R. Cas.* 127, 26 *Fed. Rep.* 586; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1. QUOTED IN *Jackson v. Dines*, 13 *Colo.* 90, 21 *Pac. Rep.* 918; *Union Pac. R. Co. v. Douglas Co.*, 31 *Fed. Rep.* 540; *Northern Pac. R. Co. v. Majors*, 5 *Mont.* 111; *Bybee v. Oregon & C. R. Co.*, 11 *Sawyer* (U. S.) 479. REVIEWED IN *Radke v. Winona & St. P. R. Co.*, 39 *Minn.* 262, 39 *N. W. Rep.* 624.—*Van Wyck v. Knevals*, 10 *Am. & Eng. R. Cas.* 664, 106 *U. S.* 360, 1 *Sup. Ct. Rep.* 336.—APPROVED IN *Sioux City & I. F. T. L. & L. Co. v. Griffey*, 72 *Iowa* 505, 34 *N. W. Rep.* 304. FOLLOWED IN *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 *U. S.* 720.

Within the meaning of the first section of the Act of Congress of July 23, 1866, granting lands to the state for the use and benefit of the St. Joseph & Denver City railroad company "the line of the route of the road" was "definitely fixed" when a map of said location adopted by the directors of the company was received by, and filed with, the secretary of the interior, as required by law. *Knevals v. Hyde*, 1 *McCrary* (U. S.) 402.

And after the road was definitely located the equitable title to the lands granted vested in the company, and a patent subsequently issued to a homesteader conveyed no title. *Knevals v. Hyde*, 1 *McCrary* (U. S.) 402. *St. Joseph & D. R. Co. v. Baldwin*, 7 *Neb.* 247. *Van Wyck v. Knevals*, 10 *Am. & Eng. R. Cas.* 664, 106 *U. S.* 360, 1 *Sup. Ct. Rep.* 336.

30. Act of July 26, 1866.—Under the Act of Congress of July 26, 1866, granting lands to the state to aid in the construction of the southern branch of the Union Pacific R. Co., subsequently known

as the Missouri, Kansas & Texas R. Co., the latter company obtained a right of way, among other lands, across townships 16 and 36, the original claim of the state to school lands in said townships having been rejected by congress and abandoned by the state. *Missouri, K. & T. R. Co. v. Roberts*, 152 *U. S.* 114, 14 *Sup. Ct. Rep.* 496.—QUOTING *Leavenworth, L. & G. R. Co. v. United States*, 92 *U. S.* 733.

6. Louisiana. Michigan.

31. Louisiana.—By the act of June 3, 1856, congress granted certain lands to the state to aid in the construction of railroads. *Held*, that no conveyance to a company in violation of the terms of the grant could vest title to such lands. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 *La. Ann.* 896, 6 *So. Rep.* 725.

Under the above grant it was a condition precedent to a conveyance that any of the sections of the road should first be constructed in sections of twenty consecutive miles before the road could obtain title to any portion of the land coterminous with the part constructed; but where the legislature of the state authorizes a road to mortgage said lands to secure the company's bonds, and the mortgage is executed, the state cannot, by subsequent legislation, abridge the rights of third parties acquired under the mortgage. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 *La. Ann.* 896, 6 *So. Rep.* 725.

The government of the United States is the only claimant that can contest the right to forfeit said lands for the non-performance of conditions subsequent, required by the act of congress, as the state is estopped by its own act in authorizing the mortgage. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 *La. Ann.* 896, 6 *So. Rep.* 725.

The government of the United States not having asserted by legislative act or judicial construction the forfeiture, the apparent legal title was in the railroad company acquiring rights under the foreclosure of said mortgage. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 *La. Ann.* 896, 6 *So. Rep.* 725.

The granted lands having been withdrawn from sale and settlement, and passed into the domain of private property—not subject to entry under the United States government homestead laws; and defendant not having a title from any source whatever, must be treated as a trespasser.

and not entitled to recover the value of improvements in excess of the annual revenues of the land. *Mower v. Kemp*, 46 Am. & Eng. R. Cas. 480, 42 La. Ann. 1007, 8 So. Rep. 830.

The state has had at no time separate, distinct interests of her own under the grant of June 3, 1856. Under that statute it acted simply as an instrumentality through which to carry out a particular purpose of congress; a means to a special end, and that end one exclusively in the interests of the United States. *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 So. Rep. 865.

In conveying at once all the lands embraced in the trust under the grant of June 3, 1856, to the Vicksburg, S. & T. R. Co., instead of holding the legal title in herself, selling limited quantities as the road progressed, and turning the proceeds from time to time over to the constructing company as it carried on the work, the state made a radical departure from the terms of its agency; still its action was not absolutely null and void, but only voidable. *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 So. Rep. 865.

At the end of ten years the powers of the state ceased by exhaustion through its own acts; and by limitation of time under the express terms of the act of congress the state had no power or authority in 1879 to retrace its steps, undo what it had done, and attempt to restore the *status quo* by a simple legislative act of forfeiture, and by repealing its act of transfer of 1857 to the company. *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 So. Rep. 865.

Inasmuch as by the granting of plaintiff's prayer the legal title of the lands would be taken from the company in whom the state herself has placed them, without vesting thereby the absolute ownership of the same in the state (the state's authority to dispose of them in any way having ceased in 1866), and inasmuch as by granting plaintiff's prayer, should the United States refuse to forfeit the grant, a very large quantity of land would, through the instrumentality of this court, be placed *hors de commerce* for an indefinite time—the United States refusing to receive them, and the state under its qualified title absolutely prohibited from making any use of them, it would be worse than a vain act for the court to adjudge these lands to be the

property of the state "for the objects and purposes of the act of congress," which is the decree sought. *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 So. Rep. 865.

The state herself is estopped from claiming that the company did not have such a property in the land conveyed to it as would permit the mortgage given by it to its bondholders to originally attach to those lands, and from claiming that the mortgage so given by the company under the authority of her own legislative act was null and void. *State v. Vicksburg, S. & P. R. Co.*, 44 La. Ann. 981, 11 So. Rep. 865.

32. Michigan.—Congress granted, June 3, 1856, certain lands to the state of Michigan to aid in building railroads. The state accepted the grant, and provided that they should go to a certain road, to be sold by the company upon the completion of each twenty miles, to be applied to the construction of the road and to no other purpose. The company was unable to sell the lands as thus earned, and issued bonds, secured by a mortgage of the lands, and from the proceeds of the bonds built the road. Held, these lands were liable to state taxation, though they were not while held by the state as trustee of the United States. *Tucker v. Ferguson*, 22 Wall. (U. S.) 527.

The act of June 3, 1856, constituted a present grant of the lands included within its terms, devoted to a particular purpose, and no further conveyance by the federal government was contemplated. *Johnson v. Ballou*, 28 Mich. 379.

The grant conveyed the title to the land to the state, but it was a floating title and did not attach to any particular lands until the proper action should be had to entitle some beneficiary to select and convey them. *Johnson v. Ballou*, 28 Mich. 379. *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341.

But the right of selection was in the railroad company and not in the state after the lands had been earned, and the sale by the company of any specific parcel of land exceeding the quantity earned and lying within the limits specified in the grant was to that extent an effectual selection, and the board of control provided for by statute could not qualify the right of selection nor subject it to any conditions not performed or waived. *Johnson v. Ballou*, 28 Mich. 379.

No patent from the United States or from

the state was requisite to vest the title in the railroad company, independent of the legislative grants. *Johnson v. Ballou*, 28 Mich. 379.

Where the title of the Indians and their right of occupation of certain lands had been fully extinguished, they passed under the act of June 3, 1856, notwithstanding that they were held by the United States in trust to sell them for the benefit of the Indians. *Shepard v. Northwestern L. Ins. Co.*, 40 Fed. Rep. 341.

The act of June 3, 1856, was accepted by the state, and the right to construct one road from Grand Haven to Owosso was awarded, and the right to construct from the latter place to Flint and thence to Port Huron was awarded to a different company. *Held*, that the grants were distinct, and the design was to provide for two distinct lines to intersect at Owosso, and to aid each by a grant of the lands lying within the prescribed distance to it; and the conveyance to the latter company for a construction of a portion of the line east of Owosso of lands lying west of that place, and opposite a portion of the other line, was invalid. *Bowes v. Haywood*, 35 Mich. 241.

It is immaterial that the charter of the company authorized it to build a road from Owosso westerly to Grand Haven, for there must be something more than a paper line; and while it remains on paper only, with no intention on the part of the company to actually build the road, there is nothing to which the grant can be applied. *Bowes v. Haywood*, 35 Mich. 241.

The state, by Mich. Act 126 of 1857, set the lands granted apart for the benefit of certain designated roads, on condition that the beneficiaries should accept them subject to the terms of the act. *Held*, in a case in which the acceptance was qualified, that the company acquired no title, and that a bill would not lie to quiet a title to the lands obtained by a levy of execution against the beneficiary intended by the statute. *Rogers v. Port Huron & L. M. R. Co.*, 10 Am. & Eng. R. Cas. 635, 45 Mich. 460, 8 N. W. Rep. 46.

Railroad companies which accepted the congressional grant acquired rights which could not be destroyed except by their own neglect. *Rogers v. Port Huron & L. M. R. Co.*, 10 Am. & Eng. R. Cas. 635, 45 Mich. 460, 8 N. W. Rep. 46.

Plaintiff company filed a bill to set aside a

mortgage held by defendant as a cloud on its title to certain land claimed under the act of June 3, 1856, and the lower court granted the relief prayed for, which decree on appeal was reversed, but on a rehearing was affirmed by a majority of the court on the facts of the case. *Jackson, L. & S. R. Co. v. Davison*, 65 Mich. 416, 14 West. Rep. 65, 32 N. W. Rep. 726.

The effect of the act of June 3, 1856, to aid in the construction of a railroad from Amboy, via Hillsdale and Lansing, to some point on or near Traverse bay, and of the acceptance of the grant by the state, and of act No. 126, Laws of 1857, granting such lands to the Amboy, Lansing & Traverse Bay R. Co., has been settled by this court, so far, at least, as to determine that the title of the United States to the lands was divested, and that, when earned, the railroad company might select any land within the prescribed limit of six miles, if not fifteen miles. *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. Rep. 837.

The appointment by the governor of the agent nominated by the railroad company to select its lands, the filing of the list of lands so selected with the commissioner of the state land office, the certification of the same by the commissioner to the secretary of the interior, and the approval by that officer of such selection are, in the absence of any proof to the contrary, *prima facie* evidence of the compliance by the railroad company with the statutory requirements to the satisfaction of the federal and state governments. *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. Rep. 837.

The act did not expressly require the preservation or filing with the state or federal departments of any selection or report of the agent appointed to select lands for the company, and the lands described in the list filed by the company with the state land commissioner, certified by him to be a true and correct list of the lands selected by the agent and approved by the secretary of the interior, may be assumed to have been properly selected. *Tillotson v. Webber*, 96 Mich. 144, 55 N. W. Rep. 837.

The certificate of the commissioner of the general land office that an annexed paper is a copy of a list of lands on file in his office, so far as the same applies to certain descriptions contained therein, makes the paper admissible in an action of ejectment involving the particular descriptions

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7. Minnesota.

33. In general.—A deed by the governor to a railroad company, conveying lands which the state held for railroad purposes under land grants from the general government, in advance of the actual construction of the road, is not void, but voidable. *St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co.*, 57 Fed. Rep. 272.

But as the state held such lands only in trust to secure the construction of railroads, and the governor erroneously conveyed lands, it is within the power of the legislature, after the lapse of several years and a failure to build the road, to declare such lands forfeited, and to grant them anew to another company for railroad purposes. *St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co.*, 57 Fed. Rep. 272.

And a mortgage by a company to which lands have been granted in advance of the construction of its road, of all "lands appertaining to the roads," does not include the lands erroneously conveyed so as to prevent such forfeiture. *St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co.*, 57 Fed. Rep. 272.

34. Act of June 29, 1854.—On June 29, 1854, congress passed an act entitled "An act to aid the territory of Minnesota in the construction of a railroad therein." Among other provisions the act provided that "the said lands hereby granted shall be subject to the disposal of any legislature thereof for the purpose aforesaid, and no other." *Held*, that the territory had no such beneficial interest in the land as would prevent congress from repealing the act before any railroad was constructed, as was done by the subsequent act of August 4, 1854. *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358.—CRITICISED IN *Nash v. Sullivan*, 10 Am. & Eng. R. Cas. 552, 29 Minn. 206. DISTINGUISHED IN *Northern Pac. R. Co. v. Majors*, 5 Mont. 111. FOLLOWED IN *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1. RECONCILED IN *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44.

Where a period was fixed by an act for the completion of the contemplated improvement, and if the work was not completed within that time, then the power of

the territory to dispose of the lands was to cease, such part of the lands as had been appropriated at the expiration of that period, in execution of the work, was to be unaffected by that provision; but the residue would cease to be held by the territory for the use and purpose for which the lands had been granted. *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358.—EXPLAINED IN *Denny v. Dodson*, 13 Sawy. (U. S.) 68.

The Act of Congress of June 29, 1854, granting certain lands to the territory of Minnesota to aid in the construction of a certain railroad, vested in the territory a present estate in the lands, subject to a condition for their revesting in the United States. *United States v. Minnesota & N. W. R. Co.*, 1 Minn. 127 (Gil. 103).

35. Act of March 3, 1857.—The Act of Congress of March 3, 1857, granting certain lands to the territory of Minnesota for the purpose of aiding in the construction of several lines of railroad between different points in the territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections. No further disposition of the land along either road was allowed, except as the road was completed in divisions of twenty miles. *Chamberlain v. St. Paul & S. C. R. Co.*, 92 U. S. 299. *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 49.—QUOTED IN *Swann v. Lindsey*, 14 Am. & Eng. R. Cas. 504, 70 Ala. 507; *Jackson, L. & S. R. Co. v. Davison*, 65 Mich. 416, 14 West. Rep. 65, 37 N. W. Rep. 537.

The indemnity clause of the act of March 3, 1857, covers losses from the grant by sales and pre-emptions prior to the date of the act, as well as losses from the same causes between the date of the act and the final location of the road. *Winona & St. P. R. Co. v. Barney*, 26 Am. & Eng. R. Cas. 513, 113 U. S. 618, 5 Sup. Ct. Rep. 606.—DISTINGUISHING *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.—QUOTED IN *Wisconsin C. R. Co. v. Price County*, 64 Wis. 579.

The act of March 3, 1857, § 6, provided "that in case any lands on the line of said roads or branches are within any Indian territory no title to the same shall accrue * * * until the Indian title to the same shall have been extinguished." *Held*, that as soon as the Indian title was extinguished, and the line of road located, the title to

these lands vested in the state for the benefit of the roads. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 11 Sup. Ct. Rep. 168.—FOLLOWING BUTTZ *v. Northern Pac. R. Co.*, 119 U. S. 55.

The land grant made by the act of March 3, 1857, embraced both the lands found within the limits of the state as afterwards organized, and also all lands that were found in the former territorial limits, but cut off into the territory of Dakota. *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 11 Sup. Ct. Rep. 168; reversing 26 Fed. Rep. 569.

The act of March 3, 1857, was in itself a grant conveying to the state the legal title of the lands found to fall within its operation. The certification of lands to the state by the secretary of the interior under the law of 1854 did not affect the legal title of such lands. *Weeks v. Bridgman*, 41 Minn. 352, 43 N. W. Rep. 81.

Only upon the definite location of the lines of railroad referred to in the grant, by filing maps thereof in the department of the interior, did the grant become applicable to particular lands so as to prevent the acquisition of vested rights by pre-emption which would prevail notwithstanding the grant. *Weeks v. Bridgman*, 41 Minn. 352, 43 N. W. Rep. 81.

By implication from the terms of the act, lands to which the right of pre-emption should attach before such definite location were excepted from it. *Weeks v. Bridgman*, 41 Minn. 352, 43 N. W. Rep. 81.

Both companies claim under the grant by the act of March 3, 1857, entitled "An act making a grant of land to the territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said territory, and granting public lands in alternate sections to the state of Alabama, to aid in the construction of certain railroads in said state," and the defendant company claims part of the lands under a congressional grant of 1864. The line of defendant was located through the territory where the lands in controversy lie in 1859; the line of plaintiff in 1868. No valid selection of lands for indemnity purposes was made till 1872, when defendant first selected the lands in controversy for such purposes, and they were certified by the secretary of the interior to the state for defendant's line. *Held*, that the lands within the six-mile limits of plaintiff, and between the six- and fifteen-mile lim-

its of the defendant, belong to plaintiff. The lands lying between plaintiff's six- and fifteen-mile limits, and between defendant's fifteen- and twenty-mile limits, belong to the plaintiff. The lands lying between the six- and fifteen-mile limits of each company belong to both companies in common. *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 27 Minn. 128, 6 N. W. Rep. 461.

36. Act of March 3, 1865.—The act of March 3, 1865, enlarged the grant made by the act of March 3, 1857, from six sections per mile to ten sections, and the limits within which the indemnity lands were to be selected to twenty sections; and further provided that any "lands which may have been granted to the territory or state of Minnesota for the purpose of aiding in the construction of any railroad, which lands may be located within the limits of this extension of said grant or grants, shall be deducted from full quantity of the lands hereby granted." Prior to act of 1865 a grant had been made to a railroad of lands located within the limits covered by said extension grant. *Held*: (1) that the grant by the act of 1857 was a grant of land in place and not of quantity; (2) that the enlargement of the grant by act of 1865 did not change its nature as to the six sections originally granted; (3) that as to remaining four sections the grant was one of quantity, but to be selected along and opposite the completed road; (4) that where the earlier grant to aid in the construction of the Minnesota & Cedar Valley R. interferes with the extension grant to the plaintiff in error, the earlier grant takes the land, and the extension must be abandoned. *Winona & St. P. R. Co. v. Barney*, 26 Am. & Eng. R. Cas. 513, 113 U. S. 618, 5 Sup. Ct. Rep. 606. *Nash v. Sullivan*, 10 Am. & Eng. R. Cas. 552, 29 Minn. 206, 12 N. W. Rep. 698.

The subsequent act of congress, entitled "An act authorizing the St. Paul & Pacific R. Co. to change its line in consideration of a relinquishment of lands," passed March 3, 1871, did not require a release to the United States of the entire land between Crow Wing and St. Vincent, but only of the lands along the abandoned line between Crow Wing and Otter Tail or Rush Lake, the lands along the line between the latter point to St. Vincent remaining unaffected by said act of congress or the release required thereby. *Nash v. Sullivan*, 10 Am. & Eng. R. Cas. 552, 29 Minn. 206, 12 N. W. Rep. 698.

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The act of March 3, 1865, § 3, providing that any lands granted to Minnesota by the act of March 3, 1857, which might be located within the limits of the extension made by said act of 1865 to the original grant made by said act of 1857 should be deducted from the full quantity of lands granted by the act of 1865, applies to "granted lands" of the prior grant falling within the six-mile limit, and not to possible indemnity lands which might be subsequently acquired. *Barney v. Winona & St. P. R. Co.*, 26 *Am. & Eng. R. Cas.* 522, 117 *U. S.* 228, 6 *Sup. Ct. Rep.* 654.—QUOTED IN *Northern Pac. R. Co. v. Sanders*, 47 *Fed. Rep.* 604.

The term "any lands which may have been granted to the territory or state of Minnesota," as used in the Act of Congress of March 3, 1865, § 3, includes all land the title to which had passed to the territory or state, whether these lands were in place or indemnity lands; and the word "granted" has the broad, rather than the narrow, signification. *Barney v. Winona & St. P. R. Co.*, 24 *Fed. Rep.* 889; *reversed in* 117 *U. S.* 228, 6 *Sup. Ct. Rep.* 654.—FOLLOWING *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 *U. S.* 720, 5 *Sup. Ct. Rep.* 334; *Winona & St. P. R. Co. v. Barney*, 113 *U. S.* 618, 5 *Sup. Ct. Rep.* 606.

The act of March 3, 1857, and the act of March 3, 1865, were grants *in presenti*, attaching to the lands from the date of the grants, when located, both as to the limits of the state, and the territorial limits in 1857. *St. Paul, M. & M. R. Co. v. Phelps*, 137 *U. S.* 528, 11 *Sup. Ct. Rep.* 168.

The second section of the act of March 3, 1865, entitled "An act extending the time for the completion of certain railroads in the states of Minnesota and Iowa, and for other purposes," relates only to the lands granted by that act. *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 27 *Minn.* 128, 6 *N. W. Rep.* 461.

37. Act of July 4, 1866.—The act of July 4, 1866, granted lands within certain limits, with the exception of those to which it "shall" appear, when the line of the road should be definitely located, "that the right of pre-emption or homestead settlement has attached." *Held*, that lands of which there is a homestead entry of record are within the exception. *Hastings & D. R. Co. v. Whitney*, 24 *Am. & Eng. R. Cas.* 106, 34 *Minn.* 538, 27 *N. W. Rep.* 69.—APPLYING *United*

States v. Burlington & M. R. R. Co., 98 *U. S.* 334; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 *U. S.* 414.

38. Act of July 13, 1866.—A federal grant of lands in place to aid in the construction of a railroad is a grant *in presenti*, in the nature of a float, which acquires precision by the definite location of the route of the railroad, and when, thereafter the lands are indicated by the secretary of the interior, by the certification prescribed by act of July 13, 1866, § 3, such act of indication and certification relates to the date of the original grant, and the title of the state accrues as of that date. And when the state conveys to the railroad company, the latter takes title as of the date of the original grant, which takes precedence of a pre-emption title resting upon a settlement and entry made after the grant. *Winona & St. P. R. Co. v. Randall*, 10 *Am. & Eng. R. Cas.* 558, 29 *Minn.* 283, 13 *N. W. Rep.* 127.—REVIEWED IN *Radke v. Winona & St. P. R. Co.*, 39 *Minn.* 262, 39 *N. W. Rep.* 624.

Such certificate of the secretary of the interior has the force and effect of a patent, and its effect in passing the title to particular lands cannot be questioned by one not interested. *Minnesota L. & I. Co. v. Davis*, 40 *Minn.* 455, 42 *N. W. Rep.* 299.

39. Act of March 1, 1877.—Under *Minn. Act of March 1, 1877*, declaring certain public lands, which had been conveyed to railroad companies, forfeited, where such lands are conveyed to a second company, it may maintain an action to recover them or quiet its title only so fast as its title accrued to the land by constructing its road; hence the statute of limitations would only run from that date. *St. Paul & N. P. R. Co. v. St. Paul, M. & M. R. Co.*, 57 *Fed. Rep.* 272.

8. Missouri.

40. Act of June 10, 1852.—Under the act of June 10, 1852, the location of the land is not complete until the company has caused a map thereof to be recorded in the office where deeds are recorded, in each county where any part of the land is situate. *Baker v. Gee*, 1 *Wall. (U. S.)* 333.—FOLLOWED IN *Pacific R. Co. v. McCombs*, 39 *Mo.* 329.—*Pacific R. Co. v. McCombs*, 39 *Mo.* 329.—FOLLOWING *Baker v. Gee*, 1 *Wall.* 333; *Hannibal & St. J. R. Co. v. Moore*, 37 *Mo.* 338.—DISTINGUISHED IN *Funkhouser v. Peck*, 67 *Mo.* 19.

Whatever may be the nature of the title

acquired by the state by virtue of the act of June 10, 1852—whether the state acquired the fee-simple title to the lands clothed in a political trust for the execution of which the faith of the state was pledged by the acceptance of the grant, or whether the act of congress created an estate upon condition subsequent—a mere trespasser cannot defend against a grantee of the state by invoking a supposed right of the United States to enter for condition broken. *Kennett v. Plummer*, 28 Mo. 142.

A certificate of location under the Act of Congress of February 17, 1815, for the relief of sufferers by earthquakes in New Madrid, located in 1818, and survey made and returned to the surveyor-general in 1820, but not returned to the recorder of land titles until 1859, constituted a valid location of the land covered by the survey, and brought the land within the exceptions of the act of June 10, 1852. *Pacific R. Co. v. McCombs*, 39 Mo. 329.

Under the act of June 10, 1852, and the act of the state of December 25, 1852, transferring such grant to the Pacific railroad, the agent of the company, in estimating the quantity of lands within the exceptions of the granting act, returned sections 8 and 18, T. 45 N. R., 7 E., as included within the exceptions, and selected lands outside of the limit of six miles to make up the quantity of lands to which the company was entitled under the grants, lists of which were certified to the company. *Held*, that by this action the company was estopped from asserting that said sections were not included within the exceptions of the act, although subsequent corrections of the certified lists made at the general land office showed that the company had not received all the lands to which it was entitled. *Pacific R. Co. v. McCombs*, 39 Mo. 329.

The act of June 10, 1852, was a grant *in presenti*, and passed the title to the state immediately upon the definite location of the road. *Wright v. Gish*, 94 Mo. 110, 6 S. W. Rep. 704.

The entry of a portion of such lands in the public land office, after the title passed from the government, under the Act of Congress of June 10, 1852, was invalid, and a patent granted thereto void. *Wright v. Gish*, 94 Mo. 110, 6 S. W. Rep. 704.

Where it appeared from the tract book at the local land office that certain lands comprised within such grant were posted as

having been entered in 1839, but the records in the general land office showed that such posting was a mistake, and that the lands so posted as entered had, in fact, never been entered, but that the title to them was in the United States at the time of the passage of the act of June 10, 1852, they were not excepted from the operation of the grant of said act. *Wright v. Gish*, 94 Mo. 110, 6 S. W. Rep. 704.

41. Act of February 9, 1853.—The act of February 9, 1853, provided that the lands should revert to the United States if the road was not completed in ten years. The road not being completed within that time, an act was passed in 1866 declaring that the former act, "with all the provisions therein made, be and the same is hereby revived and extended for the term of ten years." *Held*, that the latter act was not such a legislative declaration of forfeiture as would divest the state of all title granted by the former act; but it was rather the intention to waive the right of forfeiture. *St. Louis, I. M. & S. R. Co. v. McGee*, 10 Am. & Eng. R. Cas. 649, 75 Mo. 522.

The above act of 1853 operated as a grant *in presenti*, and the statute of limitations began to run in favor of an occupant of the lands, and against one claiming under the grant from the date of the former's entry. *St. Louis, I. M. & S. R. Co. v. McGee*, 10 Am. & Eng. R. Cas. 649, 75 Mo. 522.

And the running of the statute of limitations as against one claiming lands under the above act of 1853 is not suspended by Mo. Gen. St. 1865, p. 746, § 7. *St. Louis, I. M. & S. R. Co. v. McGee*, 10 Am. & Eng. R. Cas. 649, 75 Mo. 522.

42. Act of August 3, 1854.—Under the act of June 10, 1852, and the state statute of September 20, 1852, designating the road, no title to the land passed to the company until it had filed a map of the location of its road with the secretary of state, and in the office of the recorder of deeds in the respective counties where the land might be situated, as required by the state statute. *Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 310.

The above act of congress made no provision for any kind of documentary evidence to be issued by the general land office by which the location, boundaries, and identity of the particular tracts granted within the six-mile limit were to be desig-

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nated and proved; the public sectional surveys showing the even-numbered sections within the six-mile limit, although admissible in evidence, are insufficient for that purpose. The certified list under the Act of Congress of August 3, 1854, is evidence to show what lands passed by the grant; but if the lands embraced in such lists are not of the character contemplated by the act of congress, or are not such as were intended to be granted thereby, then such certified lists can have no effect as evidence. *Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 310.—QUOTED IN *Funkhouser v. Peck*, 67 Mo. 19. REVIEWED IN *Clarkson v. Buchanan*, 53 Mo. 563; *Campbell v. Wortman*, 58 Mo. 258; *Palmer v. Boorn*, 80 Mo. 99.

43. Act of March 3, 1857.—Under the act of 1852 and the act of 1854, entitled "An act to vest in the several states and territories the title in fee of the lands which have been or may be certified to them," a descriptive list of lands accruing to the state under the former act, containing the land in controversy, made out and certified on the 9th of Feb., 1854, by the commissioner of the general land office, and approved by the secretary of the interior, and again certified in May, 1856, by said commissioner, in conformity with the latter act, confers upon the state a title to the land in controversy, unless it be swamp land or embraced in some other grant; such land was not vacant or unappropriated within the meaning of the act of March 3, 1857, entitled "An act to confirm to the several states the swamp and overflowed lands selected under the act of Sept. 28, 1850," etc. *Funkhouser v. Peck*, 67 Mo. 19.—DISTINGUISHING *Pacific R. Co. v. McCombs*, 39 Mo. 329. QUOTING *Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 310.

9. Wisconsin.

44. Act of June 3, 1856.—The act of June 3, 1856, and section 1 of the act of May 5, 1864, are grants *in presenti*, and passed the title to the odd sections designated to be afterwards located; the fixing upon the route made their location certain, and the title, previously imperfect, acquired precision and became attached to the land. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.—RECONCILING *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358.—FOLLOWED IN *Missouri, K. &*

T. R. Co. v. Kansas Pac. R. Co., 97 U. S. 491; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1; *Nash v. Sullivan*, 10 Am. & Eng. R. Cas. 552, 29 Minn. 206. QUOTED IN *Swann v. Lindsey*, 14 Am. & Eng. R. Cas. 504, 70 Ala. 507; *Swann v. Larmore*, 14 Am. & Eng. R. Cas. 519, 70 Ala. 555.

The lands granted have not reverted to the United States, although the road was not constructed within the period prescribed, no action having been taken, either by legislative or judicial proceeding, to enforce the forfeiture of the grants. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.

The provision in the act of 1856 that all lands remaining unsold after ten years shall revert to the United States if the road be not then completed, is a condition subsequent, being in effect a provision that the grant, to the extent of the lands unsold, shall be void if the work designated be not done within that period. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.

No one can take advantage of the non-performance of the conditions subsequent annexed to an estate in fee but the grantor or his heirs or successors, and, if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon the condition proceeds from the government. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.—DISTINGUISHED IN *Mower v. Kemp*, 42 La. Ann. 1007.

Where the title to land remains in the state, timber cut upon the land belongs to the state. While the timber is standing it constitutes a part of the realty; being severed from the soil, its character is changed; it becomes personalty, but its title is not affected; it continues, as previously, the property of the owner of the land, and can be pursued wherever it is carried. All the remedies are open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.

Where logs, cut from such lands of the state without license, have been intermingled with the logs cut from other lands so as not to be distinguishable, the state is entitled, under the law of Minnesota, to re-

plevy an equal amount from the whole mass. The remedy afforded by the law of Minnesota in such case is held to be just in its operation, and less severe than that which the common law would authorize. *Schulenberg v. Harriman*, 21 Wall. (U. S.) 44; affirming 2 Dill. 398.

45. Act of May 5, 1864.—The act of May 5, 1864, provided for an indemnity for lands sold or pre-empted within the grant when the road should be located. *Held*, that the indemnity included both lands disposed of by the government between the date of the act and the location of the road and prior to the date of the act. *Wisconsin C. R. Co. v. Price County*, 41 Am. & Eng. R. Cas. 669, 133 U. S. 496, 10 Sup. Ct. Rep. 341.—QUOTED IN *Northern Pac. R. Co. v. Cannon*, 46 Fed. Rep. 237.

The Act of Congress of June 3, 1856, granted to the state for railroad aid purposes alternate sections for six miles on each side of the proposed road, or in lieu thereof, if previously sold, land to be selected within fifteen miles of such road. October 26, 1856, the commissioner of the land office reserved from sale all land within such fifteen-mile limit. The Act of Congress of May 5, 1864 (13 St. at L. 66), made a similar grant for similar purposes, but excepted from the grant "all lands reserved to the United States * * * in any manner or for any purpose." *Held*, that the land reserved by the said commissioner's order was "reserved to the United States" within the meaning of this act, and did not pass by the second grant, which overlapped the first. *Wisconsin C. R. Co. v. Forsythe*, 43 Fed. Rep. 867.—FOLLOWED IN *Osborne v. Wisconsin C. R. Co.*, 43 Fed. Rep. 824.

Where the act provided that it should be lawful for agents appointed by the railway company entitled to the grant to select, subject to the approval of the secretary of the interior, from the public lands of the United States "deficiency" lands within certain defined indemnity limits—*held*, that the issuance of a patent by the United States directly to the railway company for lands so selected by an agent of the company was evidence that the company had complied with all the conditions of the grant, and was entitled to the lands described therein, and that the title passed from the United States at the date thereof. *Musser v. McRae*, 44 Minn. 343, 46 N. W.

Rep. 673; former appeal 38 Minn. 409, 38 N. W. Rep. 103.

And where it appeared that after certain deficiency lands had been earned by the railway company, and had been so selected and duly certified to the general land office, but prior to the issuance of the patent timber had been wrongfully cut and removed therefrom by trespassers—*held*, that the title acquired by the patent must be held to relate back to the selection of the land, so as to save to purchasers to whom the lands had been granted by the company, before the trespasses, a right of action for the timber wrongfully removed from the land, or its value. *Musser v. McRae*, 44 Minn. 343, 46 N. W. Rep. 673.

III. FEDERAL GRANTS TO RAILROADS.

1. In General.

46. Ascertaining quantity of land included in grant.—The quantity of lands granted to railroads is measured by the number of miles actually built. So where a grant was made, but before the road was built the act was amended so as to allow the road to be built by a shorter route, the amount of land is measured by the shorter route. *Cedar Rapids & M. R. R. Co. v. Herring*, 14 Am. & Eng. R. Cas. 537, 110 U. S. 27, 3 Sup. Ct. Rep. 485.

A grant of land to a railroad, by an act of congress, of alternate sections, without prescribing any lateral limit, construed to mean that the grantee could go off the line of the road only in case, at the time when its rights vested, there was not sufficient land on its line unappropriated to satisfy the grant. *Wood v. Burlington & M. R. R. Co.*, 10 Am. & Eng. R. Cas. 611, 104 U. S. 329.

A provision of the Pacific railroads' land grant was of "every alternate section of public land designated by odd numbers to the amount of five alternate sections per mile on each side of said road on the line thereon." Subsequently this was raised to ten sections. *Held*, that the grant was not limited to lands situate at right angles to the general line of the railroad, where it was constructed with such curves as to defeat the full grant per mile if such a rule should be applied. *United States v. Union Pac. R. Co.*, 37 Fed. Rep. 551.

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covered by a railroad grant, and the certificate of the secretary of the interior approving such list, are competent and sufficient evidence that the lands described passed to the railroad company under the grant. *Johnson v. Thornton*, 54 Iowa 144, 6 N. W. Rep. 165.—FOLLOWING Chicago, B. & Q. R. Co. v. Lewis, 53 Iowa 101.

47. Exception of mineral lands--What lands so deemed.—Under the acts of congress granting lands to the Union Pacific, Central Pacific, and Western Pacific railroads no patents could issue for mineral lands, such being excepted out of the grant. *Western Pac. R. Co. v. United States*, 108 U. S. 510, 2 Sup. Ct. Rep. 802.

In such case one taking a patent for land, knowing it to be mineral land, cannot be considered an innocent purchaser. *Western Pac. R. Co. v. United States*, 108 U. S. 510, 2 Sup. Ct. Rep. 802.

Where a grant to a railroad company excepts mineral land, the term "mineral land" means land known to be mineral land when the grant took effect, or which there was then satisfactory reason to believe to be such. *Francoeur v. Newhouse*, 14 Sawy. (U. S.) 600. *Northern Pac. R. Co. v. Barden*, 51 Am. & Eng. R. Cas. 236, 46 Fed. Rep. 592.—FOLLOWING *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 5, 11 Sup. Ct. Rep. 389.—APPLIED IN *Northern Pac. R. Co. v. Wright*, 51 Fed. Rep. 68.

The time when lands must be known to be "mineral," in order to exclude them from a grant of land made to a railroad company, is the date when the line of the railroad becomes definitely fixed, and a plat thereof is filed in the general land office. (Knowles, J., dissenting.) *Northern Pac. R. Co. v. Barden*, 51 Am. & Eng. R. Cas. 236, 46 Fed. Rep. 592.

48. — and what not.—The Act of Congress of July 1, 1862, § 2, granting a right of way over the public lands to the Central Pacific R. Co., extends to and covers all public lands whether mineral or not. *Doran v. Central Pac. R. Co.*, 24 Cal. 245.—REFERRED TO IN *Hamilton v. Spokane & P. R. Co.*, 2 Idaho 898.

Section 3 of the above act, excepting mineral lands from the provisions of the grant, only applies to the sections granted and not to the right of way. *Doran v. Central Pac. R. Co.*, 24 Cal. 245.

The mere fact that land contains copper,

gold-, and silver-bearing quartz does not make it mineral lands within the meaning of the Act of Congress of July 1, 1862, as amended July 2, 1864, granting lands to aid in the construction of the Central Pacific railroad. The statute only excepts lands which are valuable for mining purposes. *Merrill v. Dixon*, 15 Nev. 401. *Alford v. Barnum*, 45 Cal. 482.

49. Reservation of lands held under Mexican grants.—Lands within the boundary of a Mexican or Spanish grant, which are *sub judice* at the time the secretary of the interior ordered the withdrawal of lands along the route of the Pacific railroad, were not embraced in the land to that company granted by the Act of Congress of July 1, 1862, as enlarged by the act of 1864. *Newhall v. Sanger*, 92 U. S. 761.—DISTINGUISHED IN *Ryan v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 260; *United States v. Central Pac. R. Co.*, 11 Sawy. 438. EXPLAINED IN *Carr v. Quigley*, 149 U. S. 652. FOLLOWED IN *McLaughlin v. Fowler*, 52 Cal. 203. REVIEWED IN *United States v. Southern Pac. R. Co.*, 14 Sawy. 620.—*Southern Pac. R. Co. v. Garcia*, 64 Cal. 515, 2 Pac. Rep. 397.

The publication and approval by the surveyor-general of a plat and survey of a Mexican grant, under the act of June 14, 1860, has, in the absence of an application to have it returned into the district court for examination and adjudication, the same effect and validity as if a patent had issued; and thereafter the grant is in no sense *sub judice*, and is segregated from the lands lying outside of the survey. *Southern Pac. R. Co. v. Garcia*, 64 Cal. 515, 2 Pac. Rep. 397.

Lands formerly belonging to Mexico, and granted by that government to individuals, are not "public lands" within the meaning of the acts of congress making grants to railroads, being expressly reserved in the granting clause of the statutes. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228.—FOLLOWED IN *Carr v. Quigley*, 79 Cal. 130, 21 Pac. Rep. 607.

Such lands are excluded from grants by congress to railroads, to the extent of the claim when bounded by specific lines, and also to the extent of the quantity named when embraced within larger boundaries. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228.—REVIEWED IN *United States v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 620.

Lands within the exterior limits of a Mexican grant, and which were *sub judice* at

the time the line of the Pacific railroad was definitely fixed, were not reserved within the meaning of the act of July 1, 1862, § 3, but were properly patented to the company. *Carr v. Quigley*, 149 U. S. 652, 13 Sup. Ct. Rep. 961; *reversing* 79 Cal. 130, 21 Pac. Rep. 607.—APPROVING *United States v. McLaughlin*, 127 U. S. 428. EXPLAINING *Newhall v. Sanger*, 92 U. S. 761.

Where a company selects, as part of its indemnity lands, land which is within a tract covered by a Mexican claim, a patent therefor conveys a perfect title to the company where the Mexican claim is rejected before the company makes its selection, though it was *sub judice* at the time the grant was made. *Ryan v. Central Pac. R. Co.*, 5 Sawy. (U. S.) 260; *affirmed in* 99 U. S. 382.—DISTINGUISHING *Newhall v. Sanger*, 92 U. S. 762.—APPROVED IN *Southern Pac. R. Co. v. Dull*, 10 Sawy. 506, 22 Fed. Rep. 489. FOLLOWED IN *United States v. Central Pac. R. Co.*, 11 Sawy. 438. REVIEWED IN *Southern Pac. R. Co. v. Wiggs*, 14 Sawy. 568.

The Mexican grant called Las Pocitas was a float—a grant of two leagues within exterior boundaries embracing ten or more leagues, which two leagues so granted were confirmed and patented to the claimants, and the odd-numbered sections outside of the two leagues granted and confirmed, but inside of the exterior boundaries, passed to the railroad company. *United States v. Curtner*, 14 Sawy. (U. S.) 535, 38 Fed. Rep. 1.—REVIEWING *United States v. McLaughlin*, 127 U. S. 428.

When a Mexican grant, by specific boundaries carrying all the lands within the designated boundaries, has been confirmed by a decree which has become final, the said decree specifically pointing out and designating the corners by natural objects on the ground, and the connecting lines, all lands outside those specific monuments and lines, from the date when the decree becomes final, cease to be *sub judice*, if they ever were in that condition. (Ross, J., dissenting.) *United States v. Southern Pac. R. Co.*, 14 Sawy. (U. S.) 620.—REVIEWING *Newhall v. Sanger*, 92 U. S. 761; *Doolan v. Carr*, 125 U. S. 638; *United States v. McLaughlin*, 127 U. S. 428.

50. Rights of settlers and pre-emptioners.*—Where public lands have been

* Rights of settlers on lands granted to rail-

granted to railroads, with a reservation of certain sections, after the restoration to market of such lands they cease to be reserved lands, and may be pre-empted like other lands. *Clements v. Warner*, 24 How. (U. S.) 394.

Where a statute extends the time for the completion of a railroad, under a land grant, on condition that the rights of actual settlers be preserved, and that a formal acceptance of the provisions of the statute be filed with the secretary of the interior, and the company continues to exercise its chartered rights after the time for the completion of its road, it will be presumed that it has accepted the condition, and relinquished claim to lands of actual settlers, though no acceptance has been filed with the secretary of the interior. *St. Paul, M. & M. R. Co. v. Greenalgh*, 139 U. S. 19, 11 Sup. Ct. Rep. 395.

The railroad grant of July 1, 1862, conveyed the odd-numbered sections within a certain distance of the railroad "to which a pre-emption or homestead claim may not have attached." Prior to such act an individual had filed a pre-emption claim which remained intact for several years after the passage of the statute, when it was canceled because the party had never lived on the land. *Held*, that the subsequent cancellation would not pass title to the land to the railroad company. *Whitney v. Taylor*, 45 Fed. Rep. 616.—QUOTING *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 641, 5 Sup. Ct. Rep. 566; *Hastings & D. R. Co. v. Whitney*, 132 U. S. 364, 10 Sup. Ct. Rep. 112.

A person who only files a claim to pre-empt land from the United States, and who for ten years thereafter fails to make any settlement upon the same, or any improvements thereon, ought to be considered as having relinquished any claim thereto. So where a railway company brings an action of ejectment against such person, and sets up such facts as show a good title to the land in the company, under a land grant, the admission of such claim does not make its complaint demurrable. *Northern Pac. R. Co. v. Meadows*, 46 Fed. Rep. 254.—REFERRED TO IN *Hamilton v. Spokane & P. R. Co.*, 2 Idaho 898.

road company. Effect of withdrawal of lands from entry, see 46 AM. & ENG. R. CAS. 445, *abstr.*

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Congress has the power to grant a right of way for a railroad over public lands which are occupied by persons who have the right to pre-empt, but who have not yet perfected that right by proving up and making payment for the land. *Western Pac. R. Co. v. Tevis*, 41 Cal. 489, 3 Am. Ry. Rep. 50.—REFERRED TO IN *Hamilton v. Spokane & P. R. Co.*, 2 Idaho 898.

If a patent to land is issued to a railroad company under a grant made by congress of alternate sections along the line of its route, and ejectment is brought on the patent against one who had settled on the land, and acquired a pre-emption right before the land had been withdrawn from market, and he defends on the ground that the land officers were misled by false and fraudulent testimony of the agent of the railroad company, the facts that such agent swore that the land was vacant and unappropriated, and that the land officers did not know that the defendant was on the land, tend to show that the land officers were so misled. *Campbell v. Buckman*, 49 Cal. 362.

If the line of the Pacific railroad was definitely fixed before a pre-emptor, living on an odd section granted to said road, which had been surveyed, had filed his declaratory statement, then, although he afterwards files such statement and receives a patent, the railroad company has the better title. *Weaver v. Fairchild*, 50 Cal. 360.

When railroad lands, granted to the Pacific railroads, are withdrawn from pre-emption and sale by the direction of the secretary of the interior, it will be presumed that the railroad company has filed a map designating the general route of the road. *Weaver v. Fairchild*, 50 Cal. 360.

A party who has entered upon public land to acquire the title from the government as a *bona fide* settler, prior to the railroad grant must show his good faith by diligently complying with the requirements of the law under which he expects to secure the title, and must be entitled to initiate a valid claim under the law. *McLaughlin v. Menotti*, 89 Cal. 354, 26 Pac. Rep. 880.

51. Indemnity lands—Title does not pass until selection and approval by secretary of interior.—Title to the indemnity lands does not pass from the United States until the selection of such lands by the company with the ap-

proval of the secretary of the interior. Until such approval such lands are not subject to taxation. *Jackson v. La Moure County*, 46 Am. & Eng. R. Cas. 449, 1 N. Dak. 238. *Barney v. Winona & St. P. R. Co.*, 26 Am. & Eng. R. Cas. 522, 117 U. S. 228, 6 Sup. Ct. Rep. 654.—FOLLOWED IN *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358.—*United States v. Missouri, K. & T. R. Co.*, 51 Am. & Eng. R. Cas. 305, 141 U. S. 358, 12 Sup. Ct. Rep. 13.—FOLLOWING *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414; *Barney v. Winona & St. P. R. Co.*, 117 U. S. 228; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 496.—*Musser v. McKee*, 38 Minn. 409, 38 N. W. Rep. 103; further appeal 44 Minn. 343, 46 N. W. Rep. 673. *Kesser v. Carney*, 52 Minn. 397, 54 N. W. Rep. 89.

A grant of them by such railroad before such selection and approval, to another which claims them under an overlapping grant, passes no title. *Wisconsin C. R. Co. v. Forsythe*, 43 Fed. Rep. 867.

The fact that an adjustment is afterwards had of the rights of the beneficiary of the first grant, whereby it is shown that the reserved lands will not be needed for the indemnity purposes for which they were reserved, does not bring such lands within the operation of the second overlapping grant, and title to them remains in the United States. *Wisconsin C. R. Co. v. Forsythe*, 43 Fed. Rep. 867.

52. — sufficiency of secretary's approval.—When a statute granting lands to a railroad provides that indemnity lands may be selected within prescribed limits, and that upon the approval of such selection by the secretary of the interior patents shall be issued therefor, the act of the secretary approving of the selection is judicial, and not ministerial, and until such approval has been made the company has no such vested interest in the lands as subjects it to liability for state taxes in respect thereof. The failure of the secretary of the interior to reject the selection made by the company does not amount to a constructive approval. *Wisconsin C. R. Co. v. Price County*, 41 Am. & Eng. R. Cas. 669, 133 U. S. 496, 10 Sup. Ct. Rep. 341.—FOLLOWED IN *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358. QUOTED IN *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310.

53.—location and filing of map to precede selection.—When congress makes a grant of land for railroad purposes of the odd-numbered sections within a given distance of the road, with a provision for an indemnity for such as shall have been previously granted or pre-empted, and directs the secretary of the interior to reserve the same when a map shall be filed showing the location of the road, the filing of the map cuts off the right of entry upon the lands contained in the grant proper, but no right attaches to the indemnity lands until selected, which can only be done after the road is located. *Cedar Rapids & M. R. R. Co. v. Herring*, 14 Am. & Eng. R. Cas. 537, 110 U. S. 27, 3 Sup. Ct. Rep. 485.—DISTINGUISHED IN *Iowa Falls & S. C. R. Co. v. Beck*, 67 Iowa 421. FOLLOWED IN *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720; *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co.*, 117 U. S. 406. QUOTED IN *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 25 Am. & Eng. R. Cas. 99, 26 Fed. Rep. 551.

Under the provisions of the Act of Congress of July 2, 1864, granting land to the Northern Pacific railroad, the act itself withdrew the lands from pre-emption after the route of the road was fixed; and on filing a map of the route of the road, through the secretary of the interior, the grant attached to the sections conveyed, and no notice of the withdrawal of such lands from the secretary of the interior was necessary. *United States v. Northern Pac. R. Co.*, 41 Fed. Rep. 842.

In an action to recover land claimed to have passed to plaintiff's grantor under a congressional grant, as deficiency lands selected within the fifteen-mile limits—held, that a certified copy of the list of such selections, from the records of the general land office, was competent evidence. *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. Rep. 842.

54.—ratification of premature selection.—The fact that the selection of indemnity lands was made prematurely by one who had not been appointed by the state as its agent is immaterial, the selections made by him having been ratified by both state and federal governments, and the lands so selected having been certified as within the grant. *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa 476.—APPLIED IN *Sioux City & D. M. R. Co. v. Chicago, M. &*

St. P. R. Co., 25 Am. & Eng. R. Cas. 150, 27 Fed. Rep. 770.

55.—when selection unnecessary.—Where an act of congress provides for the selection of railroad indemnity lands within certain limits, and it appears all the government land within the limits is necessary to complete the indemnity, no selection is necessary. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. Rep. 389.

56.—priority of selection determines ownership.—The title to lands granted by the United States to aid railroads relates back to the date of the grant. So where a grant is made to aid two roads which cross each other, the first road located or built does not take the whole of the land within the prescribed limits at the place of crossing, but the two roads are tenants in common in that part of the land; but not so of indemnity lands; there priority of selection determines the ownership. *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Co.*, 24 Am. & Eng. R. Cas. 100, 117 U. S. 406, 6 Sup. Ct. Rep. 790.—FOLLOWING *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414.—FOLLOWED IN *United States v. Missouri, K. & T. R. Co.*, 141 U. S. 358.

57. Acceptance of grant.—Where it does not appear that a railroad company ever accepted or acted under the joint resolution of congress of April 10, 1869, but it seems that it declined to accept it, there is no presumption without evidence that it did accept any rights under it. *United States v. Northern Pac. R. Co.*, 41 Fed. Rep. 842.

58. Sale of lands granted.—A sale of lands granted to a railroad, made in contravention of the letter and policy of the law, is void *ab initio*. *Swann v. Miller*, 82 Ala. 530, 1 So. Rep. 65.

The Act of Congress of April 10, 1869 (16 St. at L. pp. 45 & 46), is a law as well as a grant, and where land granted to a railroad has been conveyed in violation of the conditions of the act, the benefit of such defect may be taken advantage of by a person other than the United States, although it is the rule that no person other than the grantor, his heirs or assigns, can take advantage of the breach of a condition subsequent. *Swann v. Miller*, 82 Ala. 530, 1 So. Rep. 65.

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The state could not pass any title to or right in the lands except in the manner authorized by the act of congress. *Cedar Rapids & M. R. R. Co. v. Carroll County*, 41 Iowa 153.

59. Forfeiture only available at instance of government.—A forfeiture of lands granted a railroad by the United States for a failure to comply with the conditions of the grant can only be taken advantage of by the government, and not by an individual holding an imperfect title to part of the lands. *Van Wyck v. Knevals*, 10 Am. & Eng. R. Cas. 664, 106 U. S. 360, 1 Sup. Ct. Rep. 336. *Bybee v. Oregon & C. R. Co.*, 46 Am. & Eng. R. Cas. 460, 139 U. S. 663, 11 Sup. Ct. Rep. 641.—**DISTINGUISHING** In re Brooklyn, W. & N. R. Co., 72 N. Y. 245; Brooklyn Steam Transit Co. v. Brooklyn, 78 N. Y. 524; Union Hotel Co. v. Hersee, 79 N. Y. 454; Farnham v. Benedict, 107 N. Y. 159.—*United States v. Curtner*, 38 Fed. Rep. 1.—**FOLLOWED IN** Southern Pac. R. Co. v. Stanley, 49 Fed. Rep. 263.

Where lands have been granted in *presenti* to a railroad company, and congress afterwards allows the grantee to assign the lands to another company, the government might question the title on the ground that the grantee has failed to perform conditions imposed in the grant, but the latter company cannot do so. *Parker v. New Orleans, B. R. & V. R. Co.*, 33 Fed. Rep. 693.

60. Quietting title to land granted.—The existence of an invalid patent to lands that have been granted to a railroad is a cloud upon the title, which the company or its grantees may have removed by bill in equity. *Van Wyck v. Knevals*, 10 Am. & Eng. R. Cas. 664, 106 U. S. 360, 1 Sup. Ct. Rep. 336.—**APPLIED IN** Northern Pac. R. Co. v. St. Paul, M. & M. R. Co., 25 Am. & Eng. R. Cas. 99, 26 Fed. Rep. 551. **EXPLAINED IN** Savannah, F. & W. R. Co. v. Davis, 43 Am. & Eng. R. Cas. 542, 25 Fla. 917, 7 So. Rep. 29. **FOLLOWED IN** Walden v. Knevals, 114 U. S. 373. **RECONCILED IN** East Ala. R. Co. v. Tennessee & C. R. R. Co., 29 Am. & Eng. R. Cas. 363, 78 Ala. 274.

Where a land-grant railroad company begins a proceeding against an individual to quiet its title to certain lands which it claims under a grant, the defendant may defend by showing that the land is swamp and overflowed land, and therefore not included in the grant to the company. *Southern Pac. R. Co. v. McCusker*, 22 Am. & Eng.

R. Cas. 187, 67 Cal. 67, 7 Pac. Rep. 122.—**FOLLOWING** *McLaughlin v. Heid*, 63 Cal. 208.

61. Withholding patent until payment of costs of survey.—Where congress grants land to a railroad and directs patents to issue for lands opposite every twenty miles of road completed, but reserves the right "to add to, alter, amend, or repeal" the grant, it is competent for congress by a subsequent law to provide that patents shall not issue until the company shall pay the government the cost of surveying. *Northern Pac. R. Co. v. Traill County*, 25 Am. & Eng. R. Cas. 364, 115 U. S. 600, 6 Sup. Ct. Rep. 201.

An Act of Congress of July 31, 1876, provided that before any conveyance was made of any lands granted to railways the cost of surveying the same should be paid to the United States, unless the company was exempted by law from payment of such costs. *Held*, that the law applied to the New Orleans Pacific railway, as assignee of the New Orleans, Baton Rouge & Vicksburg railway, under the grant made the latter by the act of March 3, 1871, § 22, though the costs of the survey had been expended by the government prior to the date of the latter act, the road not having been commenced within the five years limited by the act. *New Orleans Pac. R. Co. v. United States*, 33 Am. & Eng. R. Cas. 74, 124 U. S. 124, 8 Sup. Ct. Rep. 417; *affirming* 21 Ct. of Cl. 459.—**FOLLOWING** *United States v. Repentigny*, 5 Wall. (U. S.) 211; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. 603; *Union Pac. R. Co. v. McShane*, 22 Wall. 444.—**REFERRED TO IN** *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364.

The company having failed to construct its road in the time limited, congress had the right to impose the condition that it should be granted only on payment of cost of survey. *New Orleans Pac. R. Co. v. United States*, 33 Am. & Eng. R. Cas. 74, 124 U. S. 124, 8 Sup. Ct. Rep. 417; *affirming* 21 Ct. of Cl. 459.

62. Revocation of grants.—A railroad company took a grant of land subject to forfeiture if its road was not built in ten years. Before the time had fully elapsed the legislature declared the grant forfeited; and this declaration of forfeiture was confirmed by a subsequent act after the time had fully run. The company claimed that the first act was unconstitutional, but op-

erated to destroy its credit, and thus prevent it from completing its road, and that the grant became absolute. *Held*, that this contention could not be sustained. The passage of the first act of forfeiture, if void, did not prevent the legislature from subsequently passing a valid act touching the same subject. *Farmers' L. & T. Co. v. Chicago, P. & S. R. Co.*, 39 *Fed. Rep.* 143.

And in such case evidence that the act of revocation was induced by false representations by a rival company cannot be considered. The courts cannot inquire into the causes that influenced the legislature. *Farmers' L. & T. Co. v. Chicago, P. & S. R. Co.*, 39 *Fed. Rep.* 143.—FOLLOWED IN *Angle v. Chicago, St. P., M. & O. R. Co.*, 39 *Fed. Rep.* 912.

And the fact that another company had become the principal stockholder and creditor of the complaining company, and had constructed its road parallel to, and only a few yards from, plaintiff's incomplete road, was not a completion of plaintiff's road so as to prevent a forfeiture. *Farmers' L. & T. Co. v. Chicago, P. & S. R. Co.*, 39 *Fed. Rep.* 143.

2. To the Pacific Railroads.

a. Central Pacific.

63. The grants are in present title vested.—The grant of the right of way to the plaintiff through the public lands of the United States, made by the second section of the Act of Congress of July 1, 1862, was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right. The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section. *Central Pac. R. Co. v. Dyer*, 1 *Sawyer*, (U. S.) 641. *United States v. Curtner*, 14 *Sawyer*, (U. S.) 535, 38 *Fed. Rep.* 1; reversed in 149 U. S. 662, 13 *Sup. Ct. Rep.* 1041. *Francoeur v. Newhouse*, 40 *Am. & Eng. R. Cas.* 439, 40 *Fed. Rep.* 618. *Mc-*

Laughlin v. Menotti, 89 *Cal.* 354, 26 *Pac. Rep.* 880. *Jatunn v. Smith*, 95 *Cal.* 154, 30 *Pac. Rep.* 200. *Tarpey v. Deseret Salt Co.*, 5 *Utah* 494, 17 *Pac. Rep.* 631.—APPLYING *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600.

The title which vests under the congressional grant, and the performance of the prescribed conditions, is a legal title, upon which an action of ejectment may be maintained before the patent issues. *Francoeur v. Newhouse*, 40 *Am. & Eng. R. Cas.* 439, 40 *Fed. Rep.* 618.

The failure to pay the expense of surveying, under section 21 of the act of 1864, only prevents the issue of the patent. It does not prevent the title attaching under the congressional grant. *Francoeur v. Newhouse*, 40 *Am. & Eng. R. Cas.* 439, 40 *Fed. Rep.* 618.

As the legal title to land granted vested in the company upon identification of the land, and not at the date of the patent issued by the United States, the statute of limitations commences to run in favor of one who diverted the waters of a stream upon the land after such identification and prior to the date of the patent, from the date of the diversion, as against the railroad company and its grantees. *Jatunn v. Smith*, 95 *Cal.* 154; 30 *Pac. Rep.* 200.—QUOTING *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Denny v. Dodson*, 32 *Fed. Rep.* 899; *Forrester v. Scott*, 92 *Cal.* 398.

The lands granted were the odd-numbered sections within twenty miles of the line of the road, such as were public lands at the date of the act, not sold, reserved, or otherwise disposed of by the United States, and such odd-numbered sections within the same limits as were public lands to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed. *United States v. Curtner*, 14 *Sawyer*, (U. S.) 535, 38 *Fed. Rep.* 1; reversed in 149 U. S. 662, 13 *Sup. Ct. Rep.* 1041.

No right other than that of the railroad company could be acquired or initiated in any of said odd sections of land, after the filing in the local land office of the district on January 30, 1865, of the order of withdrawal provided for in § 7 of the act of July 1, 1862. *United States v. Curtner*, 14 *Sawyer*, (U. S.) 535, 38 *Fed. Rep.* 1; reversed in 149 U. S. 662, 13 *Sup. Ct. Rep.* 1041.

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64. The Congress The act of Congress of July 1, 1862, was a present grant, operating immediately upon the passage of the act, without reservation or exception, and was subject to no conditions except those which were subsequent, or necessarily such as that the road should be constructed within the period specified, and be afterwards maintained and used for the purposes designated. All acquisitions of land over which this right of way was thus granted, made subsequent to the passage of the act, were subject to the exercise of this right. The reservations and exceptions found in the third section of the above act apply only to the grants of the land therein mentioned, and do not apply to the grant of the right of way made in the second section. *Central Pac. R. Co. v. Dyer*, 1 *Sawyer*, (U. S.) 641. *United States v. Curtner*, 14 *Sawyer*, (U. S.) 535, 38 *Fed. Rep.* 1; reversed in 149 U. S. 662, 13 *Sup. Ct. Rep.* 1041. *Francoeur v. Newhouse*, 40 *Am. & Eng. R. Cas.* 439, 40 *Fed. Rep.* 618. *Mc-*

these lands when they were withdrawn for the purposes of a railroad grant on January 30, 1865, that under the recent decision of the United States supreme court, in *United States v. McLaughlin*, could prevent that grant from attaching. It was, therefore, the first grant to attach, and by performance of the conditions subsequent the title of the company became absolute. *United States v. Curtner*, 14 Sawy. (U. S.) 535, 38 Fed. Rep. 1; reversed in 149 U. S. 662, 13 Sup. Ct. Rep. 1041.

The selections in question were excepted from confirmation by the act of 1866; but had it been otherwise, it was not in the power of congress at that time to divest the right of the company. *United States v. Curtner*, 14 Sawy. (U. S.) 535, 38 Fed. Rep. 1; reversed in 149 U. S. 662, 13 Sup. Ct. Rep. 1041.

The act of March 1, 1877 (19 St. at L. 267), for like reasons, cannot affect the rights of the railroad company. At the date of this confirmatory act, seven years after the title of this company became perfect, the United States had no interest whatever in the land upon which the act could operate. *United States v. Curtner*, 14 Sawy. (U. S.) 535.

64. The lands granted.—The Act of Congress of July 1, 1862, granting to the Central Pacific a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its road-bed. *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. Rep. 1032.—**DISTINGUISHING** *Wood v. Truckee Turnpike Co.*, 24 Cal. 474. **FOLLOWING** *Central Pac. R. Co. v. Benity*, 5 Sawy. 118; *Winona v. Huff*, 11 Minn. 119.—*Central Pac. R. Co. v. Benity*, 5 Sawy. (U. S.) 118.—**APPROVED** in *Tennessee & C. R. Co. v. East Ala. R. Co.*, 75 Ala. 516, 51 Am. Rep. 475. **FOLLOWED** in *Southern Pac. Co. v. Burr*, 86 Cal. 279.

The right of such railroad company to recover the land so granted is not affected

by the fact that it offered to lease to defendant the parcel in dispute, as the defendant had no right to inclose or occupy the land without permission of the railroad company. *Southern Pac. Co. v. Burr*, 86 Cal. 279, 24 Pac. Rep. 1032.

65. Priority over rejected Mexican grants.—Land included within the exterior boundaries of a Mexican grant, an application for the confirmation of which was pending when the grants were made to the Central Pacific railroad company by the Acts of Congress passed July 1, 1862, and July 2, 1864, and which grant was afterwards rejected, did not pass to said railroad company by said acts of congress. *McLaughlin v. Fowler*, 52 Cal. 203.—**FOLLOWING** *Newhall v. Sanger*, 92 U. S. 761. **OVER-RULING** *Central Pac. R. Co. v. Yolland*, 49 Cal. 438; *Central Pac. R. Co. v. Robinson*, 49 Cal. 446; *Kaiser v. McLaughlin*, 49 Cal. 449.

66. Exception of mineral lands.—The exception of mineral lands from the grant to the Central Pacific extends only to lands known to be mineral, or apparently mineral, at the time when the grant attached; and a discovery of a gold mine in the lands after the title has vested by full performance of the conditions, does not defeat the title. *Francoeur v. Newhouse*, 40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618.

Where land has been granted to private parties, other parties have no right afterwards to enter upon the land and prospect for gold. No right can be initiated by a trespass upon private lands. *Francoeur v. Newhouse*, 40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618.

A person claiming, under a mineral location, to be entitled to the possession of land previously patented to the Central Pacific, in pursuance of the acts of July 1, 1862, and the amendment thereto of July 2, 1864, in order to establish his right of possession as against a person claiming under the patent, must clearly show that at the date of the patent the land, under the conditions then existing, was more valuable for mining than for agriculture, and was known to be such. And in determining the relative value of the land for such purposes, subsequent changes in the conditions affecting it cannot be considered. *Hunt v. Steese*, 75 Cal. 620, 17 Pac. Rep. 920.

Under the Act of Congress of July 1, 1862, all mineral lands were excepted; and where one claims lands under the railroad com-

pany, he must prove that it was not excepted from the grant as mineral land. *Corinne Mill C. & S. Co. v. Johnson*, 7 Utah 327, 26 Pac. Rep. 922.—REVIEWING *McGrath v. Tallent*, 7 Utah 256, 26 Pac. Rep. 574.

67. Filing map and its effect.—The map of the route of the Western Division of the Central Pacific, filed with the secretary of the interior Dec. 8, 1864, is a map of the general route, and not the line "as definitely fixed," within the meaning of the act of 1862. *United States v. McLaughlin*, 30 Fed. Rep. 147, 12 Sawy. (U. S.) 179; affirmed in 127 U. S. 428, 8 Sup. Ct. Rep. 1177.

The provision of the seventh section of the above act, requiring the plaintiff, within two years, to designate the general route of the road as near as might be, and file a map of the same in the department of the interior, did not affect the grant of the right of way; it only furnished the means by which the secretary could withdraw the lands within a specified distance of such designated route from pre-emption, private entry, and sale. *Central Pac. R. Co. v. Dyer*, 1 Sawy. (U. S.) 641.

The filing of the map of the general route, and the withdrawal thereupon, protected the lands against the acquisition of any other right by any other parties until the line should become "definitely fixed," when the grant became specific by attaching itself to every odd section within the prescribed limits. *United States v. Curtner*, 14 Sawy. (U. S.) 535, 38 Fed. Rep. 1; reversed in 149 U. S. 662, 13 Sup. Ct. Rep. 1041.—REVIEWED IN *Southern Pac. R. Co. v. Wiggs*, 14 Sawy. 568.—*McLaughlin v. Menotti*, 89 Cal. 354, 26 Pac. Rep. 880.

Parties purchasing under state locations in township 2, south, 1 east, since June 10, 1865, had official record notice of the right of the railroad company, for the map filed in the office of the register of the local land office had distinctly endorsed upon it in red ink the following, viz.: "The odd-numbered sections on this plat are granted to the Western Pacific railroad." *United States v. Curtner*, 14 Sawy. (U. S.) 535, 38 Fed. Rep. 1; reversed in 149 U. S. 662, 13 Sup. Ct. Rep. 1041.

Under section 7 of the act, the route of railroad was definitely settled, so that the grant attached when a map, approved by the directors, designating the route of the proposed road, was filed with the secretary

of the interior; and no adverse right could be initiated between the time it was so filed and the time when the notice of the order withdrawing the lands were received at the local land office. *McLaughlin v. Menotti*, 89 Cal. 354, 26 Pac. Rep. 880.

The lands having been disposed of to the railroad company, the land department had no jurisdiction to transfer them, and its listing thereof to the state was inoperative and void; and the facts showing such invalidity are admissible in an action of ejectment by the grantees of the railroad company against a defendant claiming under the state. *McLaughlin v. Menotti*, 89 Cal. 354, 26 Pac. Rep. 880.

68. Validity and effect of patents.—The patent issued under the congressional grant is only a convenient instrument of evidence that the conditions have been performed and the title vested. *Francoeur v. Newhouse*, 40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618.

An exception inserted in a patent, which is not authorized by the statute to be inserted, is void. *Francoeur v. Newhouse*, 40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618.

Where a patent is issued for land which has before been granted to other parties, and there is no interest left in the government to grant, the interior department acts without jurisdiction, there being nothing in the United States to grant, and the patent so issued is void, and may be collaterally impeached. *Francoeur v. Newhouse*, 40 Am. & Eng. R. Cas. 439, 40 Fed. Rep. 618.

Patents issued to the Central Pacific company for any sections east of range 6 within the boundaries of the Mosquelamos grant are valid, there being enough land west of range 7 to satisfy the floating grant of eleven square leagues. *United States v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177.—APPROVED IN *Carr v. Quigley*, 149 U. S. 652. REVIEWED IN *United States v. Curtner*, 14 Sawy. (U. S.) 535; *United States v. Southern Pac. R. Co.*, 14 Sawy. 620.

69. Rights of settlers and pre-emptioners.—The confirmatory act of July 23, 1866, does not apply to lands withdrawn from sale; but conceding that it does, it would be a nullity as to the lands granted and withdrawn from sale under the Pacific railroad acts. Congress could not, after the company had accepted the terms of the acts of 1862 and 1864, and acted upon them, divest

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The question whether a prior settler upon lands included within the grant to the railroad company is a *bona fide* settler, within the meaning of the act of 1864, is a question of fact; and the failure of the court to find the ultimate fact of a *bona fide* settlement in an action of ejectment, where such a settlement is relied on by the defendant to defeat the title of the railroad company, leaves the question as to which party has the better title uncertain and unsettled, and is error entitling the defendant to a new trial. *McLaughlin v. Menotti*, 89 Cal. 354, 26 Pac. Rep. 880.

b. Northern Pacific.

70. The grant is in presenti.—The donation of land under the act of July 2, 1864, was a grant *in presenti*, and took effect as of that date upon the subsequent location by the company of its road, and approval thereof by congress. *United States v. Northern Pac. R. Co.*, 14 Sawy. (U. S.) 401, 41 Fed. Rep. 842. *Washington & I. R. Co. v. Northern Pac. R. Co.*, 38 Am. & Eng. R. Cas. 670, 2 Idaho 513, 21 Pac. Rep. 658. *Northern Pac. R. Co. v. Lilly*, 24 Am. & Eng. R. Cas. 111, 6 Mont. 65, 9 Pac. Rep. 889.

The act of July 2, 1864, operated as a grant *in presenti*, notwithstanding the provisions in the act that the land was to be earned by conditions subsequent, and the issuing of patents for the land as the road should be constructed. *Northern Pac. R. Co. v. Majors*, 14 Am. & Eng. R. Cas. 487, 5 Mont. 111, 2 Pac. Rep. 322.—DISTINGUISHING *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358. QUOTING *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733; *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 U. S. 491; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 427.—DISTINGUISHED IN *Northern Pac. R. Co. v. Lilly*, 6 Mont. 65. REVIEWED IN *United States v. Northern Pac. R. Co.*, 6 Mont. 351.

71. Contrary doctrine.—By the act of July 2, 1864, the odd-numbered sections along the line of the Northern Pacific R. Co. for forty miles on either side of the line in the territories and twenty miles in the states, are set apart and devoted to the construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect

an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any twenty-five miles of said road is constructed and accepted by the United States; and in the meantime, the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against any one that unlawfully cuts timber thereon. *United States v. Childers*, 8 Sawy. (U. S.) 171, 12 Fed. Rep. 586.—APPROVED IN *United States v. Bransteen*, 13 Sawy. 64. DISAPPROVED IN *Denny v. Dodson*, 13 Sawy. 68. DISTINGUISHED IN *United States v. Ordway*, 12 Sawy. 275.

The grant does not give the corporation any such present right to or interest in any one of such sections as authorizes it to waste the same, by disposing of timber thereon before it is earned by the construction of the section of the road adjacent and opposite thereto. *United States v. Ordway*, 12 Sawy. (U. S.) 275, 30 Fed. Rep. 30.—DISTINGUISHING *United States v. Childers*, 8 Sawy. 171. FOLLOWING BUTT *v. Northern Pac. R. Co.*, 119 U. S. 55, 7 Sup. Ct. Rep. 100.

On the construction and acceptance of any section of the road of the Northern Pacific railway company, the coterminous odd sections vest absolutely in the corporation, and thereafter the patent therefor may be considered as having issued. *United States v. Ordway*, 12 Sawy. (U. S.) 275, 30 Fed. Rep. 30.

72. When and what title passes.—The title of the Northern Pacific R. Co. to the lands granted it by the act of July 2, 1864, vested in the company upon the designation by it of the route of its road, irrespective of the fact that no patent had been issued therefor. *Northern Pac. R. Co. v. Cannon*, 46 Am. & Eng. R. Cas. 419, 46 Fed. Rep. 224.—QUOTING *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 608; *Union Pac. R. Co. v. McShane*, 22 Wall. 444; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600, 6 Sup. Ct. Rep. 201; *Wisconsin C. R. Co. v. Price County*, 133 U. S. 509, 10 Sup. Ct. Rep. 341.—APPLIED IN *Northern Pac. R. Co. v. Amacker*, 46 Fed. Rep. 233.

Upon full compliance with the terms of the grant, so far as certain lands in this state are concerned, the company became entitled to a complete, perfect, and absolute title to the same, and to receive the proper evidence of such title from the United States; that

thereupon the lands ceased to belong to the United States, and became subject to the tax laws of this state, and the company having contracted to sell the same, they were properly taxable under such laws. *Cass County v. Morrison*, 5 *Am. & Eng. R. Cas.* 404, 28 *Minn.* 257, 9 *N. W. Rep.* 761.

The provision of the Act of Congress, passed in 1870, requiring the company, as a condition precedent to its right to patents for such lands, to pay the cost of surveying, selecting, and conveying the same, was an attempt to attach a new condition, not found in the original grant, to the company's right to the lands, and to the evidence of the title to the same which congress had no power to impose, as its effect would be to deprive the company of property rights. *Cass County v. Morrison*, 5 *Am. & Eng. R. Cas.* 404, 28 *Minn.* 257, 9 *N. W. Rep.* 761.—DISTINGUISHING *Kansas Pac. R. Co. v. Prescott*, 16 *Wall.* (U. S.) 603; *Union Pac. R. Co. v. McShane*, 22 *Wall.* 444.

Where the company has the legal title to lands granted it by the United States, but is not in possession, a bill by it to determine the adverse claim of a party holding the land under an invalid patent issued pursuant to an entry of the land as a mining claim, where it was valuable only for agricultural purposes, is demurrable, as failing to show ground for equitable relief. *Northern Pac. R. Co. v. Cannon*, 46 *Am. & Eng. R. Cas.* 419, 46 *Fed. Rep.* 224.

73. Title good without survey.—The grant conveyed an immediate title which attached to the particular land when the road was definitely located, so that an individual could not claim title to such land even before a survey was made. *Northern Pac. R. Co. v. Lilly*, 24 *Am. & Eng. R. Cas.* 111, 6 *Mont.* 65, 9 *Pac. Rep.* 889.

The Northern Pacific railroad company had conveyed 167 acres of the land included within its grant, to the respondent, who inclosed it within a fence, although there had never been any survey of the tract by the government. Proceedings were instituted against him under the Act of Congress of February 25, 1855, entitled "An act to prevent unlawful occupancy of public lands," to compel the removal of his fences. *Held*, that said land was not "public land of the United States." *United States v. Godwin*, 7 *Mont.* 402, 16 *Pac. Rep.* 850.—FOLLOWING *Northern Pac. R. Co. v. Majors*, 5 *Mont.*

111; *Northern Pac. R. Co. v. Lilly*, 6 *Mont.* 65; *United States v. Williams*, 6 *Mont.* 379.

74. Grant is a "float" until location of route.—The act operated as a grant *in presenti*, in the nature of a float, until the route should be determined, and then attaching to the sections specified. And the nature of the grant as thus defined is not affected by a provision in section 4 authorizing patents to issue for the lands on either side of every 25 miles of road completed. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1, 11 *Sup. Ct. Rep.* 389.—FOLLOWING *Schulenberg v. Harriman*, 21 *Wall.* (U. S.) 44; *Leavenworth, L. & G. R. Co. v. United States*, 92 *U. S.* 733; *Missouri, K. & T. R. Co. v. Kansas Pac. R. Co.*, 97 *U. S.* 491; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 *U. S.* 426; *Rice v. Minnesota & N. W. R. Co.*, 1 *Black* (U. S.) 358.—FOLLOWED IN *United States v. Southern Pac. R. Co.*, 146 *U. S.* 570; *Northern Pac. R. Co. v. Wright*, 51 *Fed. Rep.* 68.—*American Emigrant Co. v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 515.—QUOTING *Burlington & M. R. R. Co. v. Fremont County*, 9 *Wall.* 89.—*Stewart v. Allstock*, 22 *Oreg.* 182, 29 *Pac. Rep.* 553.

Accordingly lands within the limit of such grant are not to be considered as withdrawn from sale or entry until the line of the road was so definitely fixed. *Northern Pac. R. Co. v. Sanders*, 46 *Am. & Eng. R. Cas.* 431, 46 *Fed. Rep.* 239; *affirmed on rehearing* in 47 *Fed. Rep.* 604; *affirmed on writ of error* in 49 *Fed. Rep.* 129, 1 *C. C. A.* 192, 7 *U. S. App.* 47.—QUOTING *Dubuque & P. R. Co. v. Litchfield*, 23 *How.* (U. S.) 66.

The Northern Pacific railroad, having been located and constructed according to law through the state of Minnesota, is entitled to the lands granted it in place along its line, and to others to make up deficiencies, unaffected by any prior grant to the St. Paul & Pacific railroad. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1, 11 *Sup. Ct. Rep.* 389.—FOLLOWED IN *Southern Pac. R. Co. v. Araiza*, 57 *Fed. Rep.* 98; *Northern Pac. R. Co. v. Barden*, 51 *Am. & Eng. R. Cas.* 236, 46 *Fed. Rep.* 592. QUOTED IN *Northern Pac. R. Co. v. Sanders*, 47 *Fed. Rep.* 604.

75. Fixing route—Choice of routes.—The general route of the Northern Pacific railroad may be considered as fixed, when

its general route is determined, and the country is designated by the general survey, and will pass therefor.

The act of the government from said route "that it was route over fixed, but with the gently grade in location therefor.

Pac. R. Co. The act from the eligible company, a line of latitude, with a branch river Oregon. The company to Portland to do so any route between the United States. *Sawyer*, (U. S.) in 152 U.

76. W tion of the territory of —whether the limits of a territory. *13 Sawyer*.

77. Se demnity congress of the company limit, nity to loss original grant state or territory. *Northern Fed. Rep.* Burlington

its general course and direction was determined, after an actual examination of the country, or from a knowledge of it, and it is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. *Buttz v. Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 455, 119 *U. S.* 55, 7 *Sup. Ct. Rep.* 100.

The act of 1864 provided for a survey by the government and withdrawal of lands from sale or pre-emption when a "general route" of the road should be fixed. *Held*, that it was not necessary that the general route over the whole distance should be fixed, but it was a sufficient compliance with the law if enough was fixed to intelligently guide the officers of the government in locating the lands, and issuing patents therefor. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1, 11 *Sup. Ct. Rep.* 389.

The act authorized a continuous line from Lake Superior westerly, by the most eligible route, to be determined by said company, within the United States, and on a line north of the forty-fifth degree of latitude, to some point on Puget Sound, with a branch via the valley of the Columbia river to a point at or near Portland, Oreg. *Held*, that it was optional with the company whether it would build the branch to Portland; the clause giving it authority to do so did not limit its right to choose any route within the prescribed limits between Lake Superior and Puget Sound. *United States v. Northern Pac. R. Co.*, 14 *Sawyer*, (U. S.) 401, 41 *Fed. Rep.* 842; *reversed* in 152 *U. S.* 284, 14 *Sup. Ct. Rep.* 598.

76. Width of the grant.—The location of the line of the road in a state or territory determines the width of the grant—whether of ten or twenty alternate sections—without reference to the fact of whether the grant includes lands within the limits of a state or not. *Denny v. Dodson*, 13 *Sawyer*, (U. S.) 68, 32 *Fed. Rep.* 899.

77. Selection of deficiency or indemnity lands.—The joint resolution of congress of May 31, 1870, operated to give the company an additional ten-mile indemnity limit, and did not restrict the indemnity to losses occurring subsequent to the original grant, and to lands situated in the state or territory in which the loss occurs. *Northern Pac. R. Co. v. United States*, 36 *Fed. Rep.* 282.—**QUOTING** *United States v. Burlington & M. R. Co.*, 98 *U. S.* 341.

The approval of the secretary of the interior was not necessary to the vesting of the title to lands selected by the company to make up the deficiency in the lands within the forty-mile limit, under the grant to it of July 2, 1864, and the subsequent resolution of congress. *Northern Pac. R. Co. v. Barnes*, 53 *Am. & Eng. R. Cas.* 616, 2 *N. Dak.* 310, 51 *N. W. Rep.* 386.—**FOLLOWED** IN *Northern Pac. R. Co. v. Barnes*, 2 *N. Dak.* 395; *Northern Pac. R. Co. v. Strong*, 2 *N. Dak.* 395; *Northern Pac. R. Co. v. Brewer*, 2 *N. Dak.* 396; *Northern Pac. R. Co. v. Tressler*, 2 *N. Dak.* 397.

78. Filing map, and its effect.—When the general route of the road provided for in the act of July 2, 1864, § 6, was fixed, and information thereof was given to the land department by the filing of a map thereof with the secretary of the interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof; and, by way of precautionary notice to the public, an executive withdrawal was a wise exercise of authority. *Buttz v. Northern Pac. R. Co.*, 29 *Am. & Eng. R. Cas.* 455, 119 *U. S.* 55, 7 *Sup. Ct. Rep.* 100. *Denny v. Dodson*, 13 *Sawyer*, (U. S.) 68, 32 *Fed. Rep.* 899. *United States v. Northern Pac. R. Co.*, 14 *Sawyer*, (U. S.) 401, 41 *Fed. Rep.* 842.

And no subsequent neglect of the secretary could affect the rights of the company. *United States v. Northern Pac. R. Co.*, 14 *Sawyer*, (U. S.) 401, 41 *Fed. Rep.* 842.

79. Construing the grant.—Exceptions.—The provision in the act of July 2, 1864, excepting from the grant all subsequent grants prior to the definite location of its road—*held*, not to cover other grants for the construction of roads of a similar character. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1, 11 *Sup. Ct. Rep.* 389.

80. Mineral and non-mineral lands.—Mineral lands were excluded from the operation of the grant, and such lands were not withdrawn from sale prior to the definite fixing of the line of the road and filing a plat thereof in the general land office. *Northern Pac. R. Co. v. Cannon*, 54 *Fed. Rep.* 252, 7 *U. S. App.* 507, 4 *C. C. A.* 303; *affirming* 46 *Fed. Rep.* 237.

So where patents were issued to individuals for land, as mineral land, before the line of the road was definitely fixed, the company did not take title, and cannot main-

tain a bill in equity to quiet its title simply because the lands are within the limits of its grant. *Northern Pac. R. Co. v. Cannon*, 54 Fed. Rep. 252, 7 U. S. App. 507, 4 C. C. A. 303; *affirming* 46 Fed. Rep. 237.

Although such lands were subsequently declared to be agricultural, and the entries as mining claims held to be invalid. *Northern Pac. R. Co. v. Sanders*, 46 Am. & Eng. R. Cas. 431, 46 Fed. Rep. 239; *affirmed on rehearing* in 47 Fed. Rep. 604; *affirmed on writ of error* in 49 Fed. Rep. 129, 7 U. S. App. 47, 1 C. C. A. 192.

The company is not entitled to any notice of an application to patent mineral land within the limits of its grant, except the general notice provided for by U. S. Rev. St. § 2325, except where it institutes a contest under § 2335 to determine the character of the land. *Northern Pac. R. Co. v. Cannon*, 54 Fed. Rep. 252, 7 U. S. App. 507, 4 C. C. A. 303; *affirming* 46 Fed. Rep. 237.

When government surveyors report the lands as non-mineral, the title of the company attaches, so that the lands become subject to taxation, even before patents are issued therefor. *Northern Pac. R. Co. v. Wright*, 54 Fed. Rep. 67, 7 U. S. App. 502, 4 C. C. A. 193; *affirming* 51 Fed. Rep. 68.

81. Rights of settlers and pre-emptors.—That part of section 3 of the act which excepts from the grant lands reserved, sold, granted, or otherwise appropriated, and to which a pre-emption and other rights and claims have not attached, when a map of definite location has been filed, does not include the Indian right of occupancy within such "other rights and claims," nor does it include pre-emptions where section 6 declares that the land shall not be subject to pre-emption. *Buttz v. Northern Pac. R. Co.*, 29 Am. & Eng. R. Cas. 455, 119 U. S. 55, 7 Sup. Ct. Rep. 100.—**DISTINGUISHED IN** *Northern Pac. R. Co. v. Sanders*, 47 Fed. Rep. 604; *Northern Pac. R. Co. v. Sanders*, 49 Fed. Rep. 129, 7 U. S. App. 47, 1 C. C. A. 192. **FOLLOWED IN** *Southern Pac. R. Co. v. Araiza*, 57 Fed. Rep. 98.

The grant did not give the company title to lands for which a pre-emption certificate had already issued; and the fact that the certificate was subsequently canceled only operated to restore the land to the public domain, and did not give the company title thereto. *Bardon v. Northern Pac. R. Co.*, 145 U. S. 535, 12 Sup. Ct. Rep. 856.—**APPLYING** *Leavenworth, L. & G. R. Co. v.*

United States, 92 U. S. 733. **REVIEWING** *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629.

No person settling and making improvements upon the odd sections after the survey would get any rights as a settler or pre-emptor, as against the United States or the railroad company, either under section 2281 of the U. S. Rev. St., or the provision of the act, such lands never having been subject to sale or pre-emption. *Northern Pac. R. Co. v. Peronto*, 10 Am. & Eng. R. Cas. 670, 3 Dak. 217, 14 N. W. Rep. 103.

The defendant having settled upon the land in question after the passage of the act, while it was Indian territory, near the line of the road, witnessing the construction of the track, had actual knowledge of the definite line of said road, and cannot now object that notice was not sooner given by the filing of the plat of such definite line in the office of the commissioner of the general land office, nor be regarded as a *bona fide* settler or pre-emptor in any sense. *Northern Pac. R. Co. v. Peronto*, 10 Am. & Eng. R. Cas. 670, 3 Dak. 217, 14 N. W. Rep. 103.

82. Sale or encumbrance of land granted.—The grant is a present one, and passes the legal title to the grantee; but the corporation is not authorized to dispose of or encumber the land without the consent of congress, except the earned portions lying opposite to any twenty-five-mile section of the road, after the construction thereof, and the acceptance of the same by the United States. *Denny v. Dodson*, 13 Sawy. (U. S.) 68, 32 Fed. Rep. 899.—**DISAPPROVING** *United States v. Childers*, 8 Sawy. 171. **EXPLAINING** *Rice v. Minnesota & N. W. R. Co.*, 1 Black (U. S.) 358. **QUOTING** *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 741. **RECONCILING** *Northern Pac. R. Co. v. Traill County*, 115 U. S. 601.

83. Forfeiture for breach of conditions.*—The condition attached to the grant that the road shall be completed by a day named is a condition subsequent, for a breach of which no one but the government, the grantor, can claim a forfeiture, and the title of the company, though defeasible in the meantime, is still the legal one, on which it may maintain ejectment

* Failure on part of company to earn lands by performing conditions of grant, see 40 AM. & ENG. R. CAS. 448, *abstr.*

against any intruder or trespasser. *Denny v. Dodson*, 13 *Sawy. (U. S.)* 68, 32 *Fed. Rep.* 899. *Northern Pac. R. Co. v. Peronto*, 10 *Am. & Eng. R. Cas.* 670, 3 *Dak.* 217, 14 *N. W. Rep.* 103.

c. Southern Pacific.

84. Validity—What title passed.—

The land granted to the Southern Pacific Railway Company of California, under the Act of Congress of March 3, 1871, incorporating the Texas Pacific Ry. Co., is valid; and a road having been completed from Tehachapi Pass, along the line provided for, to the Colorado river, as required by the act, the title to the lands granted has fully vested in the Southern Pacific Ry. Co. of California. *Southern Pac. R. Co. v. Poole*, 12 *Sawy. (U. S.)* 538, 32 *Fed. Rep.* 451.

Section 23 of said act (18 St. 579) grants to the Southern Pacific R. Co. of California "the same rights, grants, and privileges as were granted to the same company by the act of July 27, 1866, incorporating the Atlantic & Pacific R. Co." And those "rights, grants, and privileges" were the same, along its authorized line, as were granted to the Atlantic & Pacific R. Co. *Southern Pac. R. Co. v. Poole*, 12 *Sawy. (U. S.)* 538, 32 *Fed. Rep.* 451.

The original articles of association of the Southern Pacific R. Co. of California did not specify, as one of the objects of the incorporation, the construction of a line of railroad from Tehachapi Pass to the Colorado river, in the southeastern part of the state; but, at the time of the passage of the Act of Congress of 1871, incorporating the Texas Pacific R. Co., there was in force the act of the legislature of California of March 1, 1870, authorizing any corporation then existing, or thereafter to be formed, to amend its articles of association by making and filing amended articles in the same office where the originals were filed; also, a statute authorizing railroad corporations to consolidate with each other. And the articles of association of said company were amended immediately after the passage of the Texas Pacific Act, so as to embrace the road therein provided for in the objects of the corporation, and the company consolidated with other companies in pursuance of the statute. The road, constructed as provided for in the Texas Pacific Act, was thereafter completed in accordance with the provisions of the act. *Held*, that the

proceedings were valid, and the road afterwards built was constructed in pursuance both of the laws of California, and of the acts of congress, and that the title to the lands granted vested in the Southern Pacific R. Co. of California as it existed after the amendment of its articles of association, and its consolidation with other roads. *Southern Pac. R. Co. v. Poole*, 12 *Sawy. (U. S.)* 538, 32 *Fed. Rep.* 451.—REVIEWED IN *United States v. Southern Pac. R. Co.*, 14 *Sawy.* 620.

The filing of the map of general location of the line of the road by the Southern Pacific R. Co. of California, in pursuance of the act of congress, enured to the benefit of the company as it existed after its consolidation, and the amendment of its articles of association as the successor in interest of the corporation as it existed at the time of the passage of the act of congress, and of the filing of said map, even if the two corporations cannot be considered as technically the same corporation. *Southern Pac. R. Co. v. Poole*, 12 *Sawy. (U. S.)* 538, 32 *Fed. Rep.* 451.

85. Lands granted—Width of grant.—The act of July 27, 1866, was a grant of quantity; and the grantee, upon accepting the grant, filing its map of location, and building and equipping its road in the time and manner prescribed by the act, was entitled to its full complement of land to the amount of ten alternate sections per mile on each side of the road so constructed, provided the same could be found either within the specified present grant, or indemnity limits. *Southern Pac. R. Co. v. Wiggs*, 43 *Fed. Rep.* 333, 14 *Sawy. (U. S.)* 568.

86. Exception of land included in Mexican grant. Premises within the boundaries of an alleged Mexican grant (Rancho San Jose) which was *sub judice* at the time the secretary of the interior ordered a withdrawal of lands along the route of the road were not embraced by the grant of congress to plaintiff. *Southern Pac. R. Co. v. Crampton*, (Cal.) 10 *Am. & Eng. R. Cas.* 613.

87. Filing the plat and its effect.—The act of March 3, 1871, in effect provides that "there be and hereby is granted to the Southern Pacific R. Co. of California * * * for the purpose of aiding in the construction of said railroad * * * every alternate section of public land, not min-

eral, designated by odd number * * * whenever on the line thereof, the United States having full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office." *Held*, that such act constituted a present grant that could only be defeated by failure to perform the conditions subsequent therein, and upon proper proceedings to take advantage of such failure; that the general right to the land, subject to the exceptions found in the act, vested at the date of the passage of the act of March 3, 1871, and attached to the specific land at the moment of the filing of the plat in the office of the commissioner of the general land office. Thenceforth it was not in the power of any officers of the government by any action of theirs to divest or in any way limit or modify the rights of the company so vested. *Southern Pac. R. Co. v. Dull*, 10 *Sawy.* (U. S.) 506, 22 *Fed. Rep.* 489.—**DISTINGUISHED** IN *Southern Pac. R. Co. v. Tilley*, 14 *Sawy.* 420, 41 *Fed. Rep.* 729.

Such congressional grant attached to lands lying within the exterior limits of a Mexican grant, but outside of the limits thereof as finally surveyed, if prior to the date of filing such plat in the office of the commissioner of the general land office the Mexican grant had been finally located. *Southern Pac. R. Co. v. Dull*, 10 *Sawy.* (U. S.) 506, 22 *Fed. Rep.* 489.

88. Conflict with homestead rights.—The act of July 27, 1866, does not give the company title to indemnity lands which had been patented as a homestead before the company attempted to select the same as indemnity lands. *Southern Pac. R. Co. v. Tilley*, 41 *Fed. Rep.* 729, 14 *Sawy.* (U. S.) 420.—**DISTINGUISHING** *Southern Pac. R. Co. v. Dull*, 10 *Sawy.* 506, 22 *Fed. Rep.* 489.—**OVERRULED** IN *Southern Pac. R. Co. v. Araiza*, 57 *Fed. Rep.* 98.

But lands within the indemnity limits of the company were not open for homestead entry after an order from the general land office had issued withdrawing them from entry. *Southern Pac. R. Co. v. Araiza*, 57 *Fed. Rep.* 98.—**FOLLOWING** *Buttz v. Northern Pac. R. Co.*, 119 U. S. 72, 7 *Sup. Ct. Rep.* 100; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 18, 11 *Sup. Ct. Rep.* 389. **OVERRULING** *Southern Pac. R. Co. v.*

Tilley, 41 *Fed. Rep.* 729. **QUOTING** *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 732, 5 *Sup. Ct. Rep.* 334.

And where an individual has patented such lands, he only holds them in trust for the railroad company, when the lands within the indemnity limits will not make up the loss that the company has sustained within the place limits of the grant. *Southern Pac. R. Co. v. Araiza*, 57 *Fed. Rep.* 98.

89. Conflict with grant to Atlantic & Pacific.—The grant of land under the act of March 3, 1871, and the grant to the Atlantic & Pacific railway under the act of July 27, 1866, were grants *in presenti*, taking effect, by relation, as of the dates of the statutes, when maps of the definite location of the road were filed and approved. *United States v. Southern Pac. R. Co.*, 57 *Am. & Eng. R. Cas.* 316, 146 U. S. 570, 13 *Sup. Ct. Rep.* 152; *reversing* 51 *Am. & Eng. R. Cas.* 331, 46 *Fed. Rep.* 683, which affirmed 45 *Fed. Rep.* 596, 14 *Sawy.* 620.—**FOLLOWING** *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1.

The Atlantic & Pacific railway filed a map of a definite location of the road from the Colorado river to San Francisco, by way of San Buenaventura, claiming the right to construct a road the entire distance. *Held*, that the map was a definite location of the road, under the grant, from said river to San Buenaventura. *United States v. Southern Pac. R. Co.*, 57 *Am. & Eng. R. Cas.* 316, 146 U. S. 570, 13 *Sup. Ct. Rep.* 152; *reversing* 51 *Am. & Eng. R. Cas.* 331, 46 *Fed. Rep.* 683, which affirmed 45 *Fed. Rep.* 596, 14 *Sawy.* 620.

The provision in the act of March 3, 1871, to the effect that nothing in the grant should affect or impair the rights of the Atlantic & Pacific company operated to exempt the indemnity lands of the latter company from the grant of the Southern Pacific. *United States v. Colton M. & L. Co.*, 57 *Am. & Eng. R. Cas.* 341, 146 U. S. 615, 13 *Sup. Ct. Rep.* 163; *reversing* 46 *Fed. Rep.* 683. *United States v. Southern Pac. R. Co.*, 14 *Sawy.* (U. S.) 60, 39 *Fed. Rep.* 132.

It was the intention of the act of July 27, 1866, that the road to which the grant was made should connect with the contemplated Atlantic & Pacific railroad near the eastern line of the state of California, near the intersection of the twenty-fifth parallel of latitude, and run thence to San Francisco, the location of the road to be determined by

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the company. *Southern Pac. R. Co. v. Orton*, 32 *Fed. Rep.* 457.

90. Rights of settlers and pre-emptioners.—The *Southern Pac. R. Co.* filed its map of definite location on January 3, 1867, in the office of the commissioner of the general land office, showing the present granted and indemnity limits thereon, which granted and indemnity limits are clearly defined in the act of congress; and the indemnity belt is particularly limited to specified boundaries outside of the granted limits. *Held*, that upon filing the map of definite location, and upon the secretary of the interior issuing his order withdrawing all lands within forty miles of the line of the road, the odd-numbered sections, both within the present granted and indemnity limits, were withdrawn from pre-emption, homestead entry, or any other disposition by the general land office. *Southern Pac. R. Co. v. Wiggs*, 14 *Sawv.* (U. S.) 568, 43 *Fed. Rep.* 333.—REVIEWING UNITED STATES *v.* CURTNER, 14 *Sawv.* 535.

The statute itself in terms provides that the odd sections shall not be liable to sale or entry or pre-emption other than to the company. Congress intended to withdraw from sale, entry, or pre-emption all those lands set apart within specifically defined limits, as well those authorized to be selected as lieu lands as those absolutely granted, in which the title itself presently vested. The right of selection indefeasible by pre-emptioners, vested upon filing the map of definite location and withdrawal, as provided by the statute, although the title to the land itself did not vest till the selection. *Southern Pac. R. Co. v. Wiggs*, 14 *Sawv.* (U. S.) 568, 43 *Fed. Rep.* 333.

The secretary of the interior had no authority, while a deficiency existed, to allow a pre-emption to be made upon an odd section within these indemnity limits. While such deficiency existed the secretary could not throw open the odd sections within the indemnity limits to pre-emption or homestead entry. The right of selection in the company to these lands is given in the statute itself, and the secretary cannot revoke it. *Southern Pac. R. Co. v. Wiggs*, 14 *Sawv.* (U. S.) 568, 43 *Fed. Rep.* 333.

A patent issued in the name of the United States to a pre-emptor entering upon these lands subsequent to the order of withdrawal is erroneously issued, without authority of law, and is void. The existence

of such a patent is a cloud upon the complainant's title. It embarrasses the assertion of complainant's right, and prevents it getting a patent to the same land to which it is entitled. These circumstances constitute ground for equitable relief. A patent so issued to a pre-emptor is void, and the using of it should be perpetually enjoined. *Southern Pac. R. Co. v. Wiggs*, 14 *Sawv.* (U. S.) 568.

91. Forfeiture for breach of conditions.—The fact that congress had reserved a right to adopt such measures as it might deem necessary to secure the completion of the road upon failure of the company to complete it does not prevent congress from declaring a forfeiture of the land grant for such failure. *Southern Pac. R. Co. v. Esquibel*, 36 *Am. & Eng. R. Cas.* 410, 4 *N. Mex.* 337, 20 *Pac. Rep.* 109.

d. Union Pacific.

92. How construed, generally.—Under the Act of Congress of July 1, 1862, as amended, the Eastern Division of the company had a right to construct its road to Denver, and thence, so as to connect with the main line, to Cheyenne, with the usual land grant on each side of its road. The act of March 3, 1869, authorized the company to connect with the Denver Pacific for the construction of that portion of the line between Denver and Cheyenne. *Held*, that the latter act did not make the road of the Union Pacific terminate at Denver so as to defeat its land grant beyond that point, as the grant, under the act of 1862, was *in presenti*, which became fixed as soon as the road was definitely located. The act of 1869 did not break the continuity of the line. *United States v. Union Pac. R. Co.*, 148 *U. S.* 562, 13 *Sup. Ct. Rep.* 724; *affirming* 37 *Fed. Rep.* 551.—DISTINGUISHED IN *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 426.

If the court had any doubt of the effect of the act of 1869, it would give great weight to the construction placed upon it by the land department for eighteen years, under which lands had been put upon the market and sold. *United States v. Union Pac. R. Co.*, 148 *U. S.* 562, 13 *Sup. Ct. Rep.* 724; *affirming* 37 *Fed. Rep.* 551.

93. The title—What lands were granted.—The joint resolution of congress of July 26, 1866, granted to the Union Pacific railroad, and other roads connecting

therewith, a right of way 100 feet wide, and authorized the president to set apart "twenty acres of the Fort Riley military reservation for depot and other purposes in the bottom opposite Riley City; also fractional section one on the west side of said reservation near Junction City." *Held*, that said fractional section was to be found within the reservation on the west side, not outside and bordering thereon. *Republican River Bridge Co. v. Kansas Pac. R. Co.*, 92 U. S. 315.

Whether said joint resolution conveyed the fee to said fractional section or only a use or easement, one claiming under a junior grant, with a proviso that nothing therein should interfere with "any grant to any part of said land heretofore made by the United States," cannot recover such land in ejectment. *Republican River Bridge Co. v. Kansas Pac. R. Co.*, 92 U. S. 315; *affirming* 12 Kan. 409.

Land within the limits of the grant to the company which had been settled and pre-empted before the filing of a map of the definite location of the road is excepted from the grant, and the company did not take title. *Glidden v. Union Pac. R. Co.*, 30 Fed. Rep. 660.—FOLLOWING *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. Rep. 566.

That portion of the act of July 1, 1862, which conveyed to the company a right of way included the sixteenth and thirty-sixth sections intended for the future state of Nebraska as school lands, under the act of 1854, creating the territory of Nebraska. *Union Pac. R. Co. v. Douglas Co.*, 31 Fed. Rep. 540.—QUOTING *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426. REFERRING TO *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.

The B. & M. R. R. extension is one of the branches of the Union Pacific and the lands within the limits of the grant to that corporation are not subject to private entry. *Stalnaker v. Morrison*, 6 Neb. 363.

94. Effect of survey, filing map, etc.—By act of July 26, 1866, the Union Pacific, southern branch, afterward the M., K. & T. R. Co., received a grant of right of way for its road 200 feet wide through the reserved and ceded lands of the government. Prior to December 24, 1867, the latter company surveyed its line of road, and filed its map designating its route with the secretary of the interior. October 9, 1869,

one H., one of the grantors of the defendant, Cook, purchased of the government the land in dispute. Afterwards, in May and June, 1870, the railway company changed the line of its road and built it across the land in dispute, the original location not having touched the quarter section to which the land in question belongs. *Held*, that by the survey of its line, and the filing of its map designating the route of its road, the company exercised its right under its grant, and could not reclaim it two years and a half afterwards on changing its line of road so as to affect the rights of H. or his grantees. *Missouri, K. & T. R. Co. v. Cook*, 47 Kan. 216, 27 Pac. Rep. 847.

95. Exception of homestead rights.—By the act of July 1, 1862, § 3, a grant of lands was made to the company "for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon," and it was enacted that all such lands "not sold or disposed of" by the company before the expiration of three years after the entire road should be completed should be subject to settlement and pre-emption, like other lands. *Held*: (1) that this statute should be construed, if possible, so as to effectuate the object which congress had primarily in view; (2) that the primary object of the grant was to furnish assistance in and during the construction of the road, and that opening the unsold or undisposed of lands to settlement and pre-emption was only a subordinate and secondary object; (3) that the secondary purpose of congress did not control or defeat that which was primary; (4) that the words "or disposed of" are not redundant words, or synonymous with the word "sold," but that they contemplate a use of the lands granted different from a sale, and that a mortgage is such a use. *Platt v. Union Pac. R. Co.*, 99 U. S. 48.—FOLLOWED IN *Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, 54 Fed. Rep. 759, 4 C. C. A. 561. QUOTED IN *Memphis & L. R. Co. v. Dow*, 22 Blatchf. (U. S.) 48, 19 Fed. Rep. 388. *Southern Pac. R. Co. v. Doyle*, 11 Fed. Rep. 253, 8 Sawy. 60.

The exception in the land grant of lands to which homestead claims had attached at the time the line of the railroad was definitely fixed did not operate in favor of a sham and fraudulent homestead claim.

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96. Fe.—O the inter gress of let of the 1 *Held*, th affect an Topeka within i ply inte no inter the form terest; the la its road within t the term S. F. R. Cas. 432. 97. A granted by act of river an forfeited 6, 1886, United S. Souther Souther Ct. Rep. 132. A me the inde having said cr the righ void pa the Uni Souther v. Hink 98. E —The l compan in the c reserv ment o were no years a Hunna Dill, (U. S.) And earned

Union Pac. R. Co. v. Watts, 2 Dill. (U. S.) 310.

3. To Other Railroads.

96. Atchison, Topeka & Santa Fe.—On April 3, 1867, the secretary of the interior, in pursuance of the Act of Congress of July 26, 1866, withdrew from market a large amount of land for the benefit of the Missouri, Kansas & Texas railway. *Held*, that the withdrawal in itself did not affect any right or interest of the Atchison, Topeka & Santa Fe road in the lands within its grant. The withdrawal was simply intended to prevent persons who had no interest in the lands prior to that of the former company from acquiring such interest; and the withdrawal did not prevent the latter company from definitely locating its road and taking title to all lands situate within ten miles thereof which came within the terms of the grant. *Atchison, T. & S. F. R. Co. v. Rockwood*, 5 Am. & Eng. R. Cas. 432, 25 Kan. 292.

97. Atlantic & Pacific.—The lands granted to the Atlantic & Pacific railway by act of July 27, 1866, between the Colorado river and the Pacific ocean, and declared forfeited and retaken under the act of July 6, 1866, were retaken for the benefit of the United States, and not for the benefit of the Southern Pacific railway. *United States v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. Rep. 152; reversing 14 Sawy. Co. 39 Fed. Rep. 132.

A mere trespasser on land situate within the indemnity limit grant to the company, having no contract with or authority from said company, cannot avail himself of the rights of that company in attacking a void patent issued by the government of the United States for the same land to the Southern Pacific railroad company. *Foss v. Hinkell*, 78 Cal. 158, 20 Pac. Rep. 393.

98. Burlington & Missouri River.

The land grant made July 2, 1864, to the company was made subject to the provision in the original act of July 1, 1862, § 3, which reserved to the public the right of settlement or pre-emption, if the lands granted were not sold or disposed of within three years after the entire road was completed. *Hunnewell v. Burlington & M. R. R. Co.*, 3 Dill. (U. S.) 313; affirmed in 22 Wall. (U. S.) 464.

And where such lands had been fully earned and the cost of surveying paid, they

were taxable, although the company did not pay the fees of the local land office until after the time of making the assessment of taxes. *Hunnewell v. Burlington & M. R. R. Co.*, 3 Dill. (U. S.) 313; affirmed in 22 Wall. (U. S.) 464.

The grant made by the act of July 2, 1864, in aid of defendant company embraced ten odd-numbered sections per mile along the line of the road in equal quantities on each side, if not previously disposed of by the United States; and the act allowed the land to be taken along the line of the road wherever it could be found, and lands taken along the general direction or course of the road within lines perpendicular to it at each end, were within the meaning of the statute. The lands need not be contiguous to the road. *United States v. Burlington & M. R. R. Co.*, 98 U. S. 334; affirming 4 Dill. (U. S.) 297.—APPLIED IN *Hastings & D. R. Co. v. Whitney*, 24 Am. & Eng. R. Cas. 106, 34 Minn. 538. QUOTED IN *Denver & R. G. R. Co. v. United States*, 36 Am. & Eng. R. Cas. 429, 34 Fed. Rep. 838.

Therefore, as the grant had no lateral limits, and the lands opposite certain sections of the road having been patented to other parties through a neglect to withdraw them from the market, the grant to the company could be made up by lands along other portions of the road. *United States v. Burlington & M. R. R. Co.*, 98 U. S. 334; affirming 4 Dill. (U. S.) 297.

The amendment made in 1864, enlarging the previous grant to the Union Pacific Co., was intended to apply to the grants made to all of the branches. All the reasons which led to the enlargement of the original grant led to its enlargement as to the branches. It was the intention of congress, both in the original act and in the amendment, to place the Union Pacific Co. and all its branches upon the same footing as to land privileges and duties, to the extent of their respective roads, except when it was otherwise specially stated. *United States v. Burlington & M. R. R. Co.*, 98 U. S. 334; affirming 4 Dill. (U. S.) 297. QUOTED IN *Northern Pac. R. Co. v. United States*, 36 Fed. Rep. 282.

The statute contemplates that one half of the land granted should be taken on each side of the road; and the department could not enlarge the quantity on one side to make up a deficiency on the other; but, upon a bill filed by the government, patents

embracing an excess of lands on one side of the road cannot be adjudged invalid when not so described as to be identified; nor can a decree be rendered against the company for their value. *United States v. Burlington & M. R. R. Co.*, 98 U. S. 334; *affirming 4 Dill. (U. S.) 297*.

Under the act of July 2, 1864, the grant attached when a line of the definite location of the road was fixed, though the land may not actually have been selected and patented to the company until afterwards. *Taboreck v. Burlington & M. R. R. Co.*, 2 *McCrary (U. S.) 407*, 13 *Fed. Rep.* 103.

And the question of when the company's title attached to the land is not affected by the fact that there were no lateral limits to the grant. *Taboreck v. Burlington & M. R. R. Co.*, 2 *McCrary (U. S.) 407*, 13 *Fed. Rep.* 103.

The grant of land to aid in the construction of the road, under the act of 1857, was a grant *in presenti*, in the nature of a float, until such time as the specific tracts could be ascertained by the location of the line of said railroad, and by the act of 1864 the grant was made definite and certain by reference to the line of road as then located, and no longer a float; and the right acquired under the grant could not be impaired by legislation, either state or national. The railroad was completed and the land properly certified as required by law, and the title taken thereof related back to the date of the grant. An enterer upon such lands, within the limits of the grant, whether for pre-emption or homestead purposes, could gain no rights, as against the grantee, under the last section of the Act of Congress approved April 21, 1876, the title having already passed from the United States before the passage of that act. *Burlington & M. R. R. Co. v. Lawson*, 10 *Am. & Eng. R. Cas.* 548, 58 *Iowa*, 145, 12 *N. W. Rep.* 229.

Under section 20 of "the act approved July 2, 1864, providing that when" the Burlington & Missouri River Railroad Company shall have completed twenty consecutive miles of its road the president of the United States shall appoint three commissioners to examine and report to him in relation thereto, and if it shall appear to him that twenty miles of said road have been completed as required by law, then, upon certificates of said commissioners to that

effect patents shall issue conveying the right and title to said lands to said company," etc. *Held*, that until such certificate was issued the company did not become the equitable owner of such lands. *White v. Burlington & M. R. R. Co.*, 5 *Neb.* 393.—*REVIEWED IN Bellinger v. White*, 5 *Neb.* 399.

The word "claim" in section 19 of the act is not restricted to such claims as shall afterwards ripen into perfect titles, but includes all that are made in due form, whether they are afterwards either perfected, abandoned, or forfeited or not. *Burlington & M. R. R. Co. v. Allen*, 10 *Am. & Eng. R. Cas.* 686, 14 *Neb.* 93, 15 *N. W. Rep.* 317.

The grant of the right of way over the lands of the United States by section 18 of the act was of a present interest, and notice, from the passage of the act, to all persons dealing with public lands within the prescribed limits, of the company's interest therein. *Rider v. Burlington & M. R. R. Co.*, 10 *Am. & Eng. R. Cas.* 688, 14 *Neb.* 120, 15 *N. W. Rep.* 371.—*APPROVING St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426.

And where, after one location of its road, the company changed its line pursuant to the Act of Congress approved May 6, 1870 (St. at L. 118), a purchaser of land from the United States after the passage of the act took it subject to the right of way under the new location, afterwards made. *Rider v. Burlington & M. R. R. Co.*, 10 *Am. & Eng. R. Cas.* 688, 14 *Neb.* 120, 15 *N. W. Rep.* 371.

99. California & Oregon.—Under the act of 1866 (14 St. at L. 239,) granting land to aid in the construction of the road, lands outside the forty-mile limit of the specific grant, and within the exterior limits of an alleged Mexican grant, are subject to selection in lieu of the alternate odd sections otherwise disposed of, at the time of the definite location of the road, situated within the forty-mile limit, at any time after the final rejection of such Mexican grant. *United States v. Central Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 120, 11 *Sawey. (U. S.) 438*, 26 *Fed. Rep.* 479.

The grant does not attach to the odd sections of lands outside the forty-mile limit of the specific grant until the selection is actually made by the railroad company under the direction of the secretary of the interior, in lieu of lands otherwise disposed of within said limit. *United States v. Cen-*

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If, at the time such selection of outside lieu lands is made, a claim under a Mexican grant embracing the lands selected within its exterior limits has been finally rejected, the lands have ceased to be *sub judice*, and are subject to selection. *United States v. Central Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 120, 11 *Sawy. (U. S.)* 438, 26 *Fed. Rep.* 479.

Although such lieu lands have been selected and patented, prematurely, before the final rejection of the grant, yet, a suit by the United States to vacate the selection and patent, commenced long after the final rejection of the grant, on the ground that it was issued by mistake, will not be sustained where it does not appear that any private party has acquired any interest in the land so selected, or that the government has become subject to any obligation in relation to said land, or has sustained any injury by reason of such premature selection and patent. *United States v. Central Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 120, 11 *Sawy. (U. S.)* 438, 26 *Fed. Rep.* 479.

In such case, if the patent were vacated, the railroad company would now be entitled to select an equal amount of other lands within the limits, and even to select the same lands, they being now subject to selection, and to receive a new patent therefor. A court of equity will not correct a mutual, innocent mistake from which no injury can result when it would be inequitable to do so. It will not do a vain thing. *United States v. Central Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 120, 11 *Sawy. (U. S.)* 438, 26 *Fed. Rep.* 479.

Where three exterior boundaries of a Mexican grant and the quantity of land are designated, the fourth exterior boundary is found by running a line parallel to the opposite boundary a sufficient distance therefrom to include the quantity of land called for. *United States v. Central Pac. R. Co.*, 24 *Am. & Eng. R. Cas.* 120, 11 *Sawy. (U. S.)* 438, 26 *Fed. Rep.* 479.

The owners of the land at the time of filing a bill in equity to vacate a United States patent are indispensable parties to the bill; and where it appears at the hearing that the bill is filed only against parties who have no interest in the lands, it will be dismissed for want of necessary parties. *United States v. Central Pac. R. Co.*, 24 *Am.*

& Eng. R. Cas. 120, 11 *Sawy. (U. S.)* 438, 26 *Fed. Rep.* 479.

100. Cedar Rapids & Missouri River.—The Act of Congress of June 2, 1864, granting lands to the road was a conditional grant *in presenti*, in the nature of a float, covering the lands within twenty miles of the modified line. They were not subject to homestead entry, and an enterer could acquire no rights against the grantee in the act. *Blair T. L. & L. Co. v. Kitteringham*, 43 *Iowa* 462.

The company was permitted by the act of June 2, 1864, to modify and change the location of the uncompleted portion of its line, said act providing that the company should "be entitled, for such modified line, to the same lands, and to the same amount of lands per mile, * * * as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant." The line as modified and constructed was shorter by several miles than the one first proposed. *Held*, that words "per mile" in the act were words of limitation, and that the company was limited thereby to the same number of acres per mile of constructed road that it would have been entitled to receive under the original grant. *Cedar Rapids & M. R. Co. v. Herring*, 52 *Iowa* 687, 3 *N. W. Rep.* 786.—FOLLOWED IN *Cedar Rapids & M. R. Co. v. Jewell*, 12 *Am. & Eng. R. Cas.* 277, 61 *Iowa* 410.

101. Leavenworth, Lawrence & Fort Gibson.—The odd-numbered sections granted to defendant company by the Act of Congress of March 3, 1863, were not affected by the New York Indian reservation under the treaty of 1838. *United States v. Missouri, K. & T. R. Co.*, 37 *Fed. Rep.* 68.—FOLLOWING *Kansas City, L. & S. K. R. Co. v. Attorney-General*, 118 *U. S.* 682, 7 *Sup. Ct. Rep.* 66.

The above act, and the act of July 26, 1866, should be construed *in pari materia*, as enacted for the sole purpose of building one road, the latter being merely supplementary to the former. *United States v. Missouri, K. & T. R. Co.*, 37 *Fed. Rep.* 68.

102. Leavenworth, Lawrence & Galveston.—Under the Act of Congress of March 3, 1863 (12 St. at L. 772), lands not within the grant in place, but within the limits of the indemnity strip, were not earned by, and were not to be conveyed to,

the company, one of the beneficiaries in said act, or sold for its benefit, until the completion of the entire road and branches; and if said road and branches were not completed within ten years they reverted to the United States. The road was not completed within ten years, and has never yet been completed; and congress, in 1876, by resolution (19 St. at L. 101), formally declared a forfeiture of all unearned lands. *Held*, that such lands were freed from all rights or claims arising under said grant, and that a patent therefor from the governor of the state, executed more than ten years after the passage of the act, passed no title. *Neer v. Williams*, 10 *Am. & Eng. R. Cas.* 561, 27 *Kan.* 1.

The grant in aid of the branch of the Atchison, Topeka & Santa Fé R. Co. was only of lands on either side, and did not extend beyond its terminus. This terminus was where the Leavenworth, Lawrence & G. R. entered the Neosho valley, and lands on the east of said last-named railroad were not within the terms of the grant to this branch, and never could have been selected therefor, even if the branch had been built. *Neer v. Williams*, 10 *Am. & Eng. R. Cas.* 561, 27 *Kan.* 1.

Lands within the indemnity limits named in the act of March 3, 1863, having been, prior to the Act of Congress of July 26, 1866 (14 St. at L. 289), reserved by competent authority for the purpose of aiding in an object of internal improvement, never fell within the terms of the grant in said last-named act. *Neer v. Williams*, 10 *Am. & Eng. R. Cas.* 561, 27 *Kan.* 1.

103. Memphis, El Paso & Pacific.—The sufficiency of the description given in the map and designation of the land reservation of the company, filed in the general land office on June 20, 1857, and in the office of the district surveyor of Bexar land district on February 17, 1857, has been repeatedly recognized by both the legislative and executive departments of the state. It was not necessary, to fix the locality of the reservation, that a survey should be made and description given of such reservation. The description identifies sufficiently the boundaries of the reservation. *Houston & T. C. R. Co. v. Texas & P. R. Co.*, 70 *Tex.* 649, 8 *S. W. Rep.* 498.

The charter of said company, granted by the legislature of Texas February 4, 1854, by which the land was granted and the re-

serve created, and upon which the company acted and invested its capital, is a contract within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, and not affected by the provisions of *Tex. Const.* of 1868, art. 10, § 5. *Houston & T. C. R. Co. v. Texas & P. R. Co.*, 70 *Tex.* 649, 8 *S. W. Rep.* 498.

104. Minnesota & Pacific.—When the Act of Congress of March 3, 1857, commonly known as the "Land-grant Act," was passed, the title to the government sections 16 and 36, within the territory of Minnesota, and the right to dispose thereof, still remained in the United States. Under that act, and the act of the legislative assembly of the territory, passed May 22, 1857, the company acquired a right of way over the even sections not disposed of prior to the location of its line, including sections 16 and 36. *Coleman v. St. Paul, M. & M. R. Co.*, 38 *Minn.* 260, 36 *N. W. Rep.* 638.—FOLLOWING *Simonson v. Thompson*, 25 *Minn.* 450.—EXPLAINED IN *Radke v. Winona & St. P. R. Co.*, 42 *Minn.* 61. REVIEWED IN *Radke v. Winona & St. P. R. Co.*, 39 *Minn.* 262, 39 *N. W. Rep.* 624.

105. Missouri, Kansas & Texas.—On July 26, 1866, the lands adjacent to the then selected line of plaintiff's road up the Smoky Hill river, and including the lands in controversy, were, in pursuance of positive and direct legislation, reserved from sale by the United States, and on January 22, 1867, the road along these lands was completed, accepted by the president, and patents by him ordered to be issued for the lands. The land grants to the defendant provided that, in case it should appear when the line or route of its road was definitely fixed that the United States had sold any section, or any one had been reserved by the United States for any purpose whatever, then the secretary of the interior should cause other lands in equal amount to be selected for the grant. The line of defendant's road adjacent to the lands in dispute was definitely fixed between September 5 and 20, 1866. *Held*, that the grant to the defendant never attached to the lands, but that the full title thereto passed to the plaintiff by the construction and acceptance of its road. *Kansas Pac. R. Co. v. Missouri, K. & T. R. Co.*, 15 *Kan.* 15.

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100. Oregon & California, generally.—The grant to defendant company made by Acts of Congress July 25, 1866, and June 25, 1868, included, (1) the odd-numbered sections within ten miles on each side of the road, not otherwise appropriated or disposed of, on condition that the road should be completed by July 1, 1880; (2) a grant of an absolute right of way to take effect when the road was definitely located. *Bybee v. Oregon & C. R. Co.*, 24 *Am. & Eng. R. Cas.* 127, 26 *Fed. Rep.* 586, 11 *Sawyer. (U. S.)* 479.—FOLLOWING *Denver & R. G. R. Co. v. Alling*, 99 *U. S.* 474; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 *U. S.* 428. QUOTING *Doran v. Central Pac. R. Co.*, 24 *Cal.* 259.—REFERRED TO IN *Hamilton v. Spokane & P. R. Co.*, 2 *Idaho* 898.

But the government alone could take advantage of the forfeiture for failing to complete the road in the time prescribed by the above act. *Bybee v. Oregon & C. R. Co.*, 24 *Am. & Eng. R. Cas.* 127, 26 *Fed. Rep.* 586, 11 *Sawyer. (U. S.)* 479.

The land grant made by the Act of Congress of July 25, 1866, did not include preempted lands within the twenty-mile limit of the grant. *Brown v. Corson*, 16 *Oreg.* 388, 19 *Pac. Rep.* 66, 21 *Pac. Rep.* 47.—FOLLOWING *Kansas Pac. R. Co. v. Dunmeyer*, 113 *U. S.* 629.

A pre-emption is a right derived wholly from the statute, and a substantial compliance therewith is necessary, which must be shown by competent evidence. So where land is claimed under a pre-emption, as against a railroad grant, the evidence offered must show that the conditions existed which would enable the pre-emption, and that the pre-emptor had performed enough to give him at least an inchoate right to the land. *Brown v. Corson*, 16 *Oreg.* 388, 19 *Pac. Rep.* 66, 21 *Pac. Rep.* 47.

107. — conflict with Northern Pacific grant.—The Act of Congress of July 2, 1864, authorized the construction of a railroad from Lake Superior to some point on Puget Sound, with a branch via the Columbia River valley to Portland, Ore. *Held*, that the land grant provided by the act extended both to the main line and to the branch. *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 890.

The provision of the above act granting land "not reserved, sold, or granted" was not made in contemplation of a subsequent grant to the Oregon & California railroad.

United States v. Oregon & C. R. Co., 57 *Fed. Rep.* 890.

The above grant acted *in presenti* and vested title in the company so that it could not pass to the Oregon & California railroad under the subsequent grant of July 25, 1866. *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 890.

The grant to defendant company did not gain priority over the Northern Pacific grant, either by the fact that defendant filed its map of definite location and constructed a part of its road, and received patents for the land before the Northern Pacific Co. filed a map of its location, showing that there was a conflict in the grants, or by the further fact that the Northern Pacific road was not constructed on the line as shown by such maps. *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 890.

108. Oregon Central.—The Act of Congress of May 4, 1870, making a grant of lands to the company, took the lands out of the public lands and prevented the Northern Pacific R. Co. from acquiring title thereto under the act of May 31, 1890, though the former company did not file its map of definite location until after the latter had filed a map of its general route. *United States v. Northern Pac. R. Co.*, 152 *U. S.* 284, 14 *Sup. Ct. Rep.* 598.

The act of May 4, 1870, granting lands to aid in constructing a railroad "from Portland to Astoria, Ore., and from a suitable point of junction near Forest Grove to the Yamhill river," was intended to be two grants: (1) from Portland to Astoria; (2) from the junction near Forest Grove to Yamhill river; and the company was not entitled to the lands lying within the exterior quadrant formed by drawing a line at the junction at right angles to the course of the roads. *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 426.—DISTINGUISHING *United States v. Union Pac. R. Co.*, 148 *U. S.* 362, 13 *Sup. Ct. Rep.* 724.

Such lands were declared forfeited by the Act of Congress of January 31, 1885. *United States v. Oregon & C. R. Co.*, 57 *Fed. Rep.* 426.

100. St. Joseph & Denver.—Under the land grant by Act of Congress of July 23, 1866, the title of the company attached when it filed a map of the definite location of its road, and not when it was recorded in the local land office. So an individual procuring a patent for land embraced within

the grant, between the time of filing such map and the time of its being recorded, would not take title as against the company. *Knevals v. Hyde*, 5 Dill. (U. S.) 469. *Walden v. Knevals*, 114 U. S. 373, 5 Sup. Ct. Rep. 898.—FOLLOWING *Van Wyck v. Knevals*, 106 U. S. 360. REAFFIRMING *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629.

And if the company failed to comply with the conditions of the grant, only the government could take advantage thereof. *Knevals v. Hyde*, 5 Dill. (U. S.) 469.

110. St. Paul & Pacific.—The land in controversy is within the limits of the land grant of the St. Paul & Pacific R. Co., which claims title under the act of March 3, 1857. It is included in a section of land which was improved and occupied by a mail contractor in 1855, who claimed to be entitled to enter the same by pre-emption under the act of March 3, 1855, and his application to enter the same, afterwards recognized and approved by the land department of the government, was made before the railroad company became entitled to the land under the provisions of the Land-grant Act. *Held*, that a pre-emption right had attached, within the meaning of the last-named act, and that the section of land in controversy did not enure to the railway company as a part of its land grant. *Weeks v. Bridgman*, 46 Minn. 390, 49 N. W. Rep. 191; former appeal 41 Minn. 352, 43 N. W. Rep. 81.

IV. STATE GRANTS TO RAILROADS

111. Alabama.—Under the provisions of the act approved February 11, 1870, "to loan the credit of the state to the Alabama & Chattanooga railroad company for the purpose of expediting the construction of the railroad of said company" (Sess. Acts 1869-70, pp. 89-92), the right was reserved to the company to sell any part of the lands in accordance with the terms of the grant by congress, but with the proviso added that "the proceeds of said sales shall be appropriated to the payment of the first mortgage bonds of said company" (section 1); and by force of this proviso a conveyance by the corporation to its attorney, in payments of fees for professional services rendered, would convey no title, he being chargeable with notice of the trust. *Standifer v. Swann*, 78 Ala. 88.

Under the nineteenth section of the act approved February 23, 1876, commonly

called the Debt Settlement Act, such lands as "had been sold by said railroad company under the authority reserved to it by act of February 11, 1870," were excepted from the operation of the deed to Swann & Billups as trustees, and the titles of all *bona fide* purchasers of any portions of said lands acquired under said authority were confirmed; but the act does not create any new title, nor confer a legal title on a purchaser from one who, without authority, assumed to act as agent of the railroad company, although he may invoke an equitable estoppel against the corporation from its knowledge and presumed ratification of the acts of such agent. *Standifer v. Swann*, 78 Ala. 88.

112. Arkansas.—By the act of November 26, 1856, the legislature granted to the Little Rock & Fort Smith R. Co. the lands donated by congress to the state to aid in the construction of the Cairo & Fulton railroad and its branches, which were adjacent to the route of the former road, subject to all the provisions, restrictions, limitations, and rights created by the act, so far as the same were applicable. The act also granted to the Cairo & Fulton R. Co. all of the aforesaid lands adjacent thereto. The second section provided that occupants by residence and cultivation of any of the lands comprised in the grant made by congress might purchase of the Cairo & Fulton R. Co. the legal subdivision containing his residence and improvement, not exceeding one quarter section, at two dollars and a half per acre, by complying with other provisions of the act. Both companies having failed to comply with certain conditions of the act, the legislature, on the 1st of February, 1859, passed an act releasing them from the condition, and in the third section provided that actual residents and cultivators on the 1st of November, 1858, might purchase of the Cairo & Fulton R. Co., as provided in the former act. *Held*, that although the Little Rock & Fort Smith R. Co. was not named in the second section of the first, nor in the third section of the last, act, it was within the provisions of said sections. *Little Rock & Ft. S. R. Co. v. Howell*, 31 Ark. 119.

113. California.—The Atlantic & Pacific R. Co., not having constructed any railroad in California, never had either a present or prospective right to any indemnity or lieu lands within the state; and land

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in said state within the primary limits and terms of the grant of March 3, 1871, to the Southern Pacific Co., which constructed a branch line of road from Tehachapi Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, and performed all the conditions of said grant necessary to entitle it to a patent, passed by perfect title to the Southern Pacific Co., which attached to specific land at the date when the map of the definite location was filed in the office of the commissioner of the general land office, notwithstanding said land may have been within the indemnity limits of the prior grant to the Atlantic & Pacific company. *Forrester v. Scott*, 92 Cal. 398, 28 Pac. Rep. 575.—QUOTED IN *Jatunn v. Smith*, 95 Cal. 154.

Evidence that a party was in possession of public land, and was entitled to a homestead entry, and made application therefor, which was refused, without a showing that he paid or offered to pay the register's fees, does not bring the case within the exception in a legislative grant to a railroad company, of lands to which pre-emption or homestead claims were attached "at the time the line of said road is definitely fixed." *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. Rep. 886.

114. Georgia.—Questions in regard to the location of the boundary of a right of way granted to the state for the use of a railroad, and in regard to the authority of an officer to bind the state in regard to such boundary, by negotiations with a private individual, are not affected by the question whether or not an easement or the fee of the land was originally granted. *Dougherty v. Western & A. R. Co.*, 53 Ga. 304.

Upon trial of the question as to the right of way in the East Tennessee & Georgia R. Co. over the route upon which they have constructed their road in Georgia, as against the claim of the Union Branch R. Co. to the same—*held*, that the former company takes no legal aid from the resolutions of our legislature, passed in the year 1837, offering to secure similar privileges to those enjoyed by the Western and Atlantic in our state, to any road in the state of Tennessee seeking to connect therewith; provided that the latter state would grant the privilege of extending that road to the Tennessee river. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327.—

DISTINGUISHED IN Western & A. R. Co. v. State, 54 Ga. 428.

In the year 1840 the legislature of Georgia incorporated the Cross Plains & Red Clay R. Co., reserving the right to repeal the act of incorporation. In 1847 an act was passed granting the right of way over the same route to others. In 1849 the legislature by act recognized the privileges granted to said company by the act of 1840, changed the name to Union Branch railroad, and repealed the clause in the act of 1840, reserving the right to repeal that act. *Held*, that the act of 1849 could not affect the rights which had been acquired under the act of 1847, because that act repealed the act of 1840, so far as the right of way was concerned. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327.

Where land was granted to a railroad company, so long as the same should be used "for shops, depots, and other conveniences and fixtures necessary for said company," and the only use made of the land was the building and maintenance of a track, or tracks, for the purpose of conveying freights to private parties, the storage of cars, and other like uses, this would not be a compliance by the company with the terms of the grant. *Georgia R. & B. Co. v. Mayor, etc., of Macon*, 86 Ga. 585, 13 S. E. Rep. 21.—FOLLOWING *Mayor, etc., of Macon v. East Tenn., V. & G. R. Co.*, 82 Ga. 501.

Where such a grant was made to the Milledgeville R. Co., of which the Macon & Augusta R. Co. was the legal successor, and the latter company took possession of a portion of the land and so built and used such tracks thereon, but did no more, and the Georgia Railroad & B. Co. afterwards took possession of the same, and it appearing that the title was in the city of Macon, except so far as it might be affected by the terms of such grant, then the city was entitled to recover the land from the Georgia railroad as a mere wrong-doer, unless it showed some right to hold under the Macon and Augusta company; or, if it did show such right, then the city was entitled to recover for want of compliance with the terms of the grant, and in either event, no demand was necessary as a condition precedent to the city's bringing its action for the land. *Georgia R. & B. Co. v. Mayor, etc., of Macon*, 86 Ga. 585, 13 S. E. Rep. 21.

115. Illinois.—Const. of 1848, art. 4, § 25, providing that all grants shall be sealed with the great seal of the state, and signed by the governor, and countersigned by the secretary of state, does not apply to a railroad grant made by the legislature; and such grant is therefore not rendered invalid thereby. *Illinois v. Illinois C. R. Co.*, 33 *Fed. Rep.* 730.

By the act of 1854 (Sess. Laws 192) a reasonable discretion was granted to the Ill. Central R. Co. to sell its lands upon credit, and authority may properly be inferred to fix a reasonable minimum price. *People v. Illinois C. R. Co.*, 62 *Ill.* 510, 6 *Am. Ry. Rep.* 201.

The provision in the charter of the Ill. Cent. Ry. directing that all the lands remaining unsold at the expiration of ten years from the completion of the road and its branches shall be offered at public sale annually, until the whole is disposed of, imposes a duty in such vague and general terms, that this court, in view of the serious consequences and difficulties in the way, does not feel justified in enforcing it by mandamus without further legislation. *People v. Illinois C. R. Co.*, 62 *Ill.* 510, 6 *Am. Ry. Rep.* 201.

116. Iowa.—The title of the Des Moines River lands was not passed to the Des Moines Navigation & R. Co. by the certificate of the register of the Des Moines River Improvement. The title remained in the state until conveyed by patent. *Des Moines N. & R. Co. v. Polk County*, 10 *Iowa* 1.—FOLLOWED IN *Tallman v. Butler County*, 12 *Iowa* 531. RECONCILED IN *Cedar Rapids & M. R. R. Co. v. Carroll Co.*, 41 *Iowa* 153.

It being conceded by both plaintiffs and defendants that a railroad company receiving a grant of lands under the Act of Congress of May 15, 1856, and the Act of the General Assembly of the state of July 14, 1856, has the right to select the lands and obtain certificates for lands situated more than twenty miles west of the contemplated line of their road, the question is not passed upon by this court in this case. *Iowa Homestead Co. v. Webster County*, 21 *Iowa* 221.

Under said acts the railroad company becomes legally and absolutely entitled to one hundred and twenty sections of the land granted from the completion of twenty miles, in the manner in said acts contem-

plated, the certificates of the governor of the state and from the land department of the general government being necessary only as evidence of a title already existing, and from the completion of such twenty miles the lands to which the company thus becomes entitled are subject to taxation. *Iowa Homestead Co. v. Webster County*, 21 *Iowa* 221. *Chicago, B. & Q. R. Co. v. Lewis*, 53 *Iowa* 101, 4 *N. W. Rep.* 842.

The condition of a land grant to a railroad was that, upon the completion of a certain number of miles, a patent should be issued by the governor; and such patent was issued in July, 1871. Held, that, in the absence of fraudulent concealment upon the part of the railroad company to prevent an earlier issuance of the patent, the lands were not taxable for the year 1871. *Iowa Falls & S. C. R. Co. v. Plymouth County*, 40 *Iowa* 609.

Lands were conferred upon a railroad company by the legislature, upon the conditions that the company should receive them in instalments as the work of construction progressed, and that, if the road were not completed to a designated point at the time specified, then the state might resume the rights conferred by the act making the grant. Held, that, even in the absence of an act of the legislature, after a default by the railroad company, the latter, by reason of a non-compliance with the conditions, did not possess any rights which could be enforced in the courts. *McGregor & M. R. R. Co. v. Sioux City & St. P. R. Co.*, 49 *Iowa* 604.

The Act of Congress of June 2, 1864, authorizing a change in the railroad, for which a previous grant had been made by the act of May 15, 1856, between Davenport and Council Bluffs, did not divest the company of the lands which had passed to it under the grant. *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 *Iowa* 476.

The United States alone could enforce a forfeiture of a grant of land made by congress on the ground that the road was not completed within the time limited by the congressional grant. *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 *Iowa* 476. *Chicago, B. & Q. R. Co. v. Lewis*, 53 *Iowa* 101, 4 *N. W. Rep.* 842.

The right to resume the lands, reserved by the state in case of the failure of the company to complete its road by a specified date, may be waived, and such reservation

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does not affect the title of the company to the lands granted until the right is exercised. *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101, 4 N. W. Rep. 842.

The reservation under the river grant applied to the lands situated along the main channel of the river, and such lands would not be released from its operation by the subsequent certification, under the grant, of certain lands situated on one of its branches, under the supposition that such branch was the main river. *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 54 Iowa 89, 6 N. W. Rep. 157, 21 Am. Ry. Rep. 245.

Nor would the fact that certain of the lands within the limits of the river grant were held by the Indians at the date of the reservation, and until some time in 1853, operate to defeat the title of those claiming under such grant, the reservation having taken effect as to such lands at the time the Indian title was extinguished, and prior to the grant of 1856. *Dubuque & S. C. R. Co. v. Des Moines Valley R. Co.*, 54 Iowa 89, 6 N. W. Rep. 157, 21 Am. Ry. Rep. 245.

The failure to build the road as prescribed by the grant would not defeat the legislation conferring the land upon the railroad company. *Johnson v. Thornton*, 54 Iowa 144, 6 N. W. Rep. 165.—FOLLOWING *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa 101.

The title to the lands granted to the Dubuque & Pacific R. Co., by act of congress approved May 15, 1856, and by the act of the general assembly of the state approved July 15, 1856, did not pass to the company until the company had filed in the office of the governor a map or plat showing its route, and the governor had signed the same and filed it in the general land office at Washington, as provided by section 6 of said last-named act. It follows that lands within the six-mile limit, which had been pre-empted prior to such filing, did not pass to the company or its successors. *Iowa Falls & S. C. R. Co. v. Beck*, 67 Iowa 421, 25 N. W. Rep. 686.—DISTINGUISHING *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa 476; *Cedar Rapids & M. R. R. Co. v. Herring*, 110 U. S. 27, 3 Sup. Ct. Rep. 485.—FOLLOWED IN *Sioux City & I. F. T. L. & L. Co. v. Griffey*, 72 Iowa 505, 34 N. W. Rep. 304.

Where an individual has been in open, notorious, and adverse possession of land which have been granted to a railroad company, under a claim of right, for more than

ten years after the company or its grantees might have maintained an action for possession, or to quiet title, the statute of limitations bars such right, and the individual is entitled to a judgment quieting his title to the land. *Cole v. Des Moines Valley R. Co.*, 76 Iowa 185, 40 N. W. Rep. 711.—FOLLOWING *Whitehead v. Plummer*, 76 Iowa 181.

117. Kansas.—Under a conditional purchase of land by a company when by the terms of the contract of purchase no patent is to be issued for the land until all the conditions of the purchase are fulfilled, and if any one of the conditions of the purchase is not fulfilled, the company is to forfeit all its right, title, and interest in and to said land, and the same is to be sold again to other parties, and when it appears from the nature of the contract and the character of the parties that time is an essential ingredient of the contract, no title, legal or equitable, passes to the company until it fulfils every condition of its contract. *Douglas County Com'rs v. Union Pac. R. Co.*, 5 Kan 615.

118. Maine.—The E. & N. A. R. Co. did not obtain any title to township No. 11, range 3, in Aroostook county, it being part of the "lands set apart and designated for settlement" by legislative resolve of 1859, c. 288, and thus excepted from the grant of the state to this corporation (Special Laws of 1864, c. 401); nor does the timber upon that township belong to the railroad company, since standing trees pass with the soil, as part of the realty, unless a contrary intention is clearly expressed, and no such intent appears in the present instance. Therefore one who is engaged in cutting and removing the timber upon said township, claiming to act in so doing under a permit from the E. & N. A. R. Co., has no cause of action against the land agent, and those acting under his orders, who interfere to prevent a destruction and removal of the timber, and take possession thereof. *Dunn v. Burleigh*, 62 Me. 24.

119. Michigan.—Act 133 of 1877, confirming the transfer, by the governor and board of control of railroads, to the Port Huron & Lake Michigan R. Co., of lands granted by congress to the state in aid of the construction of railroads, and at first assigned to the Detroit & Milwaukee R. Co., was void as impairing the contract obligation arising from the conditions of the grant, whereby the lands were to revert to the general

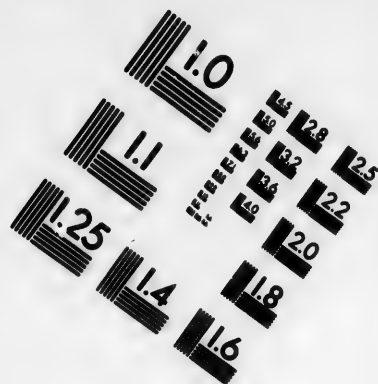
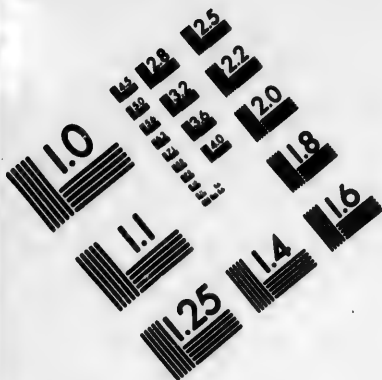
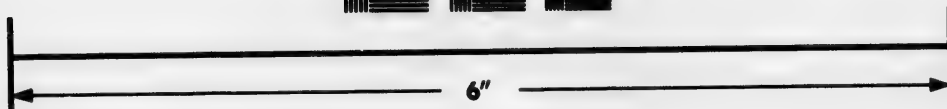
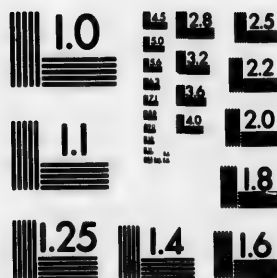


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government if the roads to which the state assigned them were not completed within a specified time. *Fenn v. Kinsey*, 45 Mich. 446, 8 N. W. Rep. 64.

120. Minnesota.—Where a grant of land and connected franchises is made to a corporation for the construction of a railroad, by a statute which provides for their forfeiture upon failure to perform the work within a prescribed time, the forfeiture may be declared by legislative act without judicial proceedings to ascertain and determine the failure of the grantee. Any public use, by legislative act, of the ownership of the state after the default of the grantee—such as an act resuming control of the road and franchises, and appropriating them to particular uses, or granting them to another corporation to perform the work—is equally effective and operative. *Farnsworth v. Minnesota & P. R. Co.*, 92 U. S. 49.—**DISTINGUISHED IN** *Mower v. Kemp*, 42 La. Ann. 1007.

Where a land grant is made by the general government to a state to aid railroads, and a company has complied with the federal law and a statute of the state transferring such lands, it is a constructive fraud for the state to convey the lands to another company; and where the former company begins suit to recover such lands, it is not governed by the provision of the state statute relating to the period of limitation for "actions to enforce a trust or compel an accounting," but is governed by the provision relating to actions for relief on the ground of fraud, and the statute does not begin to run until the fraud is discovered. *Sage v. St. Paul, S. & T. F. R. Co.*, 44 Fed. Rep. 817; *affirming* 32 Fed. Rep. 821.

Defendant company built its road and took a patent for certain indemnity lands between 1867 and 1876. In 1880 plaintiff company commenced a suit to recover the lands, claiming them under a different grant, but the suit was dismissed and nothing further was done to assert the claim until 1887, when another suit was brought. *Held*, that it was barred. *Southern Minn. R. Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. Rep. 690.—**FOLLOWING** *St. Paul, S. & T. F. R. Co. v. Sage*, 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. Rep. 315.

The Act of the Territorial Legislature of March 4, 1854, incorporating the defendant, and providing that all such lands as may be afterwards granted by congress to the ter-

ritory, to aid in the construction of its railroads, shall immediately become the property of the company, without any further act or deed, vested in the company the title acquired by the territory under the congressional act. *United States v. Minnesota & N. W. R. Co.*, 1 Minn. 127 (Gil. 103).

Minn. Special Laws of 1874, ch. 105, entitled "An act to secure the payment of certain debts contracted in the construction of certain lines of road of the St. Paul & Pacific R. Co.," impairs the obligation of the contract between the state and said company, and is therefore invalid. *De Graff v. St. Paul & P. R. Co.*, 23 Minn. 144.

Where one party has acquired from the state, through one of its officers duly authorized to make a deed of conveyance, the legal title to lands which of right, under its laws, belong to another, the former will be treated in equity as a trustee of the latter, and compelled to transfer the legal title as to such of the lands as he still holds, and to account for the proceeds of such portion as may have been sold. *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 26 Minn. 179, 2 N. W. Rep. 489.

The Act of the Legislature, passed March 2, 1865, entitled "An act to aid and facilitate the completion of the St. Paul & Pacific R. Co. and branches, is not merely a grant or conveyance of land to the railroad company, but is also a law, and therefore, in construing it, such effect must be given to it as will carry out the intent of the legislature. Such intent cannot be defeated by applying to the grant the rules of the common law applicable to mere grants or conveyances. Hence (it clearly appearing from said act that it was the intent of the legislature to grant to the company all lands which might thereafter be granted by congress to the state for the purpose of aiding the construction of the lines of road of the St. Paul & Pacific R. Co., and to authorize the governor, in behalf of the state, to execute conveyances thereof to the railroad company), conveyances of such lands executed to it by the governor, in accordance with said act of the legislature, are valid and operative to convey title to the company, although the state had no title to these lands on the 2d of March, 1865, when it made the grant to the company. *Nash v. Sullivan*, 10 Am. & Eng. R. Cas. 552, 29 Minn. 206, 12 N. W. Rep. 698.—**CRITICIS-** *ING* *Rice v. Minnesota & N. W. R. Co.*, 1

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The grant of a right of way over the school sections of the public domain, acquired by a company under the Congressional Act of March 3, 1857, and the Act of Minn. Territorial Legislature of May 22, 1857, was not a grant *in presenti*, but *in futuro*; and must be used under the statutes referred to, if at all, before the sale of the land by the state. *Radke v. Winona & St. P. R. Co.*, 39 Minn. 262, 39 N. W. Rep. 624.—REVIEWING *Coleman v. St. Paul, M. & M. R. Co.*, 38 Minn. 260; *Winona & St. P. R. Co. v. Randall*, 29 Minn. 283; *Denver & R. G. R. Co. v. Alling*, 99 U. S. 463; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426.—ADHERED TO IN *Radke v. Winona & St. P. R. Co.*, 42 Minn. 61.

121. Missouri.—The Acts of Congress of June 10, 1852, and February 9, 1853, and the Act of Missouri of September 20, 1852, amounted to a legislative grant of the even-numbered sections within six miles of the roads to be built, as soon as a definite location thereof was filed. It is not necessary that the maps of definite location should designate the particular sections granted. *Hannibal & St. J. R. Co. v. Moore*, 37 Mo. 338.—FOLLOWED IN *Pacific R. Co. v. McCombs*, 39 Mo. 329.

122. Nebraska.—The Act of the Legislature approved February 15, 1869, donating to railroad companies which should comply with its conditions the lands donated to the state by the United States for works of internal improvement, is a contract between the state and the companies which have accepted the grant; and the Act of the Legislature approved March 1, 1871, which undertakes to dispose of a portion of the same lands for the purpose of building highway bridges across the Platte river, impairs the obligations of the contract between the state and the companies, and is unconstitutional and void. *Koenig v. Omaha & N. W. R. Co.*, 3 Neb. 373.—REVIEWED IN *State v. Sioux City & P. R. Co.*, 7 Neb. 357.

Where a company has received a grant of land from the state upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. The unprofitableness of operating the road fur-

nishes no excuse whatever for a failure to comply with the conditions of the grant. *State v. Sioux City & P. R. Co.*, 7 Neb. 357.

A company in accepting a grant from the state thereby enters into a contract with the state to build and maintain its line and operate the same, and the state may enforce the contract by mandamus or other appropriate proceeding. *State v. Sioux City & P. R. Co.*, 7 Neb. 357.

A patent issued by the governor of a state in pursuance of an express grant is not void upon its face, and passes the legal title to the property therein granted. It may be impeached for fraud, or set aside for other sufficient cause, but cannot be assailed collaterally. *State v. Sioux City & P. R. Co.*, 7 Neb. 357.

The grant of lands to the Burlington & Missouri River R. Co. was of a present interest, and effective against adverse claimants, as to all of the odd-numbered sections not excepted in the grant on each side and within twenty miles of the line of the road, immediately upon and from its definite location upon the ground, which was done June 15, 1865. As to such lands, no specific selection by numbers was necessary to the perfection of the company's right. *Vance v. Burlington & M. R. R. Co.*, 10 Am. & Eng. R. Cas. 623, 12 Neb. 285, 11 N. W. Rep. 334.

123. New Jersey.—All grants of privileges by the state are subject to its right to prescribe the conditions upon which they shall be enjoyed. *Delaware, L. & W. R. Co. v. Central S. Y. & T. Co.*, 31 Am. & Eng. R. Cas. 82, 43 N. J. Eq. 71, 9 Cent. Rep. 111, 10 Atl. L. b. 490; affirmed in 43 N. J. Eq. 605.

That a power granted will not be sufficient to effect the object will not, by implication, enlarge the power, unless it appears that the legislature, in granting it, knew that such construction was necessary to effect the object. The applicants must see to it that the power conferred is sufficient to effect the purpose. Thus a grant of the power to construct a railroad "along" a river does not include the power to construct it "upon" the river, unless the power appears from the grant itself. *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259.

Lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the state of New Jersey, belonged to the state, and could be con-

veyed independent of the adjacent riparian owner. Therefore the act of that state of March 31, 1869, authorizing a sale of certain of such shore lands to railroads, conveyed title, with the right to hold and use the same free of any claim of a riparian owner. *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643.—FOLLOWED IN *Elizabeth v. Central R. Co.*, 53 N. J. L. 491.

Prior to November 12, 1874, there was a public highway extending through the Elizabethtown Point tract to the waters of Arthur's Kill, and on that day the state granted to the Central R. Co. of New Jersey the land below the original high-water line in front of the highway, with all the rights of the state therein. *Held*, that the highway did not thereafter extend below the original high-water line over land artificially reclaimed. *Elizabeth v. Central R. Co.*, 53 N. J. L. 491, 22 Atl. Rep. 47.—DISTINGUISHING *Hoboken L. & I. Co. v. Mayor*, etc., of Hoboken, 36 N. J. L. 340. FOLLOWING *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656.

124. New York.—The state has no power to grant a railroad company a strip of land under water along a navigable river so as to cut off access to the water by the upland owner. *Saunders v. New York C. & H. R. R. Co.*, 71 Hun 153, 54 N. Y. S. R. 364, 24 N. Y. Supp. 659; *affirming* 23 N. Y. Supp. 927, 30 Abb. N. Cas. 88; *modified and affirmed* in 144 N. Y. 75, 38 N. E. Rep. 992.

125. Tennessee.—Where a legislature, by charter, authorizes a company to build a railroad through certain vacant lands, and in said charter grants to the company the exclusive right, up to a limited time, to enter said lands along said road within certain limits, where the same should become subject to entry—*held*, that such right of acquisition of the fee is not in the nature of a condition, either precedent or subsequent, to the other privileges vested by the charter, and a failure of the company to enter the land cannot affect other rights granted by the charter, altogether independent of the right of soil. *Davis v. East Tenn. & G. R. Co.*, 1 Sneed (Tenn.) 94.

Where the legislature grants a charter to a railroad company authorizing the construction of its road through vacant and unappropriated lands of the state, and said charter is accepted, and the company locates and constructs its road accordingly, any subsequent enterer of said land becomes

invested with the ultimate fee-simple interest in the soil, subject to the right of way so granted to the company, and is not entitled to damages for any injury which said land may have sustained by reason of the construction of said road within the bounds so granted by the charter. The charter in such case is an absolute and unqualified grant of the right of way, founded upon the consideration of benefit to the public and the enhanced value of the adjacent lands. *Davis v. East Tenn. & G. R. Co.*, 1 Sneed (Tenn.) 94.

126. Texas.*—Where a state makes a grant of lands to a railroad company, with a provision for forfeiture upon certain conditions subsequent, and the state afterwards enters the civil war, whereby it renders the performance of the conditions impossible, the grant does not thereby become absolute; but a court of equity will regard the conditions as if no particular time for performance were specified, and require performance within a reasonable time. *Davis v. Gray*, 16 Wall. (U. S.) 203, 4 Am. Ry. Rep. 134.—FOLLOWED IN *Houston & T. C. R. Co. v. Texas & P. R. Co.*, 70 Tex. 649, 8 S. W. Rep. 498.—*Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382.

The 6th section of the 10th article of the Constitution of 1869 prohibits the grant of land and the issuance of land certificates, except to actual settlers, etc. *Held*, that this provision is prospective only, and does not affect rights to land acquired by railroad companies under previous laws. *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382.

The 7th section, article 10, of the Constitution of 1869 provides that "all lands granted to railroad companies, which have not been alienated by said companies in conformity with the terms of their charters, respectively, and the laws of the state under which the grants were made, are hereby declared forfeited to the state for the benefit of the 'School Fund.'" *Held*, that this provision cannot preclude the appellant from recovering land certificates to which it acquired a right under laws enacted prior to the adoption of the constitution. *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382.

The alternate or even sections of land reserved for the use of the state by the act of

*Conflict of title of railway and school land grants under Texas constitution and laws, see 43 AM. & ENG. R. CAS. 542, *abstr.*

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Feb. 4, 1856, incorporating the Memphis, El Paso & P. R. Co., when surveyed and delineated on the map of the district surveyor, ceased to be public land, and cannot again be regarded as a part of the public domain, so as to subject them to location. *Kuechler v. Wright*, 40 Tex. 600.—REVIEWING Wilcox v. Jackson, 13 Pet. (U.S.) 498.

In the issuance of certificates to railroads the commissioner of the general land office is as much beyond judicial control as the comptroller in the issuance of bonds, or the governor in the discharge of any of his official duties, and cannot be controlled by mandamus or otherwise. *Galveston, B. & C. N. G. R. Co. v. Gross*, 47 Tex. 428.

The act granting the appellant sixteen sections of land per mile of completed road is governed, as to the kind of certificates to be issued, by the general law, and the railroad company is not entitled to certificates under its land grant otherwise than on the alternate-section plan. *Galveston, B. & C. N. G. R. Co. v. Gross*, 47 Tex. 428.

Const. of 1876, art. 7, § 2, provides that all lands already set apart for the support of public schools, and all the alternate sections of land reserved by the state out of railroad grants, and half of the public domain of the state shall be set apart for a perpetual school fund. *Held*, that the reservation does not entitle the state to half of the sections to be granted to railroads, in addition to the sections reserved to the state. *Galveston, H. & S. A. R. Co. v. State*, 77 Tex. 367, 12 S. W. Rep. 988, 13 S. W. Rep. 619.

It was the intention of the above constitutional provision to place beyond legislative control whatever portion of the public domain might remain after the execution of the enumerated purposes; but the reservation of one half of the public domain for school purposes did not appropriate one half of all the land then constituting the public domain. *Galveston, H. & S. A. R. Co. v. State*, 77 Tex. 367, 12 S. W. Rep. 988, 13 S. W. Rep. 619.

The statute (Act of August 16, 1876) touching grants of land to railway companies is, "That any railway company heretofore chartered, or which may be hereafter organized under the general laws of the state, shall, upon completion of a section of ten miles or more of its road, be entitled to receive and there is hereby granted to every such railway from the state, sixteen sections of land for every mile of its road so com-

pleted and put in good running order." The grant is intended to enure upon the construction of ten miles of lineal extension of the road, and not upon the construction of such number of miles of track made up together with the main line and side tracks used in connection with it. The right to lands extends only to the miles of extension of completed road upon its line, and not to side tracks. *Galveston, H. & S. A. R. Co. v. State*, 51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67.

127. Wisconsin.—Chapter 10, Laws 1882, revoking the grant of certain lands to the C., P. & S. R. Co., and conferring the same upon the C., St. P., M. & O. R. Co., provided that the latter company should pay to the governor of the state a certain sum of money, to be by him expended in paying the claims of laborers, sub-contractors, and material and supply men, for labor and supplies done and furnished in and about the grading and other work done by or under the auspices of the former company. The governor, in distributing the fund so provided, construed the word "laborers," as employed in the act, as intended to designate those only who had performed manual labor in and about said work, and refused to disburse any of said fund to the members of the engineer corps or the assistant general manager of the C., P. & S. R. Co. His proceedings having been brought before this court for review by certiorari—*held*: (1) that the governor correctly interpreted the act above mentioned; (2) that within the limits prescribed in said act the legislature had vested in the governor plenary discretion in the distribution of the fund therein mentioned, and the regularity of his action in that behalf can be questioned only by that body. *State ex rel. v. Rusk*, 10 Am. & Eng. R. Cas. 642, 55 Wis. 465, 13 N. W. Rep. 452.

V. GRANTS OF SWAMP LANDS.

128. Federal decisions.—The lands granted to the state of Iowa by the Act of Congress of May 15, 1856, to aid in building railroads, did not embrace the swamp lands granted to the state by the act of Sept. 28, 1856, the act of 1856 reserving such as had been previously "sold or otherwise disposed of." *Burlington & M. R. R. Co. v. Fremont County*, 9 Wall. (U.S.) 89.

Under the grant of 1856, the title to the

various sections did not vest in the railroad company until the line of the road was definitely fixed. The grant was in the nature of a float until this line was permanently fixed. *Burlington & M. R. R. Co. v. Fremont County*, 9 Wall. (U. S.) 89.—FOLLOWED IN *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. 95; *Burlington & M. R. R. Co. v. Mills County*, 19 Law. Ed. (U. S.) 565. QUOTED IN *American Emigrant Co. v. Chicago, R. I. & P. R. Co.*, 47 Iowa 515.

When there is a dispute as to whether lands were embraced in a swamp-land grant, or a railroad grant, it is competent to prove their character by witnesses who have a personal knowledge of the lands. *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95.—DISTINGUISHED IN *Iowa R. Land Co. v. Antoine*, 52 Iowa 429. REVIEWED IN *Hays v. McCormick*, 83 Iowa 89; *State v. Central Pac. R. Co.*, 40 Am. & Eng. R. Cas. 467, 20 Nev. 372.

A certain Iowa county claimed lands as swamp, deriving title from the United States through the state. A railroad company claimed the same lands under a grant for railroad purposes. Pending litigation to settle the title, a compromise was entered into by which the county was to convey the railroad certain lands and pay \$10,000 for lands already sold. Afterwards the county sued to set aside the compromise, and the railroad sued to recover the \$10,000, and the suits were heard together. *Held*, that the county could not go back to the act of congress granting the lands to the state for the purpose of showing that the land was disposed of contrary to the trust thereby created, that being a matter between the United States and the state. *Mills County v. Burlington & M. R. R. Co.*, 10 Am. & Eng. R. Cas. 693, 107 U. S. 557, 2 Sup. Ct. Rep. 654.

In such case, after the compromise was entered into the U. S. supreme court decided in favor of the county. *Held*, that this did not abrogate the compromise, the parties still acting under it; and a judgment of a state court sustaining the compromise, in the suit brought to set it aside, was not repugnant to the former decision of the U. S. supreme court. *Mills County v. Burlington & M. R. R. Co.*, 10 Am. & Eng. R. Cas. 693, 107 U. S. 557, 2 Sup. Ct. Rep. 654.

All swamp and overflowed lands granted under the Act of Congress of Sept. 20, 1850, were excepted out of the grant of June 10,

1852, of lands to the state of Missouri for railroad purposes, so far as one would interfere with the other. *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95.—QUOTED IN *Chicago, R. I. & P. R. Co. v. Brown*, 40 Iowa 333. REVIEWED IN *Wabash, St. L. & P. R. Co. v. McDougal*, 113 Ill. 603.

The grant of swamp lands to each of the states of the Union by the act of September 28, 1850 (9 St. at L. 519), applied only to the then existing states; and the subsequent admission of a state, under an act which provided that all laws of the United States not locally inapplicable should have the same force and effect within that state as in other states of the Union, did not work a grant of swamp lands under the act of 1850. *Rice v. Sioux City & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 549, 110 U. S. 65, 4 Sup. Ct. Rep. 177.

The Swamp-land Act of 1850 grants overflowed lands to the several states to be drained and reclaimed. Subsequently portions of the granted lands are sold by the United States to innocent purchasers. Ultimately an act is passed authorizing patents to issue to them, and to indemnify each state by allowing it to locate a like quantity upon any of the public lands subject to entry. A secretary of the interior decides that this right must be confined to lands within the state; also, that the claimant is not entitled to swamp lands reserved from entry and sale by the president pursuant to the Illinois Central Railroad Act of 1850. *Held*, that this decision is binding on succeeding secretaries, and they can neither reverse it nor open it by transferring a claim to the court of claims. *Illinois v. United States*, 20 Ct. of Cl. 342.

129. Arkansas.—The act of March 13, 1879, "to authorize the commissioner of state lands to settle by compromise the conflict of title between the state and the railroad companies, to selected and unapproved swamp and overflowed lands," did not confirm the title to swamp lands which had been sold by the railroad companies. It was an offer to make a compromise which was never accepted by the companies. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The Act of the Legislature approved January 11, 1851, empowering the board of swamp-land commissioners to demand of and receive from the United States indemnity "for any swamp and overflowed lands within this state which have been sold or

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disposed of by the United States since the 28th day of September, 1850, or which may hereafter be sold or disposed of by the United States," did not authorize the United States to grant to railroad companies lands embraced within the swamp-land grant. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The Railroad-grant Act of Congress of 1853 did not include swamp and overflowed lands previously granted to the state. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The Act of the Legislature approved January 19, 1855, "fixing the line of the Little Rock & Fort Smith branch of the Cairo & Fulton railroad, and granting the lands donated by congress to the state in aid thereof," did not convey to the railroad any lands embraced within the swamp-land grant. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The Act of the Legislature of December 14, 1875, which ratified and confirmed the titles to lands selected by the state as swamp and overflowed which had been disposed of by the United States either for cash or in payment of military or county warrants or scrip, does not apply to lands granted by the United States in aid of railroads. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The act of the governor in transmitting to the general land office the list of lands claimed by the railroad under the railroad grant does not estop the state to claim swamp lands included in such list. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

The approval by the general land department, of the railroad's list of selected lands, was not a determination that the lands embraced had not passed to the state by the swamp grant. The failure of the land department to determine this question leaves this matter open for judicial determination. *Chism v. Price*, 54 Ark. 251, 15 S. W. Rep. 883, 1031.

130. Florida. — The legislature intended that the trust created by § 2 of the Internal Improvement Act should be subject to, and to some extent controlled by, its subsequent provisions. Section 29 of this act, reserving to the general assembly the power to grant alternate sections of swamp and overflowed lands to railroad companies to the extent therein mentioned,

operated as a limitation upon the trust and the power of the trustees. *Internal Imp. Fund Trustees v. St. Johns R. Co.*, 16 Fla. 531.

Section 13 of the act of 1858, chartering the St. Johns R. Co., and denoting the alternate sections of swamp lands for six miles on each side of the road, harmonizes with the purposes of the act of congress in granting these lands, and with the Internal Improvement Act, and does not impair the obligation of any contract between creditors of the trust fund and the state or trustees of the internal improvement fund. *Internal Imp. Fund Trustees v. St. Johns R. Co.*, 16 Fla. 531.

The power of one legislature is not limited by the act of an antecedent one, unless the act of the first is of such a character as to call into operation a constitutional limitation upon the power of the second. The Internal Improvement Act is not organic law. *Internal Imp. Fund Trustees v. St. Johns R. Co.*, 16 Fla. 531.

A grant of land by the state to a corporation having power to make contracts for the purpose of accomplishing corporate purposes is not a grant to the original incorporators signing the articles authorized by the general law of the state in the proportion in which they have subscribed for stock, nor does it authorize a division or an allotment of the land to the original incorporators. *Brown v. Florida Southern R. Co.*, 16 Am. & Eng. R. Cas. 463, 19 Fla. 472.

131. Iowa. — (1) *In general.* — Under the statutes it is competent for the people of a county to appropriate its swamp lands to the construction of a railroad in the county; and the proposition so to appropriate them may be lawfully submitted to a vote of the people without submitting therewith the contract for the construction of the road, and even before such contract is made. *Parks v. Iowa C. R. Co.*, 24 Iowa 188.

Where a proposition for appropriating the swamp and overflowed lands of a county to aid in the construction of a railroad had been ratified by the voters of a county, and a contract in accordance therewith had been made with the company, the contract cannot be extended to embrace a cash indemnity paid by the government to the county for swamp lands sold before selection. A subsequent act of the legislature, whose preamble recited that "the proceeds" of the swamp lands had been donated to the com-

pany, was held invalid to support its claim to the indemnity. *Palmer v. Howard County*, 45 Iowa 61.

The title of the swamp and overflowed lands, granted to the state by Act of Congress, Sept. 28, 1850, remaining vacant and unappropriated, that had been selected and reported to the general land office, was, by the Act of Congress, March 3, 1857, immediately vested in the state, and the state could thereupon demand their certification, and the act of the commissioner of the general land office in certifying these swamp lands within the limits of the railroad grants, as a part of such grants, is in contravention of the vested rights of the counties and void. *Montgomery County v. Burlington & M. R. R. Co.*, 38 Iowa 208.—FOLLOWING *Fremont County v. Burlington & M. R. R. Co.*, 22 Iowa 91, 9 Wall. (U. S.) 89.

The Act of Congress of Sept. 28, 1850, granting swamp and overflowed lands to the state, operated to convey a present title, without a patent or formal conveyance. *Chicago, R. I. & P. R. Co. v. Brown*, 40 Iowa 333.—QUOTING *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95.—*Page County v. Burlington & M. R. R. Co.*, 40 Iowa 520.—EXPLAINED IN *Connors v. Meserve*, 76 Iowa 691.

The title of the state's grantee to any portion thus granted is not defeated by the fact that such portion was omitted from the list of swamp lands finally approved by the secretary of the interior, whereby it was never patented to the state, it appearing that the omission was the result of a mistake. In the absence of a patent, parol evidence is admissible to show that land claimed to be swamp is embraced within the grant to the state. *Chicago, R. I. & P. R. Co. v. Brown*, 40 Iowa 333.

Under the Act of Congress of March 3, 1857, confirming and approving the selections of swamp lands which had been theretofore made and reported to the general land office, the title to all lands which had been so selected and which remained vacant vested absolutely in the state, whether the same were or were not actually swamp. *American Emigrant Co. v. Chicago, R. I. & P. R. Co.*, 47 Iowa 515.—FOLLOWING *Fremont and M. Counties v. Burlington & M. R. R. Co.*, 22 Iowa 91.

The authority of agents appointed by the county court, under section 927 of the Revision, to select swamp lands should appear

by the records of the court; where such authority appeared only by the affidavit of a former county judge, made and attached to the list subsequent to the selection, and it did not appear that the list had ever been forwarded to and approved by the surveyor general, or the land department of the United States, it was incompetent as evidence of title in the county. *Buena Vista County v. Iowa Falls & S. C. R. Co.*, 55 Iowa 157, 7 N. W. Rep. 474.

A resolution of the board of supervisors cannot operate as a formal conveyance of the title of the county to swamp lands. Chapter 32, Laws of 1862, authorizing a conveyance in that way of certain lands owned by the county, applies only to those therein specified. *Tama County v. Melendy*, 55 Iowa 395, 7 N. W. Rep. 669.

A party who takes possession of swamp lands after the board of supervisors of the county wherein the lands are situated has refused to accept the price offered, as it had a right to do in pursuance of an order of the county court withdrawing such lands from sale, acquires no legal or equitable title to the land. *Chicago, B. & Q. R. Co. v. Jackson*, 24 Am. & Eng. R. Cas. 105, 68 Iowa 301, 27 N. W. Rep. 248.

(2) *Illustrations*.—Certain lands were certified to defendants under a railroad grant, and while holding such title they paid the taxes levied thereon. In an action in equity to quiet title it was adjudged that the lands passed to plaintiff's grantor under the prior swamp-land grant; whether or not they passed under such grant was largely a question of fact, depending upon the character of the lands. *Held*, that the plaintiff should be required to reimburse the defendants for the taxes paid prior to the determination of such question. *American Emigrant Co. v. Iowa R. Land Co.*, 52 Iowa 323, 3 N. W. Rep. 88.—DISTINGUISHING *Iowa Homestead Co. v. Valley R. Co.*, 17 Wall. (U. S.) 153.

In an action at law to recover certain lands the plaintiff claimed title under a railroad grant and introduced in evidence the commissioner's certificate, approved by the secretary of the interior. *Held*, that parol evidence was not admissible to impeach plaintiff's title by showing that the land was in fact swamp, and hence passed under a prior swamp-land grant. *Iowa R. Land Co. v. Antoine*, 52 Iowa 429, 3 N. W. Rep. 468.—DISTINGUISHING *Hannibal & St. J.*

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R. Co. v. Smith, 9 Wall. (U. S.) 95.—FOLLOWED IN *Palmer v. Boorn*, 80 Mo. 99.

In 1856 the county of Mills issued a certificate of purchase, which entitled the holder, upon full payment, to a deed from the county to a certain tract of land enuring to it under the swamp-land grant. In 1870, while such certificate was still outstanding, the county conveyed the lands to the defendant, and possession was taken, and has since been held thereunder. The plaintiff subsequently acquired the certificate and obtained thereon a deed from the county to the lands. *Held*, that such deed did not convey the legal title, which passed by the previous conveyance to the defendant, but that the holder of the certificate held a mere equity, which would not support an action at law against the legal title. *Pendergast v. Burlington & M. R. R. Co.*, 53 Iowa 326, 5 N. W. Rep. 171.

It sufficiently appears from the evidence in this case (see opinion) that there was on file in the office of the commissioner of the general land office a claim that the land in question was included in the swamp-land grant of September 28, 1850, and that such claim was regarded by the commissioner as *prima facie* sufficient. The county had conveyed the land to D. as swamp land, and D. had conveyed to S., and these deeds were of record in the proper county. S. had also deeded to defendant, but the deed was not of record. Afterwards the Dubuque & Sioux City R. Co. claimed the land under Act of Congress of May 15, 1856. The commissioner of the general land office, upon what evidence does not appear, decided that the land was not swamp land, but that it enured to the said railroad company, and plaintiff claims under said company. *Held*, that this decision was not conclusive upon the defendant and those under whom she claimed, because they were given, and had, the right to appeal; and while it appears that they did not appeal, it was incumbent upon plaintiff also, in order to bind defendant by that decision, to prove that notice of the right to appeal was given to those claiming under the swamp-land grant, which he has failed to do. Consequently, defendant's *prima facie* title is not overcome. *Connors v. Meservey*, 76 Iowa 691, 39 N. W. Rep. 388. — EXPLAINING Page County v. Burlington & M. R. R. Co., 40 Iowa 520.

Whether the land in question passed un-

der the swamp-land grant depends upon its character when that act was passed, and evidence of its character at the time of the trial of the action was properly excluded. *Connors v. Meservey*, 76 Iowa 691, 39 N. W. Rep. 388.

Plaintiff in his petition relied upon the decision of the commissioner of the general land office that the land was not swampy, and did not allege that it was not in fact swampy. *Held*, that he could not be allowed, in rebuttal, to introduce evidence that it was not in fact swampy at the time of the passage of the swamp-land grant. *Connors v. Meservey*, 76 Iowa 691, 39 N. W. Rep. 388.—FOLLOWED IN *Snell v. Dubuque & S. C. R. Co.*, 78 Iowa 88.

The lands in controversy were returned to the general land office as swamp lands under the Swamp-land Act of Congress of 1850, but in 1858 the secretary of the interior certified the land as being a part of a grant to aid in building a railroad from Dubuque to Sioux City; said grant being made subject, however, to all prior sales or other disposition within its limits. The land was never in the actual occupation of any one prior to the commencement of this action. *Held*, that the fee-simple title to the land passed to the state by virtue of said Act of Congress of 1850, and to the county by the Act of the General Assembly of 1853, and the legal possession thereunder never having been disturbed by the defendant nor its grantors, this action was not barred by the statute of limitations. *American Emigrant Co. v. Fuller*, 83 Iowa 599, 50 N. W. Rep. 48.

132. Minnesota.—The Minn. Act of March 6, 1863, granting swamp lands to the St. Paul & Pacific R. Co., was a valid contract, and entitled the company to select, in order to make up deficiencies of such lands within the prescribed limits, from any such lands belonging to the state at the time the right to select became perfect. The lands set apart by the commissioner of the state land office to the purposes named in the act of Feb. 13, 1865, setting apart swamp lands to state institutions, could only be lawfully set apart by him from the surplus of such lands after there were enough to fill grants of such lands by the state, made prior to the passage of that act. *St. Paul & C. R. Co. v. Brown*, 24 Minn. 517.

The swamp lands so set apart to the trustees of the Hospital for the Insane belong to the state, the title being held by the

trustees for it, and as its officers or agents, and, there not being enough swamp lands without them to fill the grant to the St. Paul & Pacific R. Co., are subject to the right of selection by the St. Paul & Chicago R. Co., the successor in interest of the former company, to make up the deficiencies of such lands within the limits prescribed in the act of March 6, 1863. *St. Paul & C. R. Co. v. Brown*, 24 Minn. 517.

The act is a grant of seven, and not fourteen, full sections per mile. *St. Paul & C. R. Co. v. Brown*, 24 Minn. 517.

The grant of swamp lands to the intervenor by Sp. Laws 1875, ch. 54, was a grant *in presenti* upon conditions subsequent. Such a grant is not forfeited by a mere breach of the conditions, but only by some affirmative action on part of the state, after the breach, declaring or asserting the forfeiture on account of the breach. Hence, although the intervenor defaulted, yet, it never having been divested of the grant by any declaration or assertion of forfeiture by the state, the condition precedent to defendant's grant has never been performed or fulfilled, and consequently the grant has never taken effect. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.

The grant to intervenor is also a float grant, but the right of selection is given to the grantee, but limited to the three counties of St. Louis, Cook, and Lake. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.

Sp. Laws 1869, ch. 56, although in form an amendment to Sp. Laws 1865, ch. 3, is in itself a complete act, making a "float" grant to the plaintiff in aid of its "Hinckley" branch, of ten sections to the mile, without any limitation as to the locality where the lands shall be selected. But the right of selection, not being given to the plaintiff, belongs to the state, which may fill the grant out of any of its swamp lands. Notwithstanding the grant to plaintiff, the state had a right to grant any of its swamp lands to any one else, provided only that it retained enough to fill plaintiff's grant. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.—REVIEWED IN *Northern Pac. R. Co. v. Barnes*, 2 N. Dak. 310.

Sp. Laws 1878, ch. 246, transferring this grant to the defendant "in case of forfeiture by said Duluth & Iron Range R. Co.," was a grant upon a condition precedent, to wit, that the former grantee shall be divested of the grant, and the same become reinvested in the state because of a breach of its conditions. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.

There not being enough swamp lands in the three counties named to fill intervenor's grant, and there being enough outside these counties to fill plaintiff's grant, the state had no right to appropriate to the latter lands in these counties, at least after intervenor's grant had, by selection, attached specifically to such lands. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.

The provision in this grant "that no lands shall accrue to the said company under this act until all grants of swamp lands previously made shall be fully satisfied," was not intended to postpone the appropriation of any land to intervenor's grant until all prior grants had been actually filled by the selection of specific lands to their full amounts, but merely to provide that in case there were not enough lands to fill all the grants, including intervenor's, the prior grantees should have their full amounts, and intervenor stand the shortage. *Minneapolis & St. C. R. Co. v. Duluth & W. R. Co.*, 46 Am. & Eng. R. Cas. 473, 45 Minn. 104, 47 N. W. Rep. 464.

133. Missouri.—Under Missouri statutes a district court of a county has power to transfer alternate sections of swamp lands of the county to a railroad company in payment of a subscription to the company's stock, made by the county court. *Dunklin County ex rel. v. District County Court*, 23 Mo. 449.

A writ of mandamus will not lie to a county court directing it to vacate an order selling swamp lands to a railroad company in payment of a subscription of stock, and commanding the county court and all others to desist from carrying said order into execution. *Dunklin County ex rel. v. District County Court*, 23 Mo. 449.

The Act of Congress of September 28, 1850, "to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," operated as a reserva-

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tion upon the grant of lands made to Missouri for the construction of the railroads described in the Act of Congress of June 10, 1852; and in a suit of ejectment brought by the railroad corporation claiming title to lands under said act of June 10, 1852, parol evidence is admissible to prove that the land sued for was "swamp and overflowed lands, made thereby unfit for cultivation," so as to bring such land within the terms of the grant or reservation made by the act of September 28, 1850, although the lists and plats to be made by the secretary of the interior, provided for in said act, had not been made and transmitted to the governor, nor patents issued. Such parol evidence is not admissible to prove title in defendant, but is admissible for the purpose of rebutting and invalidating the effect of the lists issued under the Act of Congress of June 10, 1852, and August 3, 1854. *Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 310.

The Act of Congress of September 28, 1850, constituted a present grant, vesting an absolute title, *proprio vigore*, in the state of Missouri to such lands within her limits without issue of patent. The failure of the secretary of the interior afterwards to perform his duty in making out the lists and plats of the lands, and transmitting them to the governor, did not in any wise interfere with or impair the title. And in ejectment for such land parol evidence is admissible for the purpose of identifying the same as in fact swamp and overflowed land. *Clarkson v. Buchanan*, 53 Mo. 563.—FOLLOWING *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95. REVIEWING *Hannibal & St. J. R. Co. v. Smith*, 41 Mo. 310.—REVIEWED IN *Campbell v. Wortman*, 58 Mo. 258.

Actual dispossession of the covenantee, under a judgment, is not necessary to enable him to sue on his covenant of warranty. But in all cases of involuntary dispossession the burden of proof is on him to establish the adverse paramount title to which he has yielded; and it should appear that the possession was surrendered only after claim or demand therefor. Where suit on such covenant was brought against the Hann. & St. J. R. Co., and it appeared that prior and subsequent to the Act of Congress of 1850, known as the swamp-land grant, the land was partially covered with water, and plaintiff had voluntarily surrendered it to the county of Livingston, but there was

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no proof to show that it was ever selected as swamp land under the provisions of that act, or that it had ever been confirmed or patented to the state, plaintiff could not recover. And such would be the case even though, under the Act of Congress of June 10, 1852, the land was in fact exempted from the grant to defendant. It would not follow therefrom that the title to the land was necessarily in the county. *Morgan v. Hannibal & St. J. R. Co.*, 63 Mo. 129, 20 Ky. Rep. 444.—DISTINGUISHED IN *Hannibal & St. J. R. Co. v. Snead*, 65 Mo. 239; *Conklin v. Hannibal & St. J. R. Co.*, 65 Mo. 533.

Swamp lands were excepted from the railroad grant made by the Act of Congress of 1852 and such fact may be set up as a defense in a suit in ejectment by one who claims under the railroad grant. *Hannibal & St. J. R. Co. v. Snead*, 65 Mo. 239.—DISTINGUISHING *Morgan v. Hannibal & St. J. R. Co.*, 63 Mo. 129.—REFERRED TO IN *Palmer v. Boorn*, 80 Mo. 99.

When the plaintiffs' claim to the land in controversy, in ejectment, is founded on the swamp-land grant of congress of September 28, 1850, he cannot recover if it appears that the land is, in point of fact, high and dry rolling prairie, and has never been selected as swamp land by the officers of the general government, notwithstanding the defendant, who claims under the railroad land grant of congress of June 10, 1852, fails to show that the railroad company either had built its road into the county where the land lay, when it was selected by the company, or had recorded a map of the lands selected in the proper county as received by the act of the state legislature of September 20, 1852. *Funkhouser v. Peck*, 67 Mo. 19.

In the absence of evidence that the secretary of the interior has neglected or refused to decide whether a tract of land in controversy in an action of ejectment is swamp or overflowed land or not, within the Act of Congress of September 28, 1850, the defendant will not be permitted to show, by parol evidence, that it falls within that act, for the purpose of defeating a title held under the railroad land grant of congress of June 10, 1852. *Palmer v. Boorn*, 80 Mo. 99.—FOLLOWING *Iowa R. Land Co. v. Antoine*, 52 Iowa 429. REFERRING TO *Hannibal & St. J. R. Co. v. Snead*, 65 Mo. 239. REVIEWING *Hannibal & St. J. R. Co.*

v. Smith, 41 Mo. 310; *Hannibal & St. J. R. Co. v. Smith*, 9 Wall. (U. S.) 95.

VI. CANADIAN GRANTS.

134. Subsidy lands—License.—After a railroad has received and registered a certificate of subsidy lands, under the Real Property Act of 1889, § 64, providing that such registered certificate is conclusive evidence of title "as against Her Majesty as represented by the government of Manitoba and all persons whomsoever," the registration is conclusive, and no question can be made of the right of the company to take, hold and convey the land. *In re Canadian Pac. R. Co.*, 6 Man. 598.

The Canadian Pacific R. Co. has power, without taking out the license required by the statutes of this province, to take, hold, acquire, dispose of, sell, or contract to sell, or grant the lands situated in the territory added to Manitoba in 1881, which have been granted and are to be granted to the company as part of its subsidy for the construction and operation of its railway, under 44 Vict. c. 1. (D. 1891). 49 Vict. c. 11 (M. 1886), and 53 Vict. c. 23 (M. 1890), are *ultra vires* in so far as they require a license of said company in order to take and hold lands. *In re Canadian Pac. R. Co.*, 7 Man. 389.

135. Grants of beach and land below high-water mark.—In 1881, by letters patent issued pursuant to statute of Canada, 49 Vict. c. 1, § 18a, and having, by section 2, the force of an act of parliament, plaintiffs were granted the right to "take, use, and hold the beach and land below high-water mark in any *** navigable water, gulf, or sea *** to such extent as shall be required by the company for its railway and other works, as shall be exhibited upon a map or plan thereof deposited in the office of the minister of railways." The plaintiffs' right to occupy the foreshore, under section 18a, *supra*, was exclusive. *Canadian Pac. R. Co. v. Vancouver*, 2 British Col. 306.

136. Enforcement of claim under statute—Petition of right.—An act of the legislature of Canada having provided that a railway company should be entitled to 4,000,000 acres of the waste lands of the crown on completion of its road, and a proportionate quantity of such lands on completion, in the manner specified, of 20

miles of the line—*held*, that a petition of right presented to the lieutenant-governor of Ontario, addressed to her Majesty the Queen, was the proper proceeding for the purpose of enforcing the claim of the railway company, under the act, against that province. *Canada C. R. Co. v. Queen*, 20 Grant's Ch. (U. C.) 273.

137. — parties.—Where a question affected the right of the government to the land granted in a patent, the attorney-general was held to be a necessary party, and leave to amend was granted to enable him to be added as a party, although the defendant was in a position to move, and made a counter-motion, to dismiss, but the defendant was allowed costs. *Great Western R. Co. v. Jones*, 2 Chan. Chamb. (U. C.) 219.

The legislature of Canada, by an act, set apart a certain quantity of land along the line of a projected railway, to be granted to the company on completion of the railway, and a proportionate part of such lands on the completion of 20 miles of the railway; the company having completed a portion of the line of railway to an extent of more than 20 miles, applied for a grant of the proportion to which, under the act, it claimed to be entitled, which was refused. The company thereupon presented a petition of right against the province of Ontario. It was alleged that the province of Ontario had not along the line of the road sufficient lands to make the grant desired. *Held*, that this formed no ground for the province of Ontario insisting that the province of Quebec should have been made a party to the proceeding. *Canada C. R. Co. v. Queen*, 20 Grant's Ch. (U. C.) 273.

138. Rights of settlers and pre-emptioners.—47 Vict. c. 14 (B.C.), throwing open certain land conveyed to the Esquimalt & N. railway, to actual settlers for agricultural purposes, confers no right of pre-emption to land not within the pre-emption laws of the province, and only "unreserved and unoccupied lands" come within those laws. *Hoggan v. Esquimalt & N. R. Co.*, 20 Can. Sup. Ct. 235.

LANDINGS.

Right to condemn for railway purposes, see EMINENT DOMAIN, 125, 189.

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LANDLORD AND TENANT.

Injuries to tenant as an element of land damages, see EMINENT DOMAIN, 708.

Respective rights of action of for flowing land, see FLOODING LANDS, 64, 65.

— to sue for injuries caused by fire, see FIRES, 155, 156.

Rights of tenant whose term expires during pendency of condemnation proceedings, see EMINENT DOMAIN, 152.

1. Presumption of the existence of the relation.—A railroad company built a spur track across plaintiff's land, paid him rent for a portion of the time the land was thus occupied, and afterwards continued the occupation with his assent, until his whole road (including said spur track) passed into defendant's hands under a foreclosure sale; and defendant continued the occupation, without any notice to plaintiff of a claim to hold adversely to him. *Held*, that the presumption is that defendant held as plaintiff's tenant. *Wittman v. Milwaukee, L. S. & W. R. Co.*, 51 Wis. 89, 8 N. W. Rep. 6.

2. Termination of the relation.—Where the whole of leased premises are taken by a railroad, and no damages are assessed to the tenant, the relation of landlord and tenant is ended, and the latter is not liable for future rent. *Dyer v. Wightman*, 66 Pa. St. 425.—RECONCILING *Frost v. Earnest*, 4 Whart. (Pa.) 86; *Dobbins v. Brown*, 12 Pa. St. 75.—FOLLOWED IN *Fitzpatrick v. Pennsylvania R. Co.*, 10 Phila. (Pa.) 141.

The tenant of a tramway, after termination of the tenancy, cannot dispute his landlord's right of possession. *James v. Miles*, 54 Ark. 460, 16 S. W. Rep. 195.—APPLYING *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608.

3. Rights of the tenant, generally.—The tenant is the owner of the leased premises during the term, and the landlord can confer no right on others in respect to them which he could not himself exercise. *Crowell v. New Orleans & N. E. R. Co.*, 20 Am. & Eng. R. Cas. 306, 61 Miss. 631.

A railroad company leased a pavilion situated some 230 feet from a road, with no way of getting to it except across a platform belonging to the company. The lessees used the pavilion for selling mineral waters, confectionery, etc., and were enjoined by the company from driving across the platform to and from the pavilion. The lessees claimed that it was necessary in

their business to drive over the platform, and the evidence tended to show that it was so constructed as not to be liable to injury from such driving. *Held*, that the lessees could not be enjoined so long as they properly used the platform. *New Orleans City R. Co. v. McCloskey*, 35 La. Ann. 784.

4. — to recover against a trespasser.—A railroad company entering and constructing its road-bed upon leased premises under authority from the landlord only, is a trespasser, and the tenant can recover from it for injuries inflicted. *Crowell v. New Orleans & N. E. R. Co.*, 20 Am. & Eng. R. Cas. 306, 61 Miss. 631.

Though a tenant tacitly permits a railroad company to construct its road-bed on the leased premises, the construction by him of a fence across the works is notice that he intends to protect his crop in that way, and the destruction of the fence by the company will render it liable in damages for injuries resulting therefrom. *Crowell v. New Orleans & N. E. R. Co.*, 20 Am. & Eng. R. Cas. 306, 61 Miss. 631.

Crops were destroyed by the negligence of a railroad company on lands that were leased for that and the following year. *Held*, that both the owner of the land and the tenant could maintain a joint action against the company for the loss of the crops, and for damage to the land, though by the terms of the lease the rent was to be paid in a share of the crops when matured. *Texas & P. R. Co. v. Gill*, 2 Tex. App. (Civ. Cas.) 151.

Where it appears that growing crops are destroyed by reason of a railroad company failing to maintain proper cattle-guards, proof that the crops were on rented grounds, under a contract by which the tenant was to render the landowner a certain share of the crops, when mature and harvested, does not give the landowner an interest in the crops such as would make him a necessary co-plaintiff in an action by the tenant. *St. Louis, A. & T. R. Co. v. Heard*, 3 Tex. App. (Civ. Cas.) 470.

5. Lease and its assignment.—Where a railway company arranges by private contract the price of the interest of a defendant in land it requires, a covenant in his lease not to assign without the consent of his landlord is abrogated so as to enable the defendant to assign to the company without the lessor's consent. *Slipper v.*

Tottenham & H. J. R. Co., 36 *L. J. Ch.* 841, *L. R.* 4 *Eq.* 112.

Where a lease contains a proviso empowering the lessor to resume any portion of the land which might be required for the purpose of building, etc., such proviso will not enable the lessor to resume a portion of the land for the purpose of conveying it to a railway company discharged from the lease. *Johnson v. Edgware, H. & L. R. Co.*, 35 *L. J. Ch.* 322.

6. Rents, generally.—One cannot sue a railroad company for rent, who has never consented to their using his land, and has warned them that they went upon it at their peril and had no right in the soil. *Marquette, H. & O. R. Co. v. Harlow*, 37 *Mich.* 554.—FOLLOWED IN *Marquette, H. & O. R. Co. v. Harlow*, 37 *Mich.* 557.

A street-car company leased certain premises for the purpose of storing its cars and other property, with a side track, or turn out, for the purpose of running its cars to and from the building. During the term the street in front of the premises, by authority of the city, was cut down so as to interfere seriously with the use of the premises and materially reduce their value for the company's use. *Held*, that the damages thus sustained could not be set up as a defense to an action to recover rent. *Gallup v. Albany R. Co.*, 7 *Lans. (N. Y.)* 471; *affirmed* in 65 *N. Y.* 1.

7. Eviction and its effect.—Where a landlord sells a part of leased premises to a railroad company, if the company enters by permission of the landlord, it amounts to an eviction of the portion sold, although the entry by the company is unlawful by reason of its entering without the assessment of damages to the tenant. *Halligan v. Wade*, 21 *Ill.* 470.

But where land is rented with the understanding that it may be sold during the term to a railroad company, the laying down of a track on the land does not amount to an eviction so as to release the tenant from payment of rent. *Price v. Pittsburg, Ft. W. & C. R. Co.*, 34 *Ill.* 13.

8. Ground rents.—The owner of a ground rent is not affected by proceedings of a railroad company against his tenants, to take and occupy the ground for the purposes of its road, the landlord and tenant having distinct estates. *Vogtly v. Pittsburg & Ft. W. R. Co.*, 2 *Grant's Cas. (Pa.)*

243.—DISTINGUISHED IN *Philadelphia, W. & B. R. Co. v. Williams*, 54 *Pa. St.* 103.

The principal of a ground rent is not a debt within the meaning of the Act of Congress of Feb. 25, 1862. *Philadelphia & R. R. Co. v. Morrison*, 5 *Phila. (Pa.)* 515.

LANDOWNER.

Assumption by, of risk from fire, see **FIRES**, 20.

At time of taking, solely entitled to damages, see **EMINENT DOMAIN**, 426.

Burden of proof to show inability to agree with, see **EMINENT DOMAIN**, 367, 474.

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Construction and repair of cattle-guards, and farm crossings by, see **CATTLE-GUARDS**, 20; **FARM CROSSINGS**, 5.

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Necessity of compensation to, for land condemned, see **EMINENT DOMAIN**, 371-423.

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Release of damages by, see **RELEASE**, 28-30.

Reservation of easements to, see **EMINENT DOMAIN**, 221, 483.

Respective rights of company and, in property condemned, see **EMINENT DOMAIN**, 133-152.

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- to appeal in condemnation proceedings, see EMINENT DOMAIN, 871.
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- jury trial of question of damages, see EMINENT DOMAIN, 520.
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- recover cost of fence from company, see FENCES, 44, 45.
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- Strict construction of condemnation laws in favor of, see EMINENT DOMAIN, 47.
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- Trespass by, for wrongful interference with property, see EMINENT DOMAIN, 1055-1085.
- Waiver by, of prepayment of damages, see EMINENT DOMAIN, 1022.
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I. LEASES.

1. Construction of Leases.

1. Generally.—An instrument conveying an estate in land, subordinate to that of the grantor, to a grantee, upon a valid consideration, and for a definite term, is a lease, and not a license, as a license grants no estate in land. *New York, C. & St. L. R. Co. v. Randall*, 102 *Ind.* 453, 26 *N. E. Rep.* 122.

A grant and demise by one railway corporation of all its property, real and personal, with all its privileges and franchises, to another, in perpetuity, is equivalent to an absolute conveyance. *Chicago, B. & Q. R. Co. v. Boyd*, 118 *Ill.* 73, 7 *N. E. Rep.* 487.

Where a railroad company leases a part of its track, the reserved rent therefor is appurtenant to the land and the track thereon, and passes to a consolidated company acquiring possession of the road. *New York C. R. Co. v. Saratoga & S. R. Co.*, 39 *Barb. (N. Y.)* 289.

A lessor railroad company does not cease to be a corporation because the lessee company, under N. Y. Act of 1879, ch. 503, takes a transfer of all the stock of the lessor company and issues its own stock in lieu thereof; and condemnation proceedings instituted by the lessor company before such transfer, do not abate. *In re Metropolitan El. R. Co.*, 12 *N. Y. Supp.* 506; *affirmed in* 43 *N. Y. S. R.* 651, 17 *N. Y. Supp.* 778, 63 *Hun* 629, *mem.*

In construing a written lease of a railroad in which the parties claim the words and expressions contain their true intent and meaning, and there is no claim of fraud or mistake, there should be given to each

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word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole, and which will secure and carry into effect the object of the parties. *Cincinnati, S. & C. R. Co. v. Indiana, B. & W. R. Co.*, 26 *Am. & Eng. R. Cas.* 615, 44 *Ohio St.* 287, 7 *N. E. Rep.* 139.

When a written lease of a railroad consists of more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction. *Cincinnati, S. & C. R. Co. v. Indiana, B. & W. R. Co.*, 26 *Am. & Eng. R. Cas.* 615, 44 *Ohio St.* 287, 7 *N. E. Rep.* 139.

2. Powers and duties of lessor and lessee as between each other.—When two railroads are united under a lease specifying the duties and liabilities of each, neither is restricted in any particular not included in their contract with each other; each may obtain new legislative grants, and avail itself of additional powers, in any way they may find advantageous to themselves, provided these new operations are kept so distinct as not to interfere with the due operation of their agreement with each other. *March v. Eastern R. Co.*, 43 *N. H.* 515.

Such lease between the roads must be construed with reference to the objects proposed by the existing charters of each at the time the lease was made, and its construction or operation cannot be affected by any change of the plans or objects of the corporation, beyond the existing scope of their chartered powers at the time of the making of such lease. *March v. Eastern R. Co.*, 43 *N. H.* 515.

Such roads may, as between themselves, vary the terms of their contract with each other, and may consent to a different appropriation of the funds, profits, or dividends from that provided for in the original contract; but stockholders in either road who have not thus assented may, in equity, hold both corporations to perform their original contract, and apply their funds and

profits in the way originally provided for, so far as relates to themselves. *March v. Eastern R. Co.*, 43 *N. H.* 515.—QUOTED IN *Goodwin v. Hardy*, 57 *Me.* 143.

Defendant elevated railroad company leased two other roads to hold for a term of nine hundred and ninety-nine years, "or so long as it shall continue to exist as a corporation and be capable of exercising all the functions herein stipulated on its behalf." Subsequently an action was commenced on behalf of the people against the lessee company to dissolve it for insolvency, and receivers *pendente lite* were appointed; whereupon one of the lessor companies applied for a surrender of its property. *Held*, that the appointment of the receivers did not terminate the lease. The provision that the lease should continue so long as the lessee "be capable of exercising its functions," would only terminate the lease when the company became legally disabled from fulfilling its contracts, and mere inability to perform would not have that effect. *New York El. R. Co. v. Manhattan R. Co.*, 63 *How. Pr. (N. Y.)* 14.

The above lease contained a provision that the lessor companies might assume possession of their property if any payment was in arrears for ninety days. *Held*, as the court had taken possession of the property during the litigation, it could not surrender it on the ground of insolvency before entry of final judgment. *New York El. R. Co. v. Manhattan R. Co.*, 63 *How. Pr. (N. Y.)* 14.

In such case the court could not settle conflicting claims as to the ownership of the property until after it entered a judgment of forfeiture and took possession of the property for final distribution. *New York El. R. Co. v. Manhattan R. Co.*, 63 *How. Pr. (N. Y.)* 14.

3. Lease with power of purchase.*—A lessee of land who has an option to purchase the demised premises has an equitable estate in the land, and when he exercises his option he is to be considered as the owner *ab initio*. *People's St. R. Co. v. Spencer*, 156 *Pa. St.* 85, 27 *Atl. Rep.* 113.

Plaintiff leased rolling stock to a railroad company, under an agreement for a sale, with a proviso that if the company should not be able to purchase it should return the property, and that all freights earned

*Conditional sale or lease of rolling stock, see note, 57 *AM. & ENG. R. CAS.* 239. See also *MORTGAGES*, 47-60.

on business of plaintiff should be retained and credited on the rentals and purchase price. A receiver was appointed for the railroad who used the rolling stock in operating the road. On intervening petition by plaintiff to be paid the balance of the price, and cross-petition by the receiver to recover the excess of freights retained by plaintiffs above the agreed rentals—*held*, that the receiver might return the property, and notwithstanding the dismissal of plaintiff's intervening petition recover on his cross-petition the excess of freights retained by plaintiff above the rentals less the amount of any damages sustained by the property. *Sunflower Oil Co. v. Wilson*, 48 Am. & Eng. R. Cas. 664, 142 U. S. 313, 12 Sup. Ct. Rep. 235.—DISTINGUISHING *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *American Bridge Co. v. Heidelbach*, 94 U. S. 798; *Gilman v. Illinois & M. Tel. Co.*, 91 U. S. 603.

By the lease and subsequent purchase of the road and its franchises, the present company, known as the Macon & Brunswick R. Co., acquired the right to extend and construct the road from Macon to Atlanta, subject to the limitations in the original and amended charters of the company, subsequent legislation thereon, and the constitutional guaranty to the owners of property not to force them to part with any portion of it without just compensation. *Wood v. Macon & B. R. Co.*, 68 Ga. 539.

S. and the F., N. S. & C. R. R. Co. entered into a contract by which S. leased a railroad owned by him to the company for a term of fifty years at an annual rental of a specified percentage upon the agreed cost of the road. The contract contained the ordinary covenant for the surrender of the demised premises at the end of the term, subject, however, to certain other provisions, in substance as follows: The lessee covenanted at the end of the term to pay to the lessor the principal sum expended by him upon the road, rent to continue until such payment, and then to cease. Upon such payment being made it was stipulated that the company should be vested with the fee of the road and appurtenances, and that the contract should thereupon be deemed a sufficient grant. The contract contained the usual provisions for re-entry for non-payment of rent or breach of other covenants by the lessee. The said company assigned the contract to another railroad corpora-

tion, which leased to the defendant all the property covered by the contract for the term of ninety-nine years, at a different rent from that reserved in the original lease, and with a provision for re-entry and a covenant to surrender at the end of the term. In an action by the devisee of S. to recover rent—*held* (Finch, J., dissenting), that the lease to defendant operated, as between it and S. or his devisee, as an assignment of the entire term fixed by the original contract, and thus established a privity of estate between S. and defendant, which rendered the latter liable; that the agreement to transfer the fee did not merge the fifty years' term or prevent the relation of landlord and tenant subsisting during its continuance, as by the terms of said agreement the payment of the purchase price at the end of that term is made a condition precedent to the vesting of the fee in the lessee, and so the contract was not a present sale of the fee, but simply for a sale to take place *in futuro*. *Stewart v. Long Island R. Co.*, 102 N. Y. 601, 8 N. E. Rep. 200, 2 N. Y. S. R. 557; *reversing* 32 Hun 68.

Plaintiff leased its railroad, the land upon which the same was built, and the property generally as it was at the date of the lease to defendant with the right of purchase upon payment of the cost thereof and all rent accruing to the time of purchase; and upon such payment said demised premises were to be conveyed free from incumbrance. Defendant tendered the costs, with rent to time of tender, but demanded that plaintiff convey a perfect title, or convey with covenant of warranty of title, and it was held that he demanded more than his contract permitted, and his tender was no bar to a claim for rent and did not prevent its accruing in the future; and that plaintiff not having demanded, but on the contrary having resisted, a specific performance in the manner claimed by defendant, and defendant having sought to compel him to complete his title at an additional expense, by the tender of the costs, only of the demised premises, as they existed at the date of the lease, neither party was in a condition to demand a specific performance in respect to a conveyance of the premises. *Hicksville & C. S. B. R. Co. v. Long Island R. Co.*, 48 Barb. (N. Y.) 355.

A railroad company contracted with a bank to furnish funds to purchase locomotives, cars, etc., for the road. The bank, by the

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contract, acquired the absolute title to the articles, and agreed to lease the same back to the company for three years at a weekly rental of \$1000, with the provisos (1) that the company might at any time during the term pay \$105,500 and put an end to the contract; (2) that the contract should terminate when said weekly payments of rent should amount to \$105,500. *Held*, that the absolute title to the property vested in the bank when purchased, and that the contract amounted to a lease to the company, and not a sale and mortgage back. *Bank of Upper Canada v. Grand Trunk R. Co.*, 13 U. C. C. P. 304.

4. Lease of street railway with power to extend it.*—Plaintiff was the owner of a street railroad in the city of B., and also the franchise and right to extend the road upon other streets, upon obtaining consent of the local authorities and property owners. On April 1, 1886, the parties entered into a contract by which, "in consideration of the mutual covenants and agreements" therein contained, plaintiff leased to the defendants the right to use the existing road and the right to construct and operate the extension; it agreed to obtain the necessary consents, and, in case it should fail to do so within sixty days and should give notice to that effect to defendants, it was provided that at the option of the latter the lease and agreement should cease or continue operative. Defendants agreed to have a specified portion of the extension completed on or before November 15, 1881, and the residue at times specified, unless delayed by legal proceedings; and to pay as rental a percentage on the gross receipts, commencing October 1, 1860, they stipulating that the annual rental should not be less than \$15,000. Defendants took possession of the completed road; plaintiff did not procure the requisite consents until in October, 1886, when defendants began the construction of the extension, but were restrained by order of the court, on the ground that the consent of another street railroad to laying the road on one of the streets, which was an important part of the extension, had not been obtained. This consent was never obtained, and a company to whom defendants had assigned

the lease gave plaintiff notice that it elected to hold the contract broken because of non-performance, and that it was ready to surrender the property on being reimbursed for the expenditures. In an action to recover the guaranteed rental—*held*, that the lease was inoperative as a present demise of the extension not then built and could not be effective with respect to the right to create such property until plaintiff procured the requisite consents; that the guaranty, therefore, was dependent upon the performance of the conditions precedent which were necessary to enable defendants to complete the extension, and so it never became operative. *Atlantic Ave. R. Co. v. Johnson*, 134 N. Y. 375, 31 N. E. Rep. 903, 47 N. Y. S. R. 535; *affirming* 57 Hun 591, *mem.*, 32 N. Y. S. R. 1052, 11 N. Y. Supp. 106.

It seems that if the fixed amount of rent had been guaranteed from the beginning of the term, defendants could not have defended, but their remedy would have been to counter-claim damages. *Atlantic Ave. R. Co. v. Johnson*, 134 N. Y. 375, 31 N. E. Rep. 903, 47 N. Y. S. R. 535; *affirming* 57 Hun 591, 32 N. Y. S. R. 1052, 11 N. Y. Supp. 106.

The company which procured the injunction restraining the construction of the extension was, after the trial of this action, adjudged to have forfeited its charter. Plaintiff claimed, on appeal, that said company was a wrong-doer in opposing the extension, and so that its covenant did not require it to overcome such resistance. *Held*, untenable; that the court could not go outside the record to reverse the judgment; also that until the judgment of forfeiture was obtained said company had the right to oppose the extension. *Atlantic Ave. R. Co. v. Johnson*, 134 N. Y. 375, 31 N. E. Rep. 903, 47 N. Y. S. R. 535; *affirming* 57 Hun 591, 32 N. Y. S. R. 1052, 11 N. Y. Supp. 106.

5. When lease will not prevent a forfeiture of charter.—Where a company organized under the general railroad act leases a portion of its route to another company, with a right to lay down tracks to enable the lessee to complete its own road, the tracks when built not to belong to the lessor, or to be operated by it, this is not such a user by the lessor of its franchises as to prevent a forfeiture, under N. Y. Act of 1867, ch. 775. *In re Brooklyn, W. & N. R. Co.*, 81 N. Y. 69; *affirming* 19 Hun 314.—

* Lease of street railway and franchise for extension of the road. Liability for rent, see 52 AM. & ENG. R. CAS. 81, *abstr.*

REFERRING TO *In re Brooklyn, W. & N. R. Co.*, 72 N. Y. 245, 75 N. Y. 335; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 524.

Such a corporation cannot retain its corporate existence without the expenditure so required, by granting to another company the privilege of laying tracks over such parts of its route as the other company may desire to use. *In re Brooklyn, W. & N. R. Co.*, 81 N. Y. 69; *affirming* 19 Hun 314.

A reservation in such lease of a right to the lessor to run cars over a portion of the tracks laid by the lessee on payment of a specified sum for the use of the track does not avail to give the lessor the benefit of the expenditures by the lessee. *In re Brooklyn, W. & N. R. Co.*, 81 N. Y. 69; *affirming* 19 Hun 314.

6. When lease will not prevent mandamus to compel operation of road.—The fact that the specific portion of the railway in question had been leased by the defendant to another railway company, and was being operated in connection with the line of the latter, but not in conformity to a decree of the court—*held*, to be no defense to the issuance of a writ of mandamus to compel the operation of the road. *State v. Iowa C. R. Co.*, 83 Iowa 720, 50 N. W. Rep. 280.

7. What a lease of "terminal facilities" includes.—"Terminal facilities," as understood by those operating railroads, only include tracks used in making up trains. So a lease by one company to another of such facilities will not include a track used only for reaching car works. *Jacksonville, L. & St. L. R. Co. v. Louisville & N. R. Co.*, 47 Ill. App. 414.

8. Contracts not amounting to leases.—A vote by a railroad company to agree with another company to take a lease of a road to be constructed by the latter, and to pay as rent a certain per cent. of the cost thereof, and a vote by the latter company to lease its road on the terms stated, are but preliminary to an actual lease, and are therefore not in contravention of the Massachusetts statutes, prohibiting such leases. *Peters v. Boston & M. R. Co.*, 114 Mass. 127.

Two railroads contracted that one should take charge of and operate the other, for a term of years, the operating road to receive 65 per cent. of the gross earnings of the line so operated, and out of the remaining 35 per cent. pay interest on the road's bonds,

and pay the residue to the company owning the road. *Held*, that this was not a lease of the road nor a contract of consolidation, but one of connection between the roads. *Archer v. Terre Haute & I. R. Co.*, 7 Am. & Eng. R. Cas. 249, 102 Ill. 493.

A contract between a party and a railroad company provided that he should furnish for the latter a specified sum of money to be expended as designated, and also that he should be president and should take possession of the road and operate it to the best advantage, devoting the earnings to certain specified objects, operating the road in the name of the company, and being paid for his services. *Held*, that the contract did not constitute a lease, and that his individual estate was not liable upon a contract entered into by the company prior to his contract therewith. *United States Rolling-Stock Co. v. Potter*, 48 Iowa 56.

9. Agreements to execute leases.—An agreement for a lease of real estate from a corporation is not required to be executed or assented to by the corporation with the same formality as the lease itself. *Conant v. Bellows Falls Canal Co.*, 29 Vt. 263.

10. Tenancy from year to year.—A railway company leased ground to another for its use for a term of five years, and agreed, in writing, to furnish to the lessee company permanent station grounds and other terminal facilities, if, within such term, the latter should elect to take certain designated grounds in perpetuity. Within the time limited, the lessee notified the lessor that it had elected to take a perpetual lease of ground not mentioned in the lease and agreement. *Held*, that the lessee could not elect to take grounds different from those named in the writings, and at the end of the five years, by holding over several years, it became a tenant from year to year. *Baltimore, O. & C. R. Co. v. Illinois C. R. Co.*, 137 Ill. 9, 27 N. E. Rep. 38.

11. Tenancy at will—Destruction of premises.—A contract entered into between a railroad company and an individual, whereby the latter is to occupy a certain building belonging to the company, and board section hands at an agreed price, creates a tenancy terminable at the will of the company. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 Sup. Ct. Rep. 333.

In the absence of fraud, misrepresentation, or deceit, the railroad in such case is not responsible for injuries happening to the

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tenant by reason of a snow slide or avalanche, by which the building is destroyed and the tenant injured and her children killed. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413, 13 Sup. Ct. Rep. 333.

2. Power to Make or Take Leases.

12. Generally.*—A corporation in debt cannot transfer its entire property by lease, so as to prevent the application of the property at its full value, to the satisfaction of its debts. *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 10 Sup. Ct. Rep. 550.—FOLLOWING *Central R. & B. Co. v. Pettus*, 113 U. S. 116; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352.

Although the Southern Kansas R. Co. is organized under the laws of Kansas, and by those laws is authorized to lease its railroad, such authority does not confer upon it power to lease a part of its railroad situated beyond the limits of the state, and constructed through the Indian Territory, pursuant to the powers conferred by an act of congress. *Briscoe v. Southern Kan. R. Co.*, 40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273.

The use of the words "successors and assigns" in a statute conferring authority on a company to construct its road does not impliedly authorize the company to execute a lease which deprives it of the power of fulfilling its corporate functions. *Briscoe v. Southern Kan. R. Co.*, 40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273.

Under the Ill. Act of Feb. 12, 1855, all companies have power to make contracts or arrangements with each other for leasing or running their respective roads or any part thereof. *Illinois Midland R. Co. v. People ex rel.*, 84 Ill. 426.

An ordinance giving a company license to construct its track across and along streets and alleys, upon condition that it shall permit other companies, not exceeding two in number, to use its main track, upon terms agreed upon, will not prohibit the company from leasing its track in the city to more than two other companies. *Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73.

Mass. Act of 1876, ch. 236, authorizing a certain company to mortgage its property to secure certificates of indebtedness, and

providing a scheme for the creation of a sinking fund to pay such certificates, does not prevent the company from leasing its road to another company under the act of 1880, ch. 205, where the rights of holders of such certificates of indebtedness are not injuriously affected. *Phillips v. Eastern R. Co.*, 22 Am. & Eng. R. Cas. 247, 138 Mass. 122.

The N. J. Act of May 2, 1885, entitled "An act respecting the leasing of railroads," is constitutional. *Stockton v. Central R. Co.*, 51 Am. & Eng. R. Cas. 1, 50 N. J. Eq. 52, 24 Atl. Rep. 964.—QUOTING *Montclair v. New York & G. L. R. Co.*, 45 N. J. Eq. 442.

Power under the law to mortgage or sell property, or lease it for a term, does not extend to the franchises of a corporation, including the right of way and other property essential to such franchises. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. (Civ. Cas.) 163.

Where a railway company purchasing a canal is authorized by statute to exercise all its "rights, powers, and privileges," it may take a lease of another canal, where this is a "right, power, or privilege" possessed by the canal purchased. *Rogers v. Oxford, W. & W. R. Co.*, 25 Beav. 322; affirmed on appeal in 2 De G. & J. 662.

The charter of a company provided for the purchase or condemnation of land by the company, and when the compensation therefor should be paid, that the company should be "entitled to a full, free, and perfect use and occupancy of the same for the purposes aforesaid." Subsequently its charter was amended, empowering it, among other things, to lease, "for any term of years, the whole or any part of its railroad and franchises." Held, that this authorized the company to lease lands acquired by condemnation after the amendment. *Pence v. St. Paul, M. & M. R. Co.*, 28 Minn. 488, 11 N. W. Rep. 80.—FOLLOWING *Freeman v. Minneapolis & St. L. R. Co.*, 28 Minn. 443.

13. Legislative authority necessary.—Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to

*Power of railroad companies to lease, see notes, 32 AM. & ENG. R. CAS. 409; 16 Id. 512; 2 Id. 238.

Right of corporation to lease franchises, see note, 35 AM. ST. REP. 402.

run and operate such road, property, and franchises of the first corporation. Such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 *Am. & Eng. R. Cas.* 58, 118 *U. S.* 290, 6 *Sup. Ct. Rep.* 1094.—REAFFIRMING *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71.—FOLLOWED IN *Mackintosh v. Flint & P. M. R. Co.*, 36 *Am. & Eng. R. Cas.* 340, 34 *Fed. Rep.* 582.—*Waldoborough v. Knox & L. R. Co.*, 84 *Me. 469*, 24 *Atl. Rep.* 942. *Troy & R. R. Co. v. Kerr*, 17 *Barb. (N. Y.)* 581.—APPLYING *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 *Hare* 306; *Winch v. Birkenhead, L. & C. J. R. Co.*, 13 *Eng. L. & Eq.* 506; *Shrewsbury v. Shrewsbury & B. R. Co.*, 1 *Sim. N. S.* 410; *MacGregor v. Deal & D. R. Co.*, 16 *Eng. L. & Eq.* 180; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 *C. B.* 775; *West London R. Co. v. London N. W. R. Co.*, 11 *C. B.* 254, 327; *London & S. W. R. Co. v. South Eastern R. Co.*, 8 *Ex.* 584; *Ware v. Grand Junction Water Co.*, 2 *R. & M.* 470.—*Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 7 *Am. & Eng. R. Cas.* 49, 86 *N. Y.* 107.—FOLLOWING *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 *N. Y.* 27; *People v. Albany & V. R. Co.*, 77 *N. Y.* 232.—DISTINGUISHED IN *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.—*Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81* *Pa. St.* 104.—QUOTED IN *Lewis v. Germantown, N. & P. R. Co.*, 16 *Phila. (Pa.)* 608.—*Fisher v. West Virginia & P. R. Co.*, (*W. Va.*) 58 *Am. & Eng. R. Cas.* 337, 19 *S. E. Rep.* 578.—FOLLOWING *Ricketts v. Chesapeake & O. R. Co.*, 33 *W. Va.* 433, 10 *S. E. Rep.* 801.—*East Anglian R. Co. v. Eastern Counties R. Co.*, 16 *Jur.* 249, 21 *L. J. C. P.* 23, 11 *C. B.* 775. *London, B. & S. C. R. Co. v. London & S. W. R. Co.*, 5 *Jur. N. S.* 801, 23 *L. J. Ch.* 321.

Mass. Act of 1872, ch. 180, providing that "any railroad corporation created by this state may lease its road to any other railroad corporation so created," under certain circumstances, applies to a corporation created by consolidating a Massachusetts corporation with others created in two adjoining states, the consolidation being under a Massachusetts statute, as the statute repeals the act of 1867, prohibiting the leasing of railroads without legislative authority, and

the act of 1871, subjecting railroad corporations to a forfeiture of charter for consolidating with or leasing another road without authority. *Peters v. Boston & M. R. Co.*, 114 *Mass.* 127.

Under the laws of Oregon a railroad company is not authorized to make or take leases of railroads and franchises. *Oregon R. & N. Co. v. Oregonian R. Co.*, 39 *Am. & Eng. R. Cas.* 176, 130 *U. S.* 1, 9 *Sup. Ct. Rep.* 409.

14. Leasing road by order of court to pay debts.—It appearing from the report of the commissioners that the annual rent of the railroad is \$37,000, and the debts proved are but \$1286.91, the road should be leased out for the shortest period for which a sufficient rent may be obtained to pay the debts and the costs of the suit. And if to accomplish this object it is necessary to lease the railroad for a term which will yield in rents a sum far exceeding the amount of the judgments, and cannot be leased at all for a shorter term, the creditors are entitled to have it leased for the longer term. *Winchester & S. R. Co. v. Colfell*, 27 *Gratt. (Va.)* 777, 17 *Am. Ry. Rep.* 121.

15. One company cannot guarantee another's lease without authority.—Without a law authorizing it, railroads cannot guarantee the performance of a lease of a road entered into by two other roads, the leased road being outside of the states creating the guaranteeing roads, and not connecting with their lines. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 *Am. & Eng. R. Cas.* 58, 118 *U. S.* 290, 6 *Sup. Ct. Rep.* 1094.—DISTINGUISHED IN *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 *Fed. Rep.* 423.

Ill. Act of Feb. 12, 1855, is a sufficient authority on the part of the St. Louis, Alton & Terre Haute Co. to make the lease sued on in this case. But if the other party to the contract, the Indianapolis & St. Louis Co., had no such authority, the contract is void as to it; and if the other companies had no power to guarantee its performance it is void as to them, and cannot give a right of action against them. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 *Am. & Eng. R. Cas.* 58, 118 *U. S.* 290, 6 *Sup. Ct. Rep.* 1094.

Section 3303, Rev. Laws Vt., which provides that railroad companies may make contracts for leasing and running the roads of other companies, confers upon a railroad

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company power to enter into a lease by which it agrees to guarantee payment of the interest coupons on the mortgage bonds of the lessor company. *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 *Am. & Eng. R. Cas.* 566, 40 *Fed. Rep.* 423.

16. Obligations to public not avoided by unauthorized lease.*—

The franchises and powers granted to railway corporations are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve itself from their obligation without the consent of the state, is a violation of its contract with the state, and is forbidden by public policy, and therefore void. *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71.—REVIEWED IN *Stockton v. Central R. Co.*, 50 *N. J. Eq.* 52.—*Gulf, C. & S. F. R. Co. v. Morris*, 35 *Am. & Eng. R. Cas.* 94, 67 *Tex.* 692, 4 *S. W. Rep.* 156.—FOLLOWED IN *International & G. N. R. Co. v. Underwood*, 34 *Am. & Eng. R. Cas.* 570, 67 *Tex.* 589.—*International & G. N. R. Co. v. Moody*, 35 *Am. & Eng. R. Cas.* 607, 71 *Tex.* 614, 9 *S. W. Rep.* 465. *Ricketts v. Chesapeake & O. R. Co.*, 41 *Am. & Eng. R. Cas.* 42, 33 *W. Va.* 433, 7 *L. R. A.* 354, 10 *S. E. Rep.* 801.—APPROVING *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 *U. S.* 309; *Grand Tower M. & T. Co. v. Ullman*, 89 *Ill.* 244; *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71. QUOTING *New York & M. L. R. Co. v. Winans*, 17 *How. (U. S.)* 31; *Washington A. & G. R. Co. v. Brown*, 17 *Wall. (U. S.)* 445. REVIEWING *Naglee v. Alexandria & F. R. Co.*, 83 *Va.* 707.

17. Validity of leases, generally.—

In the absence of a state statute forbidding railroads of the state from leasing their property, a lease is valid when not against public policy. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 *Biss. (U. S.)* 456.—DISTINGUISHED IN *Moran v. Pittsburgh, C. & St. L. R. Co.*, 32 *Fed. Rep.* 878.

Where one company owns substantially all the stock and bonds of another, a lease of the latter's line, for rent to be paid to the former, is not void for want of consideration. *Union Pac. R. Co. v. Chicago, R. I. & P. R.*

* Company cannot by lease divest itself of duties or responsibilities, see note, 4 *L. R. A.* 135.

Co., 51 *Am. & Eng. R. Cas.* 162, 51 *Fed. Rep.* 309, 10 *U. S. App.* 98, 2 *C. C. A.* 174; affirming 47 *Am. & Eng. R. Cas.* 340, 47 *Fed. Rep.* 15.

It is not unlawful or improper to lease ground for the purpose of having an elevator erected thereon. Such structures are not only universal along railroad lines, but in the development and promotion of commerce, necessitating increased facilities in methods of farm products, they are recognized as invaluable auxiliaries in the commerce of the country. *Gilliland v. Chicago & A. R. Co.*, 19 *Mo. App.* 411.

An agreement between two companies whereby one of them agrees to withdraw its opposition to a bill in parliament providing for the leasing of a portion of the other company's line to a third company, is no fraud upon parliament so as to make the agreement invalid. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 17 *Q. B.* 652, 16 *Jur.* 311, 21 *L. J. Q. B.* 89; affirming 2 *M. & G.* 324, 2 *H. & T.* 257, 14 *Jur.* 921, 20 *L. J. Ch.* 90.

A company incorporated for making and maintaining a railway sanctioned by its act can only apply its funds for special purposes, and an agreement with another company to take a lease of its line is illegal, although the object of it might have been increased profits. *East Anglian R. Co. v. Eastern Counties R. Co.*, 16 *Jur.* 249, 21 *L. J. C. P.* 23, 7 *Railw. Cas.* 150, 11 *C. B.* 775.

18. Validity of leases not authorized by charter.—The powers of corporations organized under legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71.—APPLIED IN *New Castle Northern R. Co. v. Simpson*, 21 *Fed. Rep.* 533. APPROVED IN *Frazier v. East Tenn., V. & G. R. Co.*, 40 *Am. & Eng. R. Cas.* 358, 88 *Tenn.* 138, 12 *S. W. Rep.* 537. DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371; *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 *Fed. Rep.* 423; *Cleveland & M. R. Co. v. Himrod Furnace Co.*, 37 *Ohio St.* 321. QUOTED IN *Taylor v. Philadelphia & R. R. Co.*, 3 *Am. & Eng. R. Cas.*

163, 7 Fed. Rep. 386; *McCalmont v. Philadelphia & R. R. Co.*, 14 Phila. (Pa.) 479.

A lease by a company of all its road, rolling stock, and franchises, for which there is no authority given in its charter, is *ultra vires* and void. *Thomas v. West Jersey R. Co.*, 101 U. S. 71.—DISTINGUISHED IN *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 440; *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 10 U. S. App. 98, 2 C. C. A. 174. FOLLOWED IN *Mackintosh v. Flint & P. M. R. Co.*, 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582; *American Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 188. QUOTED IN *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497, 119 Ill. 68; *State ex rel. v. Atchison & N. R. Co.*, 32 Am. & Eng. R. Cas. 388, 24 Neb. 143; *Toledo, C. & St. L. R. Co. v. Hinsdale*, 45 Ohio St. 556. REAFFIRMED IN *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290.

The ordinary clause in the charter authorizing the company to contract with other transportation companies for the mutual transfer of goods and passengers over each other's roads confers no authority to lease its road and franchises. *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

19. Validity of leases by corporations to individuals.—A railroad corporation organized under the general railroad act has no authority, without the consent of the legislature, to lease its road to an individual, and where it has so done the lessor is responsible to the public for the manner of operating the road; as to the public, those operating it must be regarded as agents of the corporation. (Folger, J., dissenting.) *Abbott v. Johnstown, G. & K. H. R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572.—FOLLOWING *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Macon & A. R. Co. v. Mayes*, 49 Ga. 355; *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.—DISTINGUISHED IN *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433.—*Durfee v. Johnstown, G. & K. H. R. Co.*, 71 Hun (N. Y.) 279.—DISTINGUISHING *Beveridge v. New York El. R. Co.*, 112 N. Y. 1. RECONCILING *Woodruff v. Erie R. Co.*, 25 Hun 246.

But it may lease to other railroad corporations under the act of 1839, ch. 218. *Fisher v. Metropolitan El. R. Co.*, 34 Hun

(N. Y.) 433.—DISTINGUISHING *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y. 27.

A lease of the road and franchises to an individual is neither *malum prohibitum* nor *malum in se*, nor is it void as contrary to public policy. *Woodruff v. Erie R. Co.*, 16 Am. & Eng. R. Cas. 501, 93 N. Y. 609; reversing 25 Hun 246.—APPLIED IN *Day v. Ogdensburgh & L. C. R. Co.*, 107 N. Y. 129. EXPLAINED IN *Metropolitan Trust Co. v. New York, L. E. & W. R. Co.*, 45 Hun 84.—FOLLOWED IN *Beveridge v. New York El. R. Co.*, 112 N. Y. 1, 19 N. E. Rep. 489, 20 N. Y. S. R. 962. QUOTED IN *Gere v. New York C. & H. R. R. Co.*, 19 Abb. N. Cas. (N. Y.) 193.

And a lessee who has, under such a lease, had the possession and use of the property, is estopped from questioning its validity in an action to recover the stipulated rent. The estoppel which thus binds the lessee also binds all who claim through or under him. *Woodruff v. Erie R. Co.*, 16 Am. & Eng. R. Cas. 501, 93 N. Y. 609; reversing 25 Hun 246.—APPLYING *Bissell v. Michigan & N. I. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504. DISTINGUISHING *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.—FOLLOWED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 259; *Easton v. Houston & T. C. R. Co.*, 38 Fed. Rep. 784; *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 48 N. J. L. 530; *Fisher v. Metropolitan El. R. Co.*, 34 Hun 433.

20. When consent of stockholders necessary.—A statute requiring the consent of stockholders to a lease of the road is for their personal benefit, and may be waived by long acquiescence. So where a company leases its road, it cannot, after the lapse of nineteen years, maintain a suit to set aside the lease because it was not by the written consent of the stockholders. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 440; affirmed in 52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953.—DISTINGUISHING *Thomas v. West Jersey R. Co.*, 101 U. S. 71. FOLLOWING *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462; *Taylor v. South & N. Ala. R. Co.*, 4 Woods (U. S.) 575; *Beecher v. Marquette & P. Rolling Mill Co.*, 45 Mich. 103, 7 N. W. Rep. 695.

The provision in Ill. Act, Feb. 16, 1865, that a lease of a railroad in Illinois to a rail-

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road out of the state, without first having obtained the written consent of all the stockholders of the lessor road residing in the state, shall be null and void, does not limit the scope of the powers conferred upon the corporation by law, an exercise of which could not be ratified or be made good by estoppel, but only prescribes regulations as to the manner of exercising corporate powers, compliance with which the stockholders may waive, or the corporation might be estopped by lapse of time, or otherwise, to deny. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 *Am. & Eng. R. Cas.* 68, 145 *U. S.* 393, 12 *Sup. Ct. Rep.* 953; *affirming* 33 *Fed. Rep.* 440.—DISTINGUISHING *Archer v. Terre Haute & I. R. Co.*, 102 Ill. 493.

Under Neb. St. 204, § 152, a railroad corporation cannot lease its franchise and property for the full term of its corporate existence without being ratified by the stockholders; but if such a lease be made and the lessee takes possession and uses the road, the lessor may recover a just compensation for the use of the road, so long as the lease is acted on. *Farmers' L. & T. Co. v. St. Joseph & D. C. R. Co.*, 1 *McCrary (U. S.)* 247, 2 *Fed. Rep.* 117.

Under Neb. Gen. St. ch. 2, § 94, a railroad lease cannot be perfected until a meeting of the stockholders has been called and two thirds at least of those present or represented shall assent thereto; and such statute is mandatory, and renders a lease void that is executed without such assent given in an assembled meeting. *Peters v. Lincoln & N. W. R. Co.*, 2 *McCrary (U. S.)* 275, 12 *Fed. Rep.* 513.

And such a meeting of the stockholders cannot be dispensed with because they have given their assent in some other mode. *Peters v. Lincoln & N. W. R. Co.*, 2 *McCrary (U. S.)* 275, 12 *Fed. Rep.* 513.

The above statute requires, as a condition precedent to the execution of the lease of a railroad, that the directors of each of the corporations shall call a meeting of the stockholders of each, at which meeting the holders of at least two thirds of the stock represented in person or by proxy and voting, shall assent thereto. *Peters v. Lincoln & N. W. R. Co.*, 4 *McCrary (U. S.)* 269, 14 *Fed. Rep.* 319.

21. Leases as affecting rights of stockholders, generally.—Where there is no legislative authority for ascertaining

the damage inflicted upon dissenting stockholders by the majority diverting their vested rights by an illegal lease, and for awarding them compensation therefor, the court will not assume that function, but will annul the lease and restore complainants to their position before those rights were invaded, regardless of the effect of such action upon the lessee. *Mills v. Central R. Co.*, 24 *Am. & Eng. R. Cas.* 47, 41 *N. J. Eq.* 1, 2 *Atl. Rep.* 453.

N. J. Act of 1880, supplementary to the general railroad law of the state, providing that any railroad may lease, consolidate, or merge with another road, does not authorize a lease by directors against a minority of dissenting stockholders. *Mills v. Central R. Co.*, 24 *Am. & Eng. R. Cas.* 47, 41 *N. J. Eq.* 1, 2 *Atl. Rep.* 453.

Neither does the act of 1881, p. 222, authorizing railroad corporations of the state to merge or consolidate with those of adjoining states, and providing for compensation to dissenting stockholders, authorize a lease by one company to another. *Mills v. Central R. Co.*, 24 *Am. & Eng. R. Cas.* 47, 41 *N. J. Eq.* 1, 2 *Atl. Rep.* 453.

Neither does the act of 1854, amending defendant company's charter, and authorizing it to purchase, lease, or operate any connecting railroad, and providing for the protection of the rights of dissenting stockholders, authorize a lease of defendant's road. *Mills v. Central R. Co.*, 24 *Am. & Eng. R. Cas.* 47, 41 *N. J. Eq.* 1, 2 *Atl. Rep.* 453.

When, by the provisions of the lease of a railroad, the lessee agrees to pay a fixed sum semi-annually, and guarantees to the lessor "an annual dividend of ten per cent.," and undertakes to pay such amount to the lessor, such lease is not a contract to which the stockholders of the company are privies, and cannot be enforced by them, although it contains a stipulation that the lessee shall, upon presentation of the certificates of stock of the lessor company, execute thereon a guaranty in terms of the lease. *Beveridge v. New York El. R. Co.*, 39 *Am. & Eng. R. Cas.* 199, 112 *N. Y.* 1, 19 *N. E. Rep.* 489, 20 *N. Y. S. R.* 962; *affirming* 42 *Hun* 656, *mem.*, 5 *N. Y. S. R.* 59.—APPLYING *Flagg v. Manhattan R. Co.*, 20 *Blatchf. (U. S.)* 142. REVIEWING *Harkness v. Manhattan R. Co.*, 22 *J. & S. (N. Y.)* 174.—DISTINGUISHED IN *Durfee v. Johnstown, G. & K. H. R. Co.*, 71 *Hun* 279.

An agreement between two railway companies containing a covenant to divide the profits earned upon the line common to both companies, is no such fraud upon the shareholders of either company as renders the agreement invalid. *Shrewsbury & B. R. Co. v. London & N. W. R. Co.*, 17 Q. B. 652, 16 Jur. 311, 21 L. J. Q. B. 89; affirming 2 M. & G. 324, 2 H. & T. 257, 14 Jur. 921, 20 L. J. Ch. 90.

The bondholders of a railroad company were, after foreclosure of a trust mortgage of the road, incorporated as a new company to succeed to all the rights of the old, with a provision that the capital stock should be forty thousand shares, of which thirty thousand should be preferred and ten thousand common stock, and that no dividend should be made on the common stock until after one of seven per cent. had been made on the preferred. The charter of the old company gave it power to lease the road to any other connecting company, that of the new company requiring a vote of three fourths for the purpose. *Held*, that the company had power, by a three-fourths vote, to lease the road for ninety-nine years to a connecting road at a fixed annual rental. And the court refused to set aside such a lease, although the entire rental was but four per cent. on the preferred stock, and was to go, not to the company, but directly to the preferred stockholders as a percentage on their stock. *Middletown v. Boston & N. Y. Air Line R. Co.*, 24 Am. & Eng. R. Cas. 153, 53 Conn. 351, 5 Atl. Rep. 706.

By the defendant company's charter the old bondholders were authorized to convert their bonds into its stock. The plaintiff town was a holder of some of the common stock. *Held*, that it could not, in its suit to set aside the lease, avail itself of the fact that some of the bondholders of the old company had not exchanged their bonds for stock, and denied the validity of the organization of the new company, nor of the fact that no provision was made in the lease for the payment of certain creditors of the company. *Middletown v. Boston & N. Y. Air Line R. Co.*, 24 Am. & Eng. R. Cas. 153, 53 Conn. 351, 5 Atl. Rep. 706.

Mass. St. of 1876, ch. 236, authorized the Eastern R. Co. to mortgage its property to trustees, to secure certificates of indebtedness to be issued to its creditors, payable in thirty years, and provided a scheme by which the holders of certificates were to

choose two thirds, and the stockholders one third, of the directors, until the debt should be reduced to a certain sum, when the power of the holders of such certificates to choose directors should cease. Until the debt should be reduced to the sum stated, all the net earnings were to be applied to the creation of a sinking fund, and, when so reduced, a certain sum annually was to be so applied. The St. of 1880, ch. 205, authorized the Eastern R. Co. to lease its property to another railroad company. The St. of 1882, ch. 177, authorized the Eastern R. Co. to increase its capital stock by issuing preferred stock to a certain amount, in exchange for certificates of indebtedness, and provided that such certificates, when received, should be canceled, and that the holders of such preferred stock should receive dividends out of the net earnings not exceeding a certain amount, semi-annually, in such sums as the directors might determine; and that nothing contained in the act should affect the rights of the holders of certificates under the St. of 1876, or authorize payments from the earnings of the corporation, except subject to the claims and charges created by the St. of 1876, and the mortgage. The Eastern R. Co., after this, proposed to execute a lease under the St. of 1880, for fifty-five years, by which the holders of preferred stock were to receive semi-annually an amount by way of dividend equal to the interest on the debt extinguished, as a fixed charge entitled to priority under the lease. *Held*, on a bill in equity to restrain the execution of the lease, that the holders of preferred shares of stock were to be treated as stockholders, and not as creditors; that the provision in the lease affected injuriously the rights of holders of certificates of indebtedness, and that an injunction must issue. *Phillips v. Eastern R. Co.*, 22 Am. & Eng. R. Cas. 247, 138 Mass. 122.

22. Remedy of dissenting stockholders.—If a company, without authority, leases its road, the lessee will only be the servant of the company owning the road, and such company will not be, by the act of leasing, discharged from its contracts or liabilities. A subscriber to the stock of the company owning the road, when he has paid his subscription and received his certificate of stock, will have equitable rights to be protected by the courts, and may pre-

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vent gross mismanagement of the property and misapplication of the funds of the corporation. But the mere fact of leasing, and probable, or even certain, loss in the earnings of the company, will constitute no defense to the payment of the subscription. If the lease is contrived for the purpose of defrauding the stockholders and sacrificing their rights, or to pervert the franchises and property from their legitimate to fraudulent and illegal purposes, a court of equity will afford the requisite relief; but these are questions that cannot be investigated in a court of law, in an action on a subscription. *Ottawa, O. & F. R. F. R. Co. v. Black*, 79 Ill. 262.—REVIEWED IN *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 65 N. H. 393.

A lease of a railroad, approved by a two-thirds vote of the stockholders, and made in compliance with the act of 1883, is not contrary to public policy, and cannot be set aside at the suit of the state, or at the suit of the stockholders who voted to approve it. If it is illegal, its illegality does not extend beyond its violation of the partnership contract of the stockholders, and of that violation an objecting minority alone can complain. *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529.

The mere fact that the same persons were directors of both the lessor and the lessee corporations is not of itself sufficient to avoid the lease at the instance of one or more stockholders, against the will of the corporation. The fact alone might entitle either corporation to avoid the lease, but does not give that right to a stockholder. *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460.—QUOTED IN *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 Am. & Eng. R. Cas. 1, 11 Daly (N. Y.) 373, 14 Abb. N. Cas. 103.

Upon taking a lease of another railroad, the lessee company guaranteed a ten per cent. annual dividend on the capital stock of the company leased, and also agreed to execute a guaranty to that effect upon the certificates of stock of the leased company. Afterwards an agreement was entered into between the two companies for a reduction of the payment to a six per cent. annual dividend. *Held*, that a stockholder, not being privy to the contract, had no rights except such as the company issuing the stock might itself have, and was not entitled to a mandamus to compel an issue of

certificates for the payment of the ten per cent. dividend. *People ex rel. v. Metropolitan El. R. Co.*, 26 Hun (N. Y.) 82. *Harkness v. Manhattan R. Co.*, 11 N. Y. S. R. 732; *affirming* 22 J. & S. 174; *affirmed in* 113 N. Y. 627, *mem.*, 20 N. E. Rep. 877.

After one road had leased another and had agreed to pay annually a sum equal to ten per cent. on the capital stock of the leased company, the companies modified the lease so as to provide for a sum equal to six per cent. The directors of both companies were substantially the same. *Held*, that this action was voidable at the election of either company, so far as the power of the directors was concerned; but their act having been approved by the stockholders, at a meeting free from fraud, it was valid and binding. *Harkness v. Manhattan R. Co.*, 11 N. Y. S. R. 732; *affirming* 22 J. & S. 174; *affirmed in* 113 N. Y. 627, *mem.*, 20 N. E. Rep. 877.

23. Rights of stockholders where

lease is fraudulent.—

The S. B. & E. J. R. Co., defendant, was incorporated to construct a railroad to connect the road of the E. R. Co. with other roads; some of the incorporators were directors of the latter company. In June, 1870, a contract was made by the new company, ostensibly with one S., who agreed to construct the road, the company to issue in payment therefor \$1,000,000 of its bonds and \$500,000 of its capital, which was to constitute all of its stock and bond debt. S. in reality acted for a syndicate composed wholly of members of the board of directors of said company, part of whom were also directors of the E. R. Co.; S., a few days thereafter, assigned the contract to the syndicate. In July, 1870, the new company leased all of its property and franchises to the E. R. Co., the lessee agreeing to pay as rent a certain proportion of the gross earnings, guaranteeing that this should never be less than \$105,000. The executive committee of the E. R. Co. passed a resolution, which, after reciting the lease and the guaranty of a rental equal to seven per cent. interest on the bonds, and seven per cent. dividends on the stock of the lessor, authorized the execution of the guaranty of the payment of semi-annual dividends of three and one half per cent. on the stock. The stock and bonds were issued to members of the syndicate; they expended about \$850,000 in the construction of the road. In December,

1870, the road, being about completed, was taken possession of by the lessee. In February, 1871, the directors of the lessor formally ratified the lease. In 1875 the lessee became insolvent; a receiver was appointed, who, by authority of the court, continued to operate the leased road. The lessee and its receiver bought in all of the stock of the lessor, except certain shares owned by plaintiffs, and thereby obtained complete control, and thereafter elected directors in the interest of the lessee. The property and assets of the lessee, including the lease, were sold under a mortgage foreclosure judgment. In 1878 the N. Y., L. E. & W. R. Co. became the owner, it covenanting to pay all of the receiver's liabilities, and it has since continued to operate the leased road, which is of great value to it as connecting its own and other roads, but it has paid nothing except interest on the bonds, refusing to pay that portion of the rental represented by the guaranty of dividends on the stock. In an action to compel the N. Y., L. E. & W. R. Co., as successor in interest of the lessee, to pay the balance of the rent reserved, the trial court found that the syndicate, fraudulently and for their own benefit and gain, caused the building contract, the lease, and the guaranties to be made, and directed a dismissal of the complaint. *Held*, error; that the fraudulent nature of the transaction did not render the lease absolutely void, but simply voidable; and that the lessee and its successor in interest could not retain the possession and enjoy the use of the leased property, after knowledge of the fraud, and with opportunity to act in repudiation, without becoming liable to pay the rent reserved; that the vice in the original transaction did not necessarily so affect the lease as to prevent ratification, or its survival after acts on the part of the lessee and its successor in interest, with knowledge of the fraud, amounting in effect to acquiescence and waiver. *Barr v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 329, 125 *N. Y.* 263, 26 *N. E. Rep.* 145, 34 *N. Y. S. R.* 188, 5 *N. Y. Supp.* 623.—*RECONCILING* Munson *v.* Syracuse, G. & C. R. Co., 103 *N. Y.* 58; *Wardell v. Union Pac. R. Co.*, 103 *U. S.* 651.—*FOLLOWED IN* Coe *v.* East & W. R. Co., 52 *Fed. Rep.* 531.

Plaintiffs, as stockholders, could maintain the action, as their corporation was

wholly under the control of its lessee. *Barr v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 329, 125 *N. Y.* 263, 26 *N. E. Rep.* 145, 34 *N. Y. S. R.* 188, 5 *N. Y. Supp.* 623.

The N. Y., L. E. & W. R. Co. was not in a position to question the legality or validity of the issue of the shares of stock held by plaintiffs, as the members of the syndicate that built the road of the S. B. & E. J. R. Co. were practically the company, they holding all of its stock, and so the manner in which they chose to build the road and to divide up their interests concerned only themselves, and however illegal the transaction, no one, so far as appeared, could complain. *Barr v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 329, 125 *N. Y.* 263, 26 *N. E. Rep.* 145, 34 *N. Y. S. R.* 188, 5 *N. Y. Supp.* 623.

It seems that no principle of law forbade the said company from agreeing to pay for the construction of its road in the way or in the amount it did. *Barr v. New York, L. E. & W. R. Co.*, 47 *Am. & Eng. R. Cas.* 329, 125 *N. Y.* 263, 26 *N. E. Rep.* 145, 34 *N. Y. S. R.* 188, 5 *N. Y. Supp.* 623.

24. When directors may execute.

—If power to lease its railroad is conferred upon a corporation by its charter or by statute, the board of directors may, without the consent of the stockholders, execute a lease thereof. *Beveridge v. New York El. R. Co.*, 39 *Am. & Eng. R. Cas.* 199, 112 *N. Y.* 1, 19 *N. E. Rep.* 489, 20 *N. Y. S. R.* 962; *affirming* 42 *Hun* 656, 5 *N. Y. S. R.* 59.—*FOLLOWING* Woodruff *v.* Erie R. Co., 93 *N. Y.* 616. *REVIEWING* People *v.* O'Brien, 111 *N. Y.* 1.

An agreement by which the lessor of a railroad agrees to accept from the lessee a smaller rental on account of financial embarrassment of the lessee, is within the power of the board of directors, without any concurrent action or ratification by the stockholders. *Beveridge v. New York El. R. Co.*, 39 *Am. & Eng. R. Cas.* 199, 112 *N. Y.* 1, 19 *N. E. Rep.* 489, 20 *N. Y. S. R.* 962; *affirming* 42 *Hun* 656, 5 *N. Y. S. R.* 59.—*QUOTING* Hoyt *v.* Thompson, 19 *N. Y.* 216.

A railroad corporation can only effect a lease of its road or make substantial modifications of an existing lease by the concur-

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A railroad company leased its road to another company, and subsequently by agreement modified the terms of the lease. A bill being filed to set aside the agreement—*held*, that the objection could not be raised that the original lease was a nullity, being made without authority of law, and that the effect of a decree in accordance with the prayer of the bill would be to reinstate it, as it did not follow that such would be the result. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

The complaint stated that a lease was executed by the officers of the defendant corporation in pursuance of a resolution duly passed by its board of directors; the answer admitted the execution of the lease under the corporate seal, but alleged that the meeting at which the resolution was passed authorizing such execution was held without a quorum; the reply denied knowledge or information concerning the want of a quorum sufficient to form a belief. *Held*, that the burden of proof was on the defendant. *Oregonian R. Co. v. Oregon R. & N. Co.*, 10 *Sawyer (U. S.)* 109.

25. Void leases as affected by laches and other acts of parties.—An unauthorized lease by officers of a corporation will be declared invalid; and mere silence will not be construed as acquiescence. *Kersey Oil Co. v. Oil Creek & A. R. Co.*, 12 *Phila. (Pa.)* 374.—*QUOTING Gordon v. Preston*, 1 *Watts (Pa.)* 387.

If a corporation has no power to make a lease, it has no power to ratify it by accepting rent thereunder. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 4 *Hun (N. Y.)* 268, 6 *T. & C.* 488.

The fact that a majority of the directors of a lessor company are personally interested in the lessee company will not make the lease void, but merely voidable at the election of the lessor, or at the suit of stockholders brought within a reasonable time. *Jesup v. Illinois C. R. Co.*, 43 *Fed. Rep.* 483.

26. Ultra vires leases.—(1) *General rules.*—A lease by one railroad corporation of its property and franchises to another corporation for a period of twenty years or

more is, in the absence of all legislative authority to make such lease, *ultra vires* and void. *Memphis & C. R. Co. v. Grayson*, 43 *Am. & Eng. R. Cas.* 681, 88 *Ala.* 572, 7 *So. Rep.* 122.

A lease whereby a railroad company attempts to transfer its entire road and franchises, in consideration of a stipulated rent as a dividend on the stock, is *ultra vires*. *Middlesex R. Co. v. Boston & C. R. Co.*, 115 *Mass.* 347, 7 *Am. Ry. Rep.* 469.—*DISTINGUISHED IN* *Cleveland & M. R. Co. v. Himrod Furnace Co.*, 37 *Ohio St.* 321.

And such lease being invalid, the lessee cannot recover from the lessor the expenses of renewing the road. *Middlesex R. Co. v. Boston & C. R. Co.*, 115 *Mass.* 347, 7 *Am. Ry. Rep.* 469.

Where an unauthorized lease for twenty years was made, and the lessors resumed possession at the end of five years, and the accounts for that period were adjusted and paid, a condition in the lease to pay the value of the unexpired term is void, the case not coming within the principle that executed contracts originally *ultra vires* shall stand good for the protection of rights acquired under a completed transaction. *Thomas v. West Jersey R. Co.*, 101 *U. S.* 71.—*DISTINGUISHED IN* *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 48 *N. J. L.* 530. *QUOTED IN* *Taylor v. South & N. Ala. R. Co.*, 4 *Woods (U. S.)* 575.

Where an action is on a lease to recover some consideration thereunder, the defendant may attack it on the ground of *ultra vires*, but where the action is by the lessee against a third party for services rendered, the authority of the lease cannot be called in question. *Southern Pac. Co. v. United States*, 28 *Ct. of Cl.* 77.

Where one company leases its road to another, a provision that the lessee company shall pay by way of rent the interest on the mortgage bonds of the lessor during the lease, and the principal on the bonds at its termination, is not *ultra vires*. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.

An agreement between three railway companies, that they will participate in portions of each other's profits, and that two of such companies, who propose to assume the relations of lessor and lessee, shall not take traffic on specified portions of their lines, is *ultra vires* and will not be specifically enforced. *Shrewsbury & B. R. Co. v. London*

& *N. W. R. Co.*, 4 *De G., M. & G.* 115, 17 *Jur.* 845, 22 *L. J. Ch.* 682.

(2) *Illustrations.*—The *L. M. & B. R. Co.*, organized to construct, own, and maintain a railroad from Muncie, Ind., by way of Lafayette, to the western boundary of the state, in the direction of Bloomington, Ill., by a written agreement with the *L. B. & M. R. Co.*, organized to construct a railroad from Bloomington, Ill., to the eastern boundary of that state, in the direction of Lafayette, Ind., transferred, granted, and conveyed to the latter company, its lessees, successors, and assigns, for the period of ninety-nine years, renewable at the pleasure of the latter company, the exclusive right to transport passengers and freight over that part of the railroad of the former company lying between Lafayette and the western state line, with possession thereof, the said latter company to use and maintain said part of said road, pay the taxes thereon, perform certain contracts theretofore made by the former company, and pay to the former company, or for its use, certain sums of money, said agreement being made by the directors and officers of said companies, without the consent of their stockholders. Said latter company assigned said agreement to the *T. W. & W. R. Co.* owning and operating a railroad running from Toledo, Ohio, to Quincy, Ill., by the way of Lafayette, Ind. *Held*: (1) that said agreement was *ultra vires* and void; (2) that an action would lie on behalf of a stockholder of the *L. M. & B. R. Co.*, without previous demand by him for redress on the directors of said company and a refusal by them, against all said companies, for an injunction and to declare void said agreement and assignment, and that the fact that after the commencement of such action the *L. M. & B. R. Co.* filed a cross-complaint therein, seeking the same relief, was not a sufficient answer on behalf of the other two companies to the original complaint. *Tippecanoe County Com'rs v. Lafayette, M. & B. R. Co.*, 50 *Ind.* 85, 8 *Am. Ry. Rep.* 324.—REVIEWED IN *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 *Biss. (U. S.)* 456.

In 1863 a Rhode Island railroad corporation executed a lease of its road to a Connecticut corporation *in perpetuum*, with a provision that the stockholders of the former should receive stock in the latter, or a fixed price in money. This lease was ratified by the Rhode Island legislature in 1865. A

year later the lessee company mortgaged the road, and became bankrupt, and was dissolved by a court in Connecticut in 1873. The mortgage was foreclosed in Rhode Island, in 1875, the road sold, and a new corporation formed. Soon afterwards certain stockholders of the leased road filed a bill to redeem, alleging that the lease was *ultra vires*, obtained by fraud, and subject to certain conditions precedent which had not been performed. *Held*, that the lease was *ultra vires*, but that complainants, by their delay and by allowing the intervention of other equities, were precluded from relief. *Boston & P. R. Corp. v. New York & N. E. R. Co.*, 2 *Am. & Eng. R. Cas.* 300, 13 *R. I.* 260.—FOLLOWED IN *Emerson v. New York & N. E. R. Co.*, 16 *Am. & Eng. R. Cas.* 404, 14 *R. I.* 555. QUOTED IN *Providence Coal Co. v. Providence & W. R. Co.*, 15 *R. I.* 303.

Certain provisions in the agreement relative to the cost of purchasing and completing another road, to the stock subscriptions of the *B. H. & E. R. Co.*, and to the issue and transfer of stock to trustees, could not be considered conditions precedent to the transfer. *Boston & P. R. Corp. v. New York & N. E. R. Co.*, 2 *Am. & Eng. R. Cas.* 300, 13 *R. I.* 260.

27. Authority to lease a connecting road may include a competing road.—By New York Act of 1859, ch. 444, defendant company was authorized to take and accept a lease of any connecting road, or that might thereafter connect, and to run and operate the same. *Held*, that this authorized defendant to lease a competing road if the two were capable of forming a continuous line. *Wallace v. Long Island R. Co.*, 12 *Hun (N. Y.)* 460.

In such case it was not necessary that the leased road should connect with defendant's road at its terminus. It was sufficient if it intersected at any point. *Wallace v. Long Island R. Co.*, 12 *Hun (N. Y.)* 460.

The lease of a competing road would not be void as a violation of New York Act of 1869, ch. 917, providing generally for the consolidation of railroads, but prohibiting it as to parallel or competing roads. *Wallace v. Long Island R. Co.*, 12 *Hun (N. Y.)* 460.

28. Leases for a long term of years.—Unless expressly authorized by the charters of both companies, or by the laws of the states creating them, a lease of one railroad for the period of 999 years is wholly void, and cannot be subsequently ratified.

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Under section 1920 of the Code of Iowa, which provides that every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being, and for 21 years thereafter, the lease of a railroad for the term of 999 years, with a rent reserved of 30 per cent. of the gross earnings of the road, is not prohibited, where the right to dispose of the fee remains in the lessor. *Todhunter v. Des Moines, I. & M. R. Co.*, 7 *Am. & Eng. R. Cas.* 67, 58 *Iowa* 205, 12 *N. W. Rep.* 267.

Under the laws of Indiana, without express grant, a railroad company cannot be a party to the lease of a railroad for a term of 99 years. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 *Am. & Eng. R. Cas.* 58, 118 *U. S.* 290, 6 *Sup. Ct. Rep.* 1094.—FOLLOWED IN *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 *U. S.* 393, 12 *Sup. Ct. Rep.* 953.

Where a railroad company, without authority of law, leases its road to another railroad company, with all its rights, property, and franchises, for a long period of time, it thereby abandons the operation of its road, and is subject to forfeiture. *State ex rel. v. Atchison & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 388, 24 *Neb.* 143, 38 *N. W. Rep.* 43.

Where a road is incorporated for a term of 100 years, a lease of its property and franchises for 475 years is not necessarily void because it extends beyond the company's corporate existence. It may be valid for the period of the company's corporate existence, and beyond that time its validity will depend upon the extension of the company's existence. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.

The Pennsylvania R. Co. being about to purchase the rolling stock and bonds of the Sunbury & Erie R. Co. and to lease it for the term of 999 years, the lessee agreeing, by the contract, to keep the road in repair, maintain its equipment, and pay 30 per cent. of the gross earnings for taxes, interest on bonds, etc., and the balance, if any, to the

lessors; on bill in equity, filed by a stockholder in both companies, for a preliminary injunction against the proposed purchase and lease—*held*, that the intended contracts were valid, because within the corporate power of the two companies, under the Acts of Assembly of April 13, 1860, and April 23, 1861, and that they were not assignments in trust for the benefit of creditors, with preferences. *Gratz v. Pennsylvania R. Co.*, 41 *Pa. St.* 447.—DISTINGUISHING *Lucas v. Sunbury & E. R. Co.*, 32 *Pa. St.* 458.—FOLLOWED IN *Wood v. Bedford & B. R. Co.*, 8 *Phila. (Pa.)* 94. REVIEWED IN *Black v. Delaware & R. Canal Co.*, 22 *N. J. Eq.* 130.

29. Leases to or from foreign corporations.—Under Rev. St. Ill. 1874, ch. 114, § 34, which provides that all railroad companies incorporated under the laws of the state are empowered to make "contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running other roads, or any part thereof," the words "other roads" include roads of Illinois corporations as well as roads of corporations of other states, and the power conferred on corporations of Illinois to make contracts "for leasing" such roads includes making as well as taking leases thereof. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 *Am. & Eng. R. Cas.* 68, 145 *U. S.* 393, 12 *Sup. Ct. Rep.* 953.

Where the parties to a lease are *in pari delicto*, and the contract has been executed on the part of the plaintiff by the delivery of the leased property, the plaintiff cannot recover back the possession of the property leased; so where the lease of an Illinois railroad to an Indiana railroad is *ultra vires* as to the latter, the former is bound to take notice of such fact. Where the contract of lease has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant, and the defendant has held the property and paid the stipulated consideration from time to time for seventeen years, so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches in failing to bring an action to set the lease aside in that time. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 *Am. & Eng. R. Cas.* 68, 145 *U. S.* 393, 12 *Sup. Ct. Rep.* 953; *affirming*

33 *Fed. Rep.* 440.—FOLLOWING Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. Rep. 1094.

The provision in Illinois Act of Feb. 16, 1865, that a lease of a railroad in Illinois to a railroad out of Illinois, without first having obtained the written consent of all the stockholders of the lessor road residing in the state of Illinois, shall be null and void, does not limit the scope of the powers conferred upon the corporation by law, an exercise of which could not be ratified or be made good by estoppel, but only prescribes regulations as to the manner of exercising corporate powers, compliance with which the stockholders may waive, or the corporation might be estopped by lapse of time, or otherwise, to deny. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 52 *Am. & Eng. R. Cas.* 68, 145 U. S. 393, 12 *Sup. Ct. Rep.* 953; affirming 33 *Fed. Rep.* 440.—FOLLOWING Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290.

Without enabling legislation a railroad company possesses no power to lease its road to a foreign corporation, and surrender its road and franchises into its control. *Archer v. Terre Haute & I. R. Co.*, 7 *Am. & Eng. R. Cas.* 249, 102 *Ill.* 493.

Section 1, ch. 71, Minn. Sp. Laws 1871, does not consent to the defendant leasing its road unless to a railroad company of this state. Sections 69, 106, ch. 34, Gen. St. 1878, does not consent to any lease by any railroad company of this state of its road to any Iowa railroad company, unless the latter has complied with the provisions of section 106. *Freeman v. Minneapolis & St. L. R. Co.*, 7 *Am. & Eng. R. Cas.* 410, 28 *Minn.* 443, 10 *N. W. Rep.* 594.—FOLLOWED IN *Pence v. St. Paul, M. & M. R. Co.*, 28 *Minn.* 488.

The supplement to the charter of the Morris Canal & Banking Co., approved March 14, 1871 (*Pamph. L. N. J.* 1871, p. 444), which authorized the company "to lease to any person or persons or corporation," empowered it to make a lease to a foreign corporation which had theretofore been recognized by the legislature, and which had a pre-existing capacity to accept the lease. *Stewart v. Lehigh Valley R. Co.*, 38 *N. J. L.* 505; affirming 36 *N. J. L.* 259.

The act of March 17, 1870 (*Laws N. J.* 1870, p. 916), does not authorize a lease to be made to a corporation not of this state.

Black v. Delaware & R. Canal Co., 24 *N. J. Eq.* 455.

A railroad company of New Jersey leased its franchises and roads to a railway corporation of another state. The lease was not only unauthorized, but was expressly forbidden by law. Its effect was to combine coal producers and carriers, and to partially destroy competition in the production and sale of anthracite coal, a staple commodity of the state. *Held*, to be a corporate excess of power which tends to monopoly and the public injury. *Stockton v. Central R. Co.*, 51 *Am. & Eng. R. Cas.* 1, 50 *N. J. Eq.* 52, 24 *Atl. Rep.* 964.—QUOTING Attorney-General v. Great Northern R. Co., 1 *Drew. & Sm.* 157, 6 *Jur. N. S.* 1006, 29 *L. J. Ch.* 794; *State v. Standard Oil Co.*, 49 *Ohio St.* 137, 30 *N. E. Rep.* 279.

Under the New York Statute of 1839, which authorizes a railroad company to agree "with any other corporation" for the use of its road "in any manner not inconsistent with provisions of the charter of the corporation whose railroad is to be used under such contract," a railroad corporation organized under the laws of New York is empowered to lease the road of a corporation organized and constructed in Vermont, provided such latter corporation is by charter authorized to lease its road. *Day v. Ogdensburg & L. C. R. Co.*, 35 *Am. & Eng. R. Cas.* 102, 107 *N. Y.* 129, 13 *N. E. Rep.* 765, 11 *N. Y. S. R.* 335; reversing 42 *Hun* 654, 4 *N. Y. S. R.* 772.

30. Leases of parallel or competing lines.—A contract whereby the road-bed, rolling stock, and equipments of one competing line of railroad is to be operated and controlled by another competing line is made illegal by Act N. H., July 5, 1867, which forbids the consolidation of competing railroads. *Manchester & L. R. Co. v. Concord R. Co.*, (*N. H.*) 47 *Am. & Eng. R. Cas.* 359.

Under New York Act of 1839, ch. 218, one railroad company may lease its franchise and property to another, provided it is to be used by the lessee for the same purpose defined in the charter of the lessor, and it may exercise this right and power unless prohibited by the charter of one of the companies. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas.* (*N. Y.*) 193.—DISTINGUISHING *Abbott v. Johnstown, G. & K. H. R. Co.*, 80 *N. Y.* 28; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 86 *N. Y.*

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Where the legislature has authorized the leasing of competing or parallel roads, the validity of such lease cannot be questioned by the courts on the ground of public policy. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.

New York Act of 1869, ch. 917, § 9, entitled "An act authorizing the consolidation of certain railroad companies, but prohibiting the consolidation of such roads as are parallel or competing, does not prevent one road from leasing another, as a lease is not a merger or consolidation. *Gere v. New York C. & H. R. R. Co.*, 19 *Abb. N. Cas. (N. Y.)* 193.

The provision of Pennsylvania Const. art. 17, prohibiting leases of parallel or competing railroads, applies only to ordinary railroads and not to passenger or street railroads. *Shipley v. Continental R. Co.*, 13 *Phila. (Pa.)* 128.—REVIEWED IN *Allentown & B. Rapid Transit Co.*, 1 Pa. Dist. 430.

31. Leases for purpose of forming continuous lines.*—Under an amendment to a railroad charter, providing that the company shall have power to consolidate and connect its road with any other continuous line of railroad, either in Illinois or in Indiana, upon such terms as may be agreed upon between the companies uniting or connecting, and for that purpose giving full power to the company to make and execute such contracts with any other company as will secure the object of such consolidation or connection, the domestic corporation can do only one of two things: either consolidate its road with another railroad in Illinois or Indiana, or make an agreement for connection with such road, so as to secure a continuous line. Under such law it has no power to lease its road to a foreign railroad company. *Archer v. Terre Haute & I. R. Co.*, 7 *Am. & Eng. R. Cas.* 249, 102 *Ill.* 493.—DISTINGUISHED IN *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 *Sup. Ct. Rep.* 953.

A lease by an Indiana company to an Ohio

*Leasing by one railroad of another where the two form a continuous line, see 52 *AM. & ENG. R. CAS.* 80, *abstr.*

company for the purpose of forming a connecting line is not in contravention of any statute of Indiana, or against the public policy of that state. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 *Biss. (U. S.)* 456.—REVIEWING *Tippecanoe County Com'rs v. Lafayette, M. & B. R. Co.*, 50 *Ind.* 85.

Where there is no statute regulating the execution of such a lease, it is not essential that its original execution, or a subsequent ratification, should be by corporate action within the state. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 *Biss. (U. S.)* 456.

Any railway company organized under the laws of Kansas may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease. *Atchison, T. & S. F. R. Co. v. Fletcher*, 24 *Am. & Eng. R. Cas.* 34, 35 *Kan.* 236, 10 *Pac. Rep.* 596.

Under its charter, and the statutes of the state, the Atchison, Topeka & Santa Fé R. Co. cannot only lease a Colorado railroad, but can also lease roads in New Mexico, Arizona, and old Mexico, if each road so leased thereby becomes, in the operation thereof, a continuation and extension of the road of the Atchison Co. *Atchison, T. & S. F. R. Co. v. Fletcher*, 24 *Am. & Eng. R. Cas.* 34, 35 *Kan.* 236, 10 *Pac. Rep.* 596.

Kentucky Act of Jan. 22, 1858, authorizing leases between railroad companies when they are so constructed as to form a continuous line, authorizes a company to take leases of branch roads by which it can establish continuous lines from the termini of such branches to that of its own road. *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 *Sup. Ct. Rep.* 969.

Mass. Act of 1852, ch. 118, authorizing the Boston & Maine R. Co. and the Salem & Lowell R. Co., each of them, to enter upon and use the railroad of the other "according to law, provided that nothing contained in this act shall be construed to impair the rights of any person or corporation," does not express an intention on the part of the legislature to appropriate to public uses any of the rights of the Boston & Lowell R. Co., under section 12 of their charter, and confers no authority upon the Boston & Maine R. Co. and the Salem & Lowell R. Co., by the use and

combination of sections of their respective roads with a portion of the Lowell & Lawrence R. Co., to establish a continuous line of transportation by railroad between Boston & Lowell. *Boston & L. R. Corp. v. Salem & L. R. Co.*, 2 Gray (Mass.) 1.

Section 94, ch. 16, Neb. Comp. St., authorizes the leasing of a railroad constructed by another company only in cases where the road of the lessee and of the company making the lease will form a continuous line. *State ex rel. v. Atchison & N. R. Co.*, 32 Am. & Eng. R. Cas. 388, 24 Neb. 143, 38 N. W. Rep. 43.

The Atchison & Nebraska R., extending from Atchison, Kan., to Lincoln, Neb., was completed to Lincoln in 1871, and leased to the B. & M. R. in 1880. *Held*, that it did not form a continuous line with the B. & M. R. and was not within the provisions of the statute authorizing the making of a lease, and that such lease was unauthorized. The mention in the statute of continuous or connected lines excludes all others. *State ex rel. v. Atchison & N. R. Co.*, 32 Am. & Eng. R. Cas. 388, 24 Neb. 143, 38 N. W. Rep. 43.—*Quoting Thomas v. West Jersey R. Co.*, 101 U. S. 71.

The union of the Montreal and the White Mountains roads formed a continuous line, within the meaning of the proviso of section 17, ch. 100, Laws N. H. 1883. That section does not require the roads of lessor and lessee to be contiguous, and does not make the state's assent to a lease to a foreign railroad company depend upon the foreign corporate power of the lessee. *Boston, C. & M. R. Co. v. Boston & L. R. Co.* 51 Am. & Eng. R. Cas. 606, 65 N. H. 393, 23 Atl. Rep. 520.

Power to intersect, join, and unite "does not include a lease."—Indiana Act of Feb. 23, 1853, ch. 85, authorizes any railroad company of Indiana "to intersect, join and unite its railroad with any other railroad" constructed in an adjoining state, at any point of the state line, or elsewhere, to which the charters of the two companies authorized their roads to go, * * * and "to make such contracts and agreements with any such railroad, constructed in an adjoining state, for the transportation of freight and passengers or for the use of its said road, as to the board of directors may seem proper." *Held*, that to connect one road with another does not fairly mean to lease or sell it to another.

St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co., 52 Am. & Eng. R. Cas. 68, 145 U. S. 393, 12 Sup. Ct. Rep. 953; *affirmed in* 33 Fed. Rep. 440.—**FOLLOWED IN** Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. Rep. 1094.

33. Power to lease on such terms as parties "think proper."—Under a grant from the legislature to the Eastern railroad in New Hampshire to lease the right to use their railroad "to such person or corporation, and upon such terms as they may deem proper," a lease of the right to use said road was executed to the Eastern R. Co., a corporation chartered in Massachusetts, which lease contained certain stipulations in relation to the payments of rents and the performance of other things therein specified to be done and performed by both said parties. *Held*, that although originally the parties to the lease might have fixed upon any terms and conditions they pleased, yet, having fixed and agreed upon certain terms and conditions by the assent of all the stockholders, the directors of both roads are bound, as are the majority of the stockholders, in both, to conduct and administer said roads accordingly, and their liability to the stockholders of each road is just the same as though they had been united by act of the legislature upon the same terms and conditions as those contained in the lease. *March v. Eastern R. Co.*, 43 N. H. 515.—**DISTINGUISHED IN** *Nashua & L. R. Co. v. Boston & L. R. Co.*, 27 Fed. Rep. 821.

The provisions of the lease between the Eastern railroad in New Hampshire and the Eastern railroad in Massachusetts do not provide for a union of interests or of capitals between said roads, or an equality of dividends between the stockholders of said corporations. *March v. Eastern R. Co.*, 43 N. H. 515.

34. Rights of parties under forfeited or expired leases.—A party built a hotel on the grounds of a railroad company under a contract to pay annually a fixed sum as ground rent. Some years afterwards, by agreement, the property was to be surrendered to the company upon payment of its value. An award fixed the value of the property, which was confirmed by the highest court of the state, which decreed it a lien on the property. After considerable time the company claimed a credit on the judgment for rents of the premises since the

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agreement to surrender. *Held*, that the company was entitled to such credit, whether the one in possession be considered a tenant or mortgagee in possession. *Scruggs v. Memphis & C. R. Co.*, 108 U. S. 368, 2 Sup. Ct. Rep. 780.

Where a company only acquires the use of land for railroad purposes, and lays a track thereon, and subsequently leases the land, only reserving the right to use the track, and the lessee fences up the land and uses it as a private coal yard, the company, by making the lease, forfeits its right and interest therein, and the owner of the fee is entitled to recover the same. *Roby v. Yates*, 53 N. Y. S. R. 535, 23 N. Y. Supp. 1108, 70 Hun 35.

The defendant leased from the plaintiff the "refreshment room and apartments connected therewith," part of a railway station, and covenanted that "no spirits of any kind should be sold or allowed to be sold in the refreshment room," and that if he "should fail, refuse, or neglect to carry out the terms of the lease, then that the lessee should, if required by the lessor, quit, leave, and absolutely vacate the premises and the lease should terminate." *Held*, that the sale of spirits in the bar room, part of the demised premises, was a contravention of the lease; that the proviso for termination of the same extended to negative covenants; and that the lease was therefore forfeited, and a right of entry accrued to the lessor, and that it was a case coming within the Overholding Tenant's Act. *Loughi v. Sanson*, 46 U. C. Q. B. 446.

35. Pennsylvania acts of 1861 and 1870, authorizing leases, construed.—The Pa. Act of April 23, 1861, relating to connecting lines, authorizes a contract by which one company acquires the right to carry coal over the road of another in the cars of the former. *Mocanqua Coal Co. v. Northern C. R. Co.*, 4 Brews. (Pa.) 158.

The Pa. Act of April 23, 1861, authorizing one railroad company to lease the road of another "and to run, use, and operate" the same, and the act of Feb. 17, 1870, extending the law to roads beyond the limits of the state, authorize only leases of finished roads. *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81* Pa. St. 104.

The act of February 17, 1870 (P. L. 81), giving to railroad companies the right to lease their property and franchises, applies

to street passenger-railway companies as well as to steam railroad companies. *Rafferty v. Central Traction Co.*, 50 Am. & Eng. R. Cas. 239, 147 Pa. St. 579, 23 Atl. Rep. 884.

The Philadelphia & Erie R. Co. leased to the Catawissa R. Co. a portion of their road, with the proviso that if "in case of an assignment for the benefit of creditors by the Catawissa Co., a judicial sale or transfer of a road shall at any time take place," the lease should be void, without any act of the Philadelphia & Erie Co.; the Catawissa Co. leased to another company "the whole of (their) railroad, etc., *** with the appurtenances of every nature whatever." *Held*, that the lease of the Philadelphia & Erie Co.'s road passed. The lease of the Catawissa Co.'s road was not "an assignment for the benefit of creditors, judicial sale, or transfer," and was not forbidden by the agreement with the Philadelphia & Erie Co. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

The act of April 23, 1861, authorizing the leasing of railroads, applies to the appurtenances as well as the road itself, and made the lease to the Catawissa Co. assignable without the consent of the Philadelphia & Erie Co. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

36. Agreement to lease before incorporating.—An agreement entered into by the provisional committee of a contemplated railway company to lease the line—*held*, not binding upon the company afterwards incorporated by act of parliament. *Monklands R. Co. v. Glasgow, A. & M. J. R. Co.*, 11 Scotch Sess. Cas. 2d Ser. 1395, 2 Ry. & C. T. Cas. 15.

37. Power of company to lease its dock.—A railroad corporation, under the laws of Florida, has the right to erect and maintain docks, wharves, and piers, as incident to its business, and to hold or dispose of them as may be deemed proper, but such corporation engaged in the business of a common carrier has no right to lease the terminal point of its railroad track and terminal facility on a navigable stream to a steamboat company, and thereby defeat the ingress and egress to and from said railroad track on the part of other competing lines of steamboat companies. *Indian River Steamboat Co. v. East Coast Transp. Co.*, 49 Am. & Eng. R. Cas. 212, 28 Fla. 387, 10 So. Rep. 480.

38. Power to lease determined in particular cases.—Under the provisions of the charter by Georgia of the Macon & Western R. Co., that company had the legal power and authority to lease its road to the Central Railroad & Banking Co. of Georgia, and the latter company had legal power and authority, under the Georgia Act of 1852, to accept such lease. *Central R. & B. Co. v. Macon*, 43 Ga. 605.

A lease by the Newport & Fall River R. Co., a corporation established under the laws of Rhode Island, to the Old Colony & Fall River R. Co., a corporation established under the laws of Massachusetts, of the unfinished railroad of the former corporation, situated in Rhode Island, for a term of years, at an annual rent, after the same shall have been completed, with a stipulation for the payment in advance of the rent for the whole term, to be used for the purpose of building the road and putting it in order for use, is not a violation of Mass. Act of 1861, ch. 156, which authorizes the latter corporation to extend its railroad to the line of Rhode Island, to connect with a railroad to be constructed from Newport, Rhode Island, to the line of Massachusetts, and provides that no part of its present reserved funds shall be appropriated to build any portion of the road in Rhode Island. *Durfee v. Old Colony & F. R. R. Co.*, 5 Allen (Mass.) 230.—APPLIED IN *Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, 54 Fed. Rep. 759, 6 U. S. App. 469, 4 C. C. A. 561.

Two railroad companies entered into an agreement by which one was to furnish the road, and the other the rolling stock and motive power, and operate the road for the mutual benefit of both, "and that uniform rates of tolls and fares should be fixed annually by agreement, and the latter company to pay the former two thirds of the receipts, *** such additional charges by way of discrimination thereby made for short distances, for motive power, not to be included in the term receipts." Held, that the tolls and fares were to be uniform, as distinguished from fluctuating rates, but not necessarily uniform as proportioned to distance. *Blossburg & C. R. Co. v. Tioga R. Co.*, 1 Abb. App. Dec. (N. Y.) 149, 1 Keyes 486.

In such case, the discriminative charges provided for only included such as might be imposed for motive power for short distances, and in addition to the discriminative

charges in the table of uniform rates. *Blossburg & C. R. Co. v. Tioga R. Co.*, 1 Abb. App. Dec. (N. Y.) 149, 1 Keyes 486.

3. Rights and Liabilities of Lessors.

39. Liability after lease.*—The lease of a railroad does not dissolve the corporation, and it may still be sued for liabilities incurred prior to such lease. *United States v. Little Miami, C. & X. R. Co.*, 1 Fed. Rep. 700.

A railroad company cannot transfer or lease the right to operate its road so as to absolve itself from its duties to the public, without legislative authority; nor will a lease duly authorized by law release the company from a failure to discharge its charter obligations, unless the law giving the power contains a proviso to this effect. *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.—FOLLOWED IN *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. Rep. 679.—*Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 362.—DISAPPROVED IN *Illinois C. R. Co. v. Kanouse*, 39 Ill. 272. REVIEWED IN *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.—*Attorney-General v. Erie & K. R. Co.*, 16 Am. & Eng. R. Cas. 652, 55 Mich. 15, 20 N. W. Rep. 696. *Backus v. Detroit, W. T. & J. R. Co.*, 36 Am. & Eng. R. Cas. 436, 71 Mich. 645, 40 N. W. Rep. 60. *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. Rep. 679.—FOLLOWING *Central & M. R. Co. v. Morris*, 68 Tex. 59.—FOLLOWED IN *East Line & R. R. Co. v. Lee*, 71 Tex. 538, 9 S. W. Rep. 604.

Where a company constructs its track, and in such construction omits to make sufficient cattle-guards where the track enters and leaves an unfenced field, the company is liable to the owner of the field for damage resulting therefrom, and this liability is not avoided by the fact that after constructing its road the company leased the same to another company, which latter company was in full possession and use of the track at the time of the happening of the injuries, and by the terms of its lease had contracted to discharge all statutory obligations and duties imposed upon the lessor company. *St. Louis, W. & W. R. Co. v. Curl*, 11 Am. & Eng. R. Cas. 458, 28 Kan. 622.

* Liability of company leasing its road to another, see notes, 36 AM. & ENG. R. CAS. 445, 7 Id. 413.

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40. Liability for acts or negligence of lessees.*

—If a railroad company, without legislative authority, executes a lease of its railroad, it is not thereby released from liability for damages caused by the negligence of the lessee company in operating it. *Briscoe v. Southern Kan. R. Co.*, 40 Am. & Eng. R. Cas. 599, 40 Fed. Rep. 273.—APPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.—*Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. *Rome & D. R. Co. v. Chasteen*, 40 Am. & Eng. R. Cas. 559, 88 Ala. 591, 7 So. Rep. 94.—DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.—*Nelson v. Vermont & C. R. Co.*, 26 Vt. 717.—APPROVED IN *Illinois C. R. Co. v. Barrow*, 5 Wall. (U. S.) 90. DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. FOLLOWED IN *Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572. QUOTED IN *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 445. REVIEWED IN *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.

A company which has leased its road, cars, and engines, and allows the lessee company to operate the same in the name of the lessor, is liable to third persons, or the public, for the carelessness and negligence of the lessee in the absence of a statutory provision to the contrary. *Singleton v. Southwestern R. Co.*, 21 Am. & Eng. R. Cas. 226, 70 Ga. 464, 48 Am. Rep. 574.—DISTINGUISHING *Jones v. Georgia Southern R. Co.*, 66 Ga. 558. QUOTING *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 627.—DISAPPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. QUOTED IN *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497, 119 Ill. 68.—*Brown v. Hannibal & St. J. R. Co.*, 27 Mo. App. 394.—APPLYING *Main v. Hannibal & St. J. R. Co.*, 18 Mo. App. 388.—*Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572.—DISTINGUISHED IN *Woodruff v. Erie R. Co.*, 16 Am. & Eng. R. Cas. 501, 93 N. Y. 609; *Gere v. New York C. & H. R. R. Co.*, 19 Abb. N. Cas. (N. Y.) 193. FOLLOWED IN *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 7 Am. & Eng. R. Cas. 49, 86 N. Y.

107. QUOTED IN *Lakin v. Willamette Valley & C. R. Co.*, 26 Am. & Eng. R. Cas. 611, 13 Oreg. 436, 57 Am. Rep. 25.—*Woodhouse v. Rio Grande R. Co.*, 67 Tex. 416, 3 S. W. Rep. 323. *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801.

In Iowa a railroad corporation cannot escape liability for an accident occurring while its road is being operated in the corporate name, even though, in fact, it may have been leased, and was at the time controlled by another party. Sections 1278 and 1307, making lessees liable to the same extent as the corporations themselves, provide merely a cumulative remedy, and do not release the corporations. *Bower v. Burlington & S. W. R. Co.*, 42 Iowa 546.

In Kentucky a company owning a road which is leased and in the exclusive control of the lessees is not liable for any injury caused by the negligent management of the road. *Harper v. Newport News & M. V. R. Co.*, (Ky.) 14 S. W. Rep. 346.

41. Liability for torts of lessees.*

A railway company cannot absolve itself from the performance of duties imposed upon it by its charter or any general law of the state, or relieve itself from liability for the wrongful acts or omissions of duty of persons operating its road by transferring its corporate powers to other parties, or by leasing its road to them, except by special statutory authority. To allow it to do so would be contrary to public policy. *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497, 119 Ill. 68, 8 N. E. Rep. 859.—QUOTING *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 450; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623; *Singleton v. Southwestern R. Co.*, 70 Ga. 464; *Thomas v. West Jersey R. Co.*, 101 U. S. 83.—REVIEWED IN *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.—*Lakin v. Willamette Valley & C. R. Co.*, 26 Am. & Eng. R. Cas. 611, 13 Oreg. 436, 11 Pac. Rep. 68, 57 Am. Rep. 25.—QUOTING *Abbott v. Johnstown, G. & K. Horse R. Co.*, 80 N. Y. 27.—QUOTED IN *Cogswell v. West St. & N. E. Elect. R. Co.*, 5 Wash. 46.—*International & G. N. R. Co. v. Underwood*, 34 Am. & Eng. R. Cas. 570, 67 Tex. 589, 4 S. W. Rep. 216.—FOLLOWING *Gulf, C. & S. F.*

* Liability of lessor for negligence of lessee, see notes, 38 Am. & Eng. R. Cas. 62, 48 Am. Rep. 580, 10 L. R. A. 794.

* Liability of railroads for torts as affected by lease of the road, see notes, 52 Am. & Eng. R. Cas. 60; 25 Id. 501; 71 Am. Dec. 295.

R. Co. v. Morris, 67 Tex. 692. REVIEWING Missouri Pac. R. Co. v. Watts, 63 Tex. 549. —Cogswell v. West St. & N. E. Elec. R. Co., 52 Am. & Eng. R. Cas. 500, 5 Wash. 46, 31 Pac. Rep. 411.—QUOTING Lakin v. Willamette Valley & C. R. Co., 13 Oreg. 436, 11 Pac. Rep. 68.

Under the Illinois statute railroad companies are liable for injuries by the wrongful acts of any lessee, contractor, or other person, done in the exercise, by its permission, of any of its franchises; but this liability is limited to such acts as the lessor company would have a right to perform under its charter, and for which it would be liable. *St. Louis, A. & T. H. R. Co. v. Balsley*, 18 Ill. App. 79.

In such cases the lessee is regarded as the servant or agent of the lessor, so far as the public is concerned. *St. Louis, A. & T. H. R. Co. v. Balsley*, 18 Ill. App. 79.

The lessor of a railroad under an authorized lease is not liable for the negligence or torts of its lessee. *Miller v. New York, L. & W. R. Co.*, 47 Am. & Eng. R. Cas. 369, 125 N. Y. 118, 26 N. E. Rep. 35, 34 N. Y. S. R. 607.—APPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

42. Liability for personal injuries, generally.*—In case of the lease of a railroad track a distinction exists, as to the liability of the lessor and lessee company, between those cases in which a liability arises from the omission of some duty in the construction of the road, and those which arise from negligence or the omission of some duty in the handling of trains and the management of the road. *St. Louis, W. & W. R. Co. v. Curl*, 11 Am. & Eng. R. Cas. 458, 28 Kan. 622.

A railroad company which leases its road pursuant to a statutory authority which does not contain any provision releasing it from the performance of its duties to the public, is liable for personal injuries sustained by the brakeman of a third company rightfully upon the road, caused by a defect in the construction of the awning of a station. *Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797.—DISTINGUISHING *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68. NOT FOLLOWING *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C.

* Liability of lessor for negligence of lessee causing injury to servants, see note, 38 Am. & Eng. R. Cas. 62.

P. 658; *Leonard v. Storer*, 115 Mass. 86.—APPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

Under Mo. Act of March 24, 1870, where a corporation of the state leases its road to a corporation of another state, both are made liable for any violation of the laws of the state. *Held*, that the Atlantic & Pacific R. Co., chartered by act of congress, is a corporation "of another state" within the meaning of the statute; and therefore the Missouri Pacific R. Co., after leasing to the other road, might be sued for personal injuries to employes of the former road. *Smith v. Pacific R. Co.*, 61 Mo. 17.

Where a railroad company has, by legislative authority, leased its road and transferred the exclusive possession and control thereof to another company, it cannot be held liable for injuries thereon sustained by a servant of the lessee through the lessee's negligence. *Virginia Midland R. Co. v. Washington*, 43 Am. & Eng. R. Cas. 688, 86 Va. 629, 10 S. E. Rep. 927.—APPROVED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

43. Liability for personal injuries to passengers.—A company owning a railroad is not relieved of liability for injuries to a passenger by the fact that the road is leased and being operated by the lessee. *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445, 3 Am. Ry. Rep. 413.—DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. FOLLOWED IN *Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572. QUOTED IN *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 Am. & Eng. R. Cas. 497, 119 Ill. 68; *Naglee v. Alexandria & F. R. Co.*, 32 Am. & Eng. R. Cas. 401, 83 Va. 707; *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801. RECONCILED IN *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433. REVIEWED IN *Harmon v. Columbia & G. R. Co.*, 28 So. Car. 401, 13 Am. St. Rep. 686, 5 S. E. Rep. 835; *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.—QUESTED V. *Newburyport & A. Horse R. Co.*, 127 Mass. 204.—DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. REVIEWED IN *Braslin v. Somerville Horse R. Co.*, 32 Am. & Eng. R. Cas. 406, 145 Mass. 64, 4 N. Eng.

Rep. 888, 13 N. E. Rep. 65.—*Braslin v. Somerville Horse R. Co.*, 32 Am. & Eng. R. Cas. 406, 145 Mass. 64, 4 N. Eng. Rep. 888, 13 N. E. Rep. 65.—NOT FOLLOWING *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68; *Murch v. Concord R. Corp.*, 29 N. H. 1. REVIEWING *Quested v. Newburyport Horse R. Co.*, 127 Mass. 204.

Where a road is leased by authority of law, under a lease giving the lessee company exclusive charge of the road, and making it exclusively liable for accidents, the lessor is not liable for the negligence of the employés of the lessee in injuring a passenger by starting a train when he is about to get on. *Phillips v. Northern R. Co.*, 41 N. Y. S. R. 780, 16 N. Y. Supp. 909.

44. Liability for personal injuries at crossings.—Where a railroad corporation, without the state's consent, leased its road to another railroad corporation, which entered upon and controlled and managed the road, the former corporation is liable for injuries to persons caused by negligent defects in its track at a highway crossing. *Freeman v. Minneapolis & St. L. R. Co.*, 7 Am. & Eng. R. Cas. 410, 28 Minn. 443, 10 N. W. Rep. 594.—REVIEWED IN *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 445; *East Line & R. R. Co. v. Culbertson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.

A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon a highway for damages resulting from an omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. *Ditchett v. Spuyten Duyvil & P. M. R. Co.*, 67 N. Y. 425, 15 Am. Ry. Rep. 109; reversing 5 Hun 165.—APPROVED IN *Arrow-smith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. DISTINGUISHED IN *Dolan v. Newburgh, D. & C. R. Co.*, 42 Am. & Eng. R. Cas. 611, 120 N. Y. 571, 24 N. E. Rep. 824, 31 N. Y. S. R. 852.

45. Liability for goods lost.—A company chartered by the state does not, by leasing its road to another corporation, release itself from liability for goods received by its line for carriage and not delivered. *Chester Nat. Bank v. Atlanta & C. Air Line R. Co.*, 25 So. Car. 216.—REVIEWED IN *Harmon v. Columbia & G. R. Co.*, 28 So. Car.

401, 13 Am. St. Rep. 686, 5 S. E. Rep. 835.—*Langley v. Boston & M. R. Co.*, 10 Gray (Mass.) 103.—DISTINGUISHED IN *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68. *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124.

Liability for loss of freight burned at a depot cannot be avoided by the railroad company under a plea that its road was leased to another company who also owned the depot. *International & G. N. R. Co. v. Moody*, 35 Am. & Eng. R. Cas. 607, 71 Tex. 614, 9 S. W. Rep. 465.

A lease from a railroad company which transfers to the lessee all its contracts, does not render the lessors liable for goods delivered to the lessee under a contract between the plaintiff and the lessors. *Pittsburg, Ft. W. & C. R. Co. v. Harbaugh*, 4 Brews. (Pa.) 115.

46. Liability for stock killed.—Where a railroad is run and operated by a lessee, not in the name of the company, but in its own name, it is not liable, under section 1 of Ind. Act of March 4th, 1863 (1 Rev. St. 1876, p. 751), for stock killed by it before such act was amended by the Act of March 14th, 1877 (Acts 1877, Spec. Sess. p. 61). *Pittsburgh, C. & St. L. R. Co. v. Hunt*, 71 Ind. 229.

47. Liability for flooding lands.—Where a road is in full control of the lessees, the lessors are not liable for injuries to landowners caused by culverts getting out of order, after the road goes into the control of the lessees; but evidence of the condition of the culverts after the lease is admissible. *Chicago, M. & N. R. Co. v. Eichman*, 47 Ill. App. 156.

Under the New York rule that the lessor of a railroad is not liable for the negligence or torts of the lessee, a railroad company cannot be held liable for damages caused by the washing of earth from an embankment erected by the lessee, which the lessor was not bound by statute or contract to build, and which was not necessarily a nuisance. The fact that the lessor was bound under the lease to pay the lessee for any work chargeable to construction cannot make it liable. *Miller v. New York, L. & W. R. Co.*, 47 Am. & Eng. R. Cas. 369, 125 N. Y. 118, 26 N. E. Rep. 35, 34 N. Y. S. R. 607; reversing 20 N. Y. S. R. 157, 3 N. Y. Supp. 245.

48. Liability for fires starting in dead grass on right of way.—A company which has leased its road to another

company, and the exclusive use of its track, etc., for ninety-nine years, which leasing is confirmed by the legislature, will be liable for the destruction of property by fire, caused by a neglect on the part of the lessee company to keep its track and right of way clear from all dead grass, dry weeds, etc., notwithstanding the legislature may have conferred upon such lessee company all the powers of the lessor company, and others. There being no clause of exemption in such act of the legislature, the liability of the lessor would remain. *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 *Am. & Eng. R. Cas.* 497, 119 *Ill.* 68, 8 *N. E. Rep.* 859.

49. Right of lessor to sue.—Where a domestic railroad company has leased its road to a foreign corporation, and an action is pending in the name of the people to have the charter declared forfeited, on the ground that the lease is illegal, the lessor company cannot maintain a separate action against the lessee, merely for the purpose of having the court's opinion as to whether the lease is *ultra vires*, and if so, to have a decree awarding it the possession of the property. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.*, 4 *Hun (N. Y.)* 712; *affirming* 16 *Abb. Pr. N. S.* 249; *appeal not dismissed* in 63 *N. Y.* 176.

One street-railway company leased its road to another, the lessee covenanting to assume all the liabilities and burdens imposed on the lessor by its charter. Subsequently the lessees refused to comply with an order of the town authorities to alter the track, and such authorities revoked a part of the location and threatened to revoke the remainder. *Held*, that the lessor company could not maintain a bill in equity to compel the lessee to alter the track. Its remedy was to make the alteration itself and then sue at law. *Medford & C. R. Co. v. Somerville*, 111 *Mass.* 232.

The P. C. R. Co. leased its franchises and road for the term of 99 years, renewable forever, to the C. & T. R. Co., which was a company created by the consolidation of the T. N. & C. R. Co. and the Junction R. Co. The consideration was in the form of covenants—to pay taxes, to assume debts, to finish the road, and to operate and manage the road in such a manner as would not endanger the corporate rights of the lessor. It appeared that only a small sum of money had ever been paid in by the stockholders of the P. C. Co., which had

never been expended; that the cost of any work on the road, previous to the lease, had been defrayed by the Junction Co., and that this work had been done, and the organization of the P. C. Co. made under the general law of the state, to enable the Junction Co. to extend its line in a manner its charter did not permit. *Held*, that the P. C. Co. was not entitled to a specific performance of the covenant in the lease to operate the road. *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 *Ohio St.* 544.—DISTINGUISHING *State v. Hartford & N. H. R. Co.*, 29 *Conn.* 538; *Rigby v. Great Western R. Co.*, 2 *Phillips* 44. QUOTING *Storer v. Great Western R. Co.*, 2 *Y. & Coll.* 48; *South Wales R. Co. v. Wythes*, 31 *Eng. L. & Eq.* 226. REVIEWING *People v. Albany & V. R. Co.*, 24 *N. Y.* 261.

50. Right to recover damages to leased grounds.—Under a lease of a railroad company including all lands on which the depot grounds, etc., were and might thereafter be located, and including such new ground as might thereafter be acquired, lands afterwards acquired for depot grounds do not pass to the lessee immediately; and the lessor is entitled to recover damages for any injuries thereto while they are in its possession, being graded and prepared. *Norwich & W. R. Co. v. Worcester*, 36 *Am. & Eng. R. Cas.* 447, 147 *Mass.* 518, 18 *N. E. Rep.* 409.

51. Right of a horse-car company to lease to a motor company.—Ill. Act of Feb. 12, 1855, authorizing railroad companies to make contracts for leasing or running their roads, does not prevent such arrangement between a road chartered to use horse power with another authorized to use steam power; but in such case the lessee company must operate the leased road according to the charter powers of the lessor. *Chicago v. Evans*, 24 *Ill.* 52.

And under the above statute a horse railroad cannot be leased to a steam railroad, and operated by steam, nor *vice versa*. *Chicago v. Evans*, 24 *Ill.* 52.

Upon an appeal from a refusal to grant a preliminary injunction to restrain a city passenger-railway company from leasing its road to a motor-power company, the supreme court will not decide whether a city passenger-railway company, without power under its charter or under the general laws relating to city passenger railways to lease its line, has such power by implication under

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subdivision 8 of section 1 of the Pa. Act of March 22, 1887 (P. L. 8), which gives to motor-power companies the power to lease the property and franchises of passenger-railway companies and operate them, but without stating in the title of the act a purpose to enlarge the powers of city passenger railways. *Smith v. Reading City Pass. R. Co.*, 156 Pa. St. 3, 26 Atl. Rep. 779; affirming 2 Pa. Dist. 490.

52. Pleadings and proofs in actions against lessors.—Under section 790, Rev. St. Mo. 1879, providing that a "corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself," the fact of the leasing must be alleged and proved in order to maintain suit for the negligence of the employés of the lessee against the lessor road. *Main v. Hannibal & St. J. R. Co.*, 18 Mo. App. 388.—APPLIED IN *Brown v. Hannibal & St. J. R. Co.*, 27 Mo. App. 394.

Although there may be neither allegation nor proof of the relation of lessor and lessee, but it appears that the C., B. & Q. Co. had for a considerable period of time been regularly operating its trains over defendant's road with its consent, and the two companies must then have, at least, borne the relation of licensor and licensee, and, since the defendant has received its charter from the state, and by its acceptance has taken upon itself burdens and responsibilities which it cannot shift without the state's consent, it is responsible for the negligence of another exercising its franchises with its permission, and whether such permission be by lease or by license makes no difference. *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 445.—REVIEWING *Macon & A. R. Co. v. Mayes*, 49 Ga. 355.

The lessee of a railroad who takes by permission of the statute authorizing the lease, but with the express reservation that the lessor shall not escape any of the responsibilities it owes the public, is, so far as the public is concerned, the mere agent of the lessor, and in an action against the lessor for the act of the lessee the petition, pleading the fact according to its legal effect, may charge the act to have been committed by the defendant corporation, and the fact that it turns out in proof to have been committed by defendant's lessee will not affect the right of recovery. *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo.

App. 445.—QUOTING *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 95; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717; *Illinois C. R. Co. v. Barron*, 5 Wall. (U. S.) 90. REVIEWING *Freeman v. Minneapolis & St. L. R. Co.*, 28 Minn. 443.

4. Rights and Liabilities of Lessees.

a. Generally.*

53. Various rights and duties.—Lessees of railroad companies in Georgia, where the companies' charters authorize the taking of private property for public purposes, are common carriers when engaged in conducting a freight and passenger business under the franchises of the lessors. *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. Rep. 678.

Mass. Rev. St. ch. 39, § 78, requiring every railroad corporation to carry a bell on every engine passing upon "its road," etc., applies to a railroad corporation who has taken a lease of a railroad owned by another corporation, and is running its own engines upon it under such lease. *Linfield v. Old Colony R. Corp.*, 10 Cush. (Mass.) 562.—REVIEWED IN *Pierce v. Concord R. Co.*, 51 N. H. 590.

A lease to a railroad by name is binding though there be no corporation of that name, where it appears that at the time the road was owned by an individual who was carrying on the business under the name employed in the lease. *Ecker v. Chicago, B. & Q. R. Co.*, 1 Am. & Eng. R. Cas. 357, 8 Mo. App. 223.

A lease under seal, executed by an agent as lessee in his individual name, and which does not purport to be executed on behalf of the principal, is not binding upon the latter, although the fact of the agency is recited therein, and although it appears by extrinsic evidence that the lessee acted as agent: the instrument can only be enforced against the party who appears upon the face of it to be the covenantor. *Kiersted v. Orange & A. R. Co.*, 69 N. Y. 343; reversing 54 How. Pr. 29.

Where a railway company leases another line, such leased line is not a part or branch of the original railway, within the meaning of an agreement between such railway and the trustees of a dock, whereby the railway

* Liability of lessee, see note, 15 AM. & ENG. R. CAS. 516.

company agreed to cause all minerals, which should be conveyed upon its line, or any part or branch of it, for shipment, to be shipped into vessels at such dock. *Taff Vale R. Co. v. Macnabb*, 42 L. J. Q. B. 153, L. R. 6 H. L. Ccs. 169, 22 W. R. 65.

54. Construction of leases—What passes.—In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; *modifying and affirming* 45 Fed. Rep. 304.

One of the provisions of a lease was that the lessee should pay a proportionate share of the expenses actually incurred in paying proper salaries to the general superintendent and subordinates employed by the lessor in superintending certain terminals. *Held*, that the lessee was entitled to use its own switch engines and men in handling freight trains at such terminals, but must do it under the superintendence of the lessor. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; *modifying and affirming* 45 Fed. Rep. 304.

The lease was silent as to provisions for car-cleaning facilities, but it did provide that the lessor on reasonable notice should construct additional side tracks, spurs, etc., the cost to be borne by the two companies; and if the lessor failed, the lessee might construct such tracks as it needed and become the sole owner thereof. *Held*, that the lessee was entitled to use tracks for car-cleaning purposes constructed by the lessor; and if it should be excluded therefrom it could require other tracks, or build them itself, under the above provisions of the lease. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; *modifying and affirming* 45 Fed. Rep. 304.

Where a railroad lease excludes from its operation the companies' "shops" at a designated place, the term "shops" extends to a tract of sixty acres of land on which the shops are situated, and which is used in connection with them; but the lessee is not excluded from a "Wye" track used in turning cars on the grounds. *Chicago, R. I.*

& P. R. Co. v. Denver & R. G. R. Co., 50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; *modifying and affirming* 45 Fed. Rep. 304. — **DISTINGUISHING** *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42.

A railroad lease was of the railroad and all the company's land upon or across which its road or any part thereof, or its machine shop, warehouses, freight or passenger depot buildings are constructed. Prior to the lease the company had acquired a strip of land to be used as a street to a station. *Held*, that such land was included in the lease; and where it was taken in condemnation proceedings by another company, the money awarded as damages belonged to the lessee during the term of the lease. *In re New York C. R. Co.*, 49 N. Y. 414, 2 Am. Ry. Rep. 175; *reversing* 49 Barb. 501; *affirming* 6 Alb. L. J. 173.

55. Lessee is limited to lessor's charter powers.—The rights and liabilities of a lessee company are governed entirely by the charter of the lessor company. *McMillan v. Michigan Southern & N. I. R. Co.*, 16 Mich. 79. *McCandless v. Richmond & D. R. Co.*, 38 So. Car. 103, 16 S. E. Rep. 429.

Where a corporation acquires by lease the property, rights, privileges, and franchises of a street-railroad company, it takes them burdened with the latter's charter obligations, and although the lease contains no provision therefor, it is liable for a percentage upon the gross earnings of the road, which the charter provides must be paid into the city treasury. *Mayor, etc., of N. Y. v. Twenty-third St. R. Co.*, 41 Am. & Eng. R. Cas. 640, 113 N. Y. 311, 21 N. E. Rep. 60, 22 N. Y. S. R. 958; *affirming* 48 Hun 552, 16 N. Y. S. R. 137, 1 N. Y. Supp. 295.

A leased railroad must ordinarily be operated under the charter of the lessors. So where one company leased the road of another with its "rights, powers, and privileges," the lessees were held bound by the charter of the lessors in fixing the rate of tolls, not their own charter. *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205. — **QUOTED IN** *Daniels v. St. Louis, K. C. & N. R. Co.*, 62 Mo. 43.

The Traction Co., by accepting a lease from the Union Passenger R. Co., and taking possession of the road, and operating it under such lease, must be held thereby to have assumed the responsibility of per-

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forming all the duties imposed by the legislature upon the lessors in the original act of incorporation; among others, the duty, imposed for the benefit of the public, of paving, repaving, and repairing the streets occupied by the road which they operated. And, where the plaintiff sues for an injury resulting from a neglect of that duty to the public, they will be held responsible. *Mullen v. Philadelphia Traction Co.*, 19 *Phila. (Pa.)* 441.

56. Right to exercise power of eminent domain.—It matters not that the necessity for an increase of the right of way for additional tracks of a railway company is caused by the use of its road by other companies acting under its lease or by contract, nor does it matter by what corporation or corporations its road is actually operated. It is still a public use, and in such case the need of the lessees is that of the lessor company, and the lessees may proceed to condemn in the name of the lessor when the public necessity so requires. *Chicago & W. I. R. Co. v. Illinois C. R. Co.*, 113 *Ill.* 156.—REVIEWING *Smith v. Chicago & W. I. R. Co.*, 105 *Ill.* 511.

The fact that a railroad is leased for 100 years does not give the lessee any power of eminent domain. Such power remains entirely in the lessor, and in amending the charter with reference thereto the legislature may deal entirely with the lessor. *Mayor, etc., of Worcester v. Norwich & W. R. Co.*, 109 *Mass.* 103.

57. Liability for obligations of lessor.*—Where the object of a railroad leased is to raise money to discharge the liens thereon, and the lessee company covenants to pay off and discharge all judgment liens, the owner of a judgment against the lessor which is a lien on the road at the time the lease is made may take a decree directly against the lessee requiring it to pay the amount of the judgment. *Chicago, M. & St. P. R. Co. v. Chicago Third Nat. Bank*, 134 *U. S.* 276, 10 *Sup. Ct. Rep.* 550; *affirming*, 26 *Fed. Rep.* 820.

The lessee of the company constructing and owning the road may be enjoined from operating it until payment of damages legally awarded. *Hibbs v. Chicago & S. W. R. Co.*, 39 *Iowa* 340, 9 *Am. Ky. Rep.* 180.

* Liability of lessee of road for lessor's debts, see 43 *AM. & ENG. R. CAS.* 688, *abstr.*

Transfer of liability from lessor to lessee, see note, 25 *AM. & ENG. R. CAS.* 501.

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Where a railroad is constructed by one company and subsequently passes into the hands of another, the second company is not, by reason of its possession of the road, liable for any taking of property in the original construction, unless it has entered into the use and possession of the lands so taken. *Wead v. St. Johnsbury & L. C. R. Co.*, 64 *Vt.* 52, 24 *Atl. Rep.* 361.

The owner of land granted to a railroad a right of way, and in consideration thereof the company agreed by parol to issue the grantor annual passes for life. Afterwards the road was leased, the lessees taking it free from "all debts, dues, claims, and liabilities" of the lessors. Held, that the claim for an annual pass was included in the above, and the lessees were not liable for a failure to provide it. *Pennsylvania Co. v. Erie & P. R. Co.*, 29 *Am. & Eng. R. Cas.* 549, 108 *Pa. St.* 621.

The lessee of a railroad agreed to pay the debts of the lessor after they should be audited by the latter. A creditor subsequently obtained judgment against the lessor before a justice of the peace, and then commenced suit in court against the lessee, in the name of the lessor, for his use, to enforce the judgment. Held, as there was no privity of contract between him and the lessee, and the claim had not been audited, the suit could not be maintained. His remedy was to enforce his judgment, either by execution, or compel the lessor by mandamus to audit his claim. *Mississippi C. R. Co. v. Southern R. Assoc.*, 11 *Am. & Eng. R. Cas.* 576, 7 *Baxt. (Tenn.)* 595.

58. When lessee company becomes a new corporation.—The Ga. Act of Nov. 12, 1889, providing for the lease of the Western & Atlantic road, declares that "the persons, associations, or corporations accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall, from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a body politic and corporate under the laws of this state, under the name and style of the Western & Atlantic R. Co., which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued on all contracts made by said company, in any county through which the road runs,

after the execution of said lease, or for any cause of action which may accrue to said company, and to which it may become liable." When, therefore, the Nashville, Chattanooga & St. Louis R. Co. became the lessee under this act, a new corporation under the laws of Georgia was created, under the name and style of the Western & Atlantic R. Co.; and for any tort committed in the operation of its railroad that corporation, and not the Nashville, Chattanooga & St. Louis R. Co., is liable. In such case section 3407 of the Code does not apply, and an action against the Nashville, Chattanooga & St. Louis for the tort is not maintainable, though the declaration alleges that "the defendant operates as lessee the Western & Atlantic Railroad," the act requiring that the Western & Atlantic R. Co. shall be sued. *Nashville, C. & St. L. R. Co. v. Edwards*, 22 Am. & Eng. R. Cas. 62, 91 Ga. 24, 16 S. E. Rep. 347.

b. Liability to Third Persons.

59. Generally.—A railroad company which has possession of and is actually operating a railroad, and holds itself out to the public as the operator, is liable for damages occasioned to third persons by the negligence of its officers or agents in the management or operation of the same, whether its possession thereof is legal or illegal. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

Where a railroad company operates and controls a railroad in its own name and through its own officers and employes, it is liable to a third person for an injury resulting to him from negligence in the management or operation of the same, and no exemption from such liability is caused by the fact that its possession and operation of the road are under an agreement between such company and the owner of the road, or the terms of which the company is to operate the road in its own right, furnish the rolling stock and to charge for the use of the same, and also charge a certain percent. of its own expenses as the operating expenses of such road. *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.

The lessee of a railroad is a common carrier over a line leased and controlled by it as much as over its own line, and is respon-

sible in damages in respect to the leased road, as well as its own, to any person who has a right of action given him by law against railroad companies. *Logan v. Central R. Co.*, 74 Ga. 684.

It seems that it is competent for the legislature, in granting permission to lease, to transfer all or any liability to the lessee. *Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572.

60. For its own or the lessor's torts.*—The lessee of a railroad is responsible for its torts. *Missouri Pac. R. Co. v. Watts*, 22 Am. & Eng. R. Cas. 277, 63 Tex. 549.—REVIEWED IN *International & G. N. R. Co. v. Underwood*, 34 Am. & Eng. R. Cas. 570, 67 Tex. 589; *East Line & R. R. Co. v. Culbertson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.

The lessee of a railroad cannot be held responsible for the negligence or wrong of its lessor. *Commonwealth v. Chesapeake & O. R. Co.*, 91 Ky. 118, 15 S. W. Rep. 53.

Or for torts committed by the lessor prior to the execution of the lease. *Pittsburgh, C. & St. L. R. Co. v. Kain*, 35 Ind. 291.

61. For injuries to passengers.—By virtue of their lease of the Atlantic & St. Lawrence road the Grand Trunk R. Co., for certain purposes, became owners of the road leased, *pro hac vice*. *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.—FOLLOWED IN *Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572.

While the lessees operate that road under their lease, the lessors are not liable under their charter or the statutes of the state for an injury sustained thereon by a passenger, caused by the wrongful acts of the agents or servants of the lessees towards him. *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.—APPROVING *Pierce v. Concord R. Co.*, 51 N. H. 593. DISTINGUISHING *Langley v. Boston & M. R. Co.*, 10 Gray (Mass.) 103. REVIEWING *Whitney v. Atlantic & St. L. R. Co.*, 44 Me. 367; *Stearns v. Atlantic & St. L. R. Co.*, 46 Me. 117.—DISTINGUISHED IN *Nugent v. Boston, C. & M. R. Co.*, 38 Am. & Eng. R. Cas. 52, 80 Me. 62, 12 Atl. Rep. 797; *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165.

* Liability for torts where one company uses tracks of another, see note, 53 AM. & ENG. R. CAS. 78.

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There is no privity, either of contract or by implication of law, between the passengers and the lessors as common carriers of passengers by which they are rendered liable for such an injury. *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.

The remedy of the passenger for an injury thus caused is against the lessees who had the exclusive use, care, direction, and control of the road, whose agent the alleged wrong-doer was, and with whom alone the passenger contracted. *Mahoney v. Atlantic & St. L. R. Co.*, 63 Me. 68.

While the Baltimore & O. R. Co., as a corporation of the state of Maryland, can have no legal existence outside of that state, yet, as the lessee of a Virginia company, exercising all the powers and functions of the latter, it may be subject to all its duties and obligations. So acting, it may be treated as a Virginia corporation *quoad* the line of railroad under its control there, so far, at least, as its liability to the citizens of Virginia is concerned. *Baltimore & O. R. Co. v. Noel*, 32 Gratt. (Va.) 394.

62. For injuries to employees.—Where the deceased was employed as conductor of a train by a company operating a road under a lease, and the injury causing his death resulted from the incompetency of the engineer or the imperfection of the lessee's engine, the lessee, and not the lessor, is liable, although the lease was made without statutory authority. *East Line & R. R. Co. v. Culbertson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 1 S. W. Rep. 706. — RECONCILING *Macon v. A. R. Co. v. Mayes*, 49 Ga. 355. REVIEWING *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; *West v. St. Louis, V. & T. H. R. Co.*, 63 Ill. 545; *Sawyer v. Rutland & B. R. Co.*, 27 Vt. 370; *Washington, A. & G. R. Co. v. Brown*, 17 Wall. (U. S.) 445; *Freeman v. Minneapolis & St. L. R. Co.*, 10 N. W. Rep. 594; *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321; *Balsley v. St. Louis, A. & T. H. R. Co.*, 8 N. E. Rep. 859; *Nelson v. Vermont & C. R. Co.*, 26 Vt. 717. — QUOTED IN *Trinity & S. R. Co. v. Lane*, 79 Tex. 643.

63. For loss of goods.—A railroad corporation which has leased a portion of another railroad connecting with its own is

not exempted from liability to the owner of goods delivered to it at a depot on the portion so leased by an agreement with the proprietors of that road by which the two corporations upon their respective roads mutually agree to furnish suitable depot accommodations, and to receive and deliver freights, and that the liability of the first corporation for upward freight upon the road of the second shall not commence until delivery on the cars of the first. *McCluer v. Manchester & L. R. Co.*, 13 Gray (Mass.) 124. — DISTINGUISHING *Langley v. Boston & M. R. Co.*, 10 Gray 103. — APPLIED IN *Humphreys v. St. Louis, I. M. & S. R. Co.*, 37 Fed. Rep. 307.

64. For maintaining defective or unlawful bridges.—In an action against the lessees of a bridge across a navigable stream to recover damages for injuries to a steamboat, owing to the piers of the bridge obstructing navigation, the plaintiff, in order to recover, must show that the defendant had notice that the piers were not parallel with the current, as was required by the act authorizing the construction of the bridge; but such notice or knowledge may be shown by acts and circumstances, and not necessarily by direct evidence. (Barclay, J., dissenting.) *Silver v. Missouri Pac. R. Co.*, 44 Am. & Eng. R. Cas. 467, 101 Mo. 79, 13 S. W. Rep. 410. — DISAPPROVING *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333. DISTINGUISHING *Nichols v. Boston*, 98 Mass. 39; *Missouri River Packet Co. v. Hannibal & St. J. R. Co.*, 1 McCrary (U. S.) 282.

A railroad company gave another company permission to lay down a track so as to make a connection which crossed an existing bridge which was also used by foot passengers. Plaintiff in passing the bridge fell between the rails of the new track by reason of its not being properly covered, and was injured. Held, that if the lessee company had the sole ownership, possession, and use of the track, then the lessor was not liable; and whether the lessee had such possession and use of it was a question for the jury. *Gwathney v. Little Miami R. Co.*, 12 Ohio St. 92.

65. For defective fences, grade crossings, trestles, and hotel approaches.—The statute imposes the duty

*Duty of lessee to fence, see note, 19 Am. & Eng. R. Cas. 632.

upon railroad companies to fence on both sides of their track, and they are liable for damages done to cattle so long as such fences are not made or kept in good order; and this liability extends to lessees operating a road. *Tracy v. Troy & B. R. Co.*, 38 N. Y. 433; *affirming* 55 Barb. 529. — FOLLOWING *Clement v. Canfield*, 28 Vt. 302. — QUOTED IN *Burchfield v. Northern C. R. Co.*, 57 Barb. (N. Y.) 589.

A railroad that is operated by a company under a perpetual lease is the road of the latter company within the meaning of the Conn. statute authorizing proceedings to abolish grade crossings. *Westbrook v. New York, N. H. & H. R. Co.*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A lessee company in possession and operating a railroad is liable to an adjoining landowner for damages caused by an imperfect trestle causing water to back over the land; and such lessee is not entitled to notice to remove or repair the trestle before the liability attaches. *St. Louis, A. & T. H. R. Co. v. Brown*, 34 Ill. App. 552.

A railway company which leases ground near its roadbed to be used by the lessee for hotel purposes is under no implied obligation to keep in repair or well lighted that portion of the passway beyond its platform, leading from its roadbed to the hotel, and which is situated on the rented premises. Nor does the fact that the ground on which the hotel is erected is owned by the company render it liable for injuries which resulted from the defective or dangerous construction of the approaches or entrances to the hotel. *Texas & P. R. Co. v. Mangum*, 30 Am. & Eng. R. Cas. 181, 68 Tex. 342, 4 S. W. Rep. 617.

c. Liability to the Lessor.

66. Generally.—Where one railroad company has a contract for the use of the track of another company at a fixed compensation, and continues to use it after it has notice that a higher compensation will be charged, and while negotiations are pending between the companies touching the compensation to be paid, it will only be required to pay at the former rate for such use after notice given. *Farmers' L. & T. Co. v. Chicago, P. & S. W. R. Co.*, 18 Fed. Rep. 484.

Where a railroad company only acquires

the right to use the track, for a certain distance, of another company, for a stipulated rent, with the provision that it shall not serve the local traffic on that part of the road, the duties, rights, and powers of the lessee company are fixed by the contract, and the interstate commerce commission cannot interfere. *Alford v. Chicago, R. I. & P. R. Co.*, 2 Int. Com. Rep. 771, 3 Int. Com. Com. 519.

An agreement by a railway company to erect a station and stop its trains at a point of junction with the line of another company is a covenant running with the estate of such latter company, and may be enforced by its lessee. *West London R. Co. v. London & N. W. R. Co.*, 11 C. B. 327, 7 Railw. Cas. 477, 17 Jur. 301, 22 L. J. C. P. 117.

Where a lease of a railway contains an agreement by the lessee company to carry over it all traffic between certain places, and contains other provisions on which no relief can be obtained in equity, and containing no negative stipulation restricting the lessee company from carrying the traffic over other lines, a bill by the lessor company alleging that the lessee is carrying the traffic over other lines of its own, and praying for an injunction, is not demurrable, and the relief sought may be granted. *Wolverhampton & W. R. Co. v. London & N. W. R. Co.*, 43 L. J. Ch. 131, L. R. 16 Eq. 433. — CONSIDERED IN *Donnell v. Bennett*, L. R. 22 Ch. D. 835, 52 L. J. Ch. 414, 48 L. T. 68, 31 W. R. 316.

A company leased its road to another company, the lessee agreeing to pay as rent a certain part of the gross earnings, and if the rent should be insufficient to pay interest on bonds, then the lessee should advance money sufficient. The rent was not sufficient to pay interest, and after some money was advanced a supplemental contract was made by which the lessee was to pay a larger part of the earnings as rent, but not to make further advances, and all provisions of the former lease not modified were ratified, and "all causes of action for breach of any agreement therein" were waived and released. *Held*, that any claims of the lessee for moneys advanced were thereby released. *Stewart v. Hoyt*, 16 Am. & Eng. R. Cas. 513, 111 U. S. 373, 4 Sup. Ct. Rep. 519.

67. For waste.—Where a railroad company leases a warehouse with the privilege of purchasing it within a certain time, if it

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fails to exercise the privilege, within the time, it is liable for waste committed on the premises during the time that it is in possession. And the fact that the road was in the hands of a receiver would not bar an action for waste. *Powell v. Dayton, S. & G. R. R. Co.*, 16 *Oreg.* 33, 8 *Am. St. Rep.* 251, 16 *Pac. Rep.* 863.

In such case the statute of limitations would not begin to run against an action against the company for waste until its privilege of purchasing under the lease had been extinguished by lapse of time. *Powell v. Dayton, S. & G. R. R. Co.*, 16 *Oreg.* 33, 8 *Am. St. Rep.* 251, 16 *Pac. Rep.* 863.

68. For value of property lost or destroyed.—A railroad company leased a steamboat, the lease providing that the boat was in good condition, but that two persons should examine it and determine its condition; but they failed to do so, and the company took it without objection. *Held*, that the company could not set up as a defense to an action for the loss of the boat any defects which were known, or might have been known by reasonable care and diligence. *Stewart v. Western Union R. Co.*, 4 *Biss. (U. S.)* 362.

And where such boat exploded while being run and was thereby lost, it is a question for the jury whether the company used reasonable skill, and whether the explosion could have been prevented by human skill. *Stewart v. Western Union R. Co.*, 4 *Biss. (U. S.)* 362.

But in such case, if the explosion resulted from some hidden and unknown defect, then the company was not liable for the loss. *Stewart v. Western Union R. Co.*, 4 *Biss. (U. S.)* 362.

69. For rent of land that becomes submerged.—Appellee leased to appellant a lot on the gulf shore for \$400 per annum, payable quarterly in advance. The defense was that since the execution of the lease and before the accrual of the rents sued for the leased property had been submerged and encroached upon by the waters of the gulf, so that it was in great part below ordinary high tide, and because of the cutting away of the beach and the consequent depletion of the land it had ceased to be owned by plaintiff, was not subject to lease, nor under private dominion. Recovery by plaintiff was affirmed. *Galveston C. R. Co. v. Gulf Land Co.*, 2 *Tex. Civ. App.* 326, 21 *S. W. Rep.* 959.

In a proper case, rent for property totally destroyed should be abated, and where there is a partial destruction of the property, apportioned; but in this case the purpose of the lease was to prevent a rival street-railway company from using it. The lessee knew when the lease was made that the lot was about two thirds under water, and was a daily witness of the erosion of the beach and the encroachment of the water. It got all it contracted for, and the judgment of the lower court was right. *Galveston C. R. Co. v. Gulf Land Co.*, 2 *Tex. Civ. App.* 326, 21 *S. W. Rep.* 959.

70. Duty to make repairs.—A contract leasing certain premises to a railroad was executed in duplicate. The lease signed by the company provided for a stipulated rent in money, and ordinary taxes, water rates, and necessary repairs, with all alterations, if any needed. The copy signed by the lessor provided for the same rent "and ordinary taxes, and water rates, and all repairs or alterations necessary." *Held*, that the company was not obliged to put the premises in good repair, or to make repairs or alterations not necessary for the use of the premises. *White v. Albany R. Co.*, 17 *Hun (N. Y.)* 98.

A covenant in the lease of a railroad that the lessees shall "return said road and property, both real and personal, at the termination of this lease, in as good condition and repair in all respects as it is now in, natural wear only excepted," imports that the road is to be kept in good running condition during the term and returned in that condition, and that all structures, which by decay or accident, become unsafe, must be renewed at the expense of the lessees. *Sturges v. Knapp*, 31 *Vt.* 1.

A lease of a wharf or pier to a railroad, contained covenants by the lessees to repair generally, "reasonable wear and tear and accidents by fire and tempest excepted," and to repair after notice in writing. The wharf was damaged by the action of the ice forced against it by a high wind. The premises were sold to plaintiff under an execution against the lessors, and plaintiff gave a written notice to repair. In an action for breach of the covenants to repair generally after notice—*held*: (1) that the non-repair was a continuing breach of the covenants to repair, of which the plaintiff, as assignee, might avail himself; (2) that the covenant to repair after notice

was subject to the same exceptions as were contained in the general covenant; (3) that the damage here sustained could not be said to be an accident caused by tempest, so as to bring it within the exception. *Thistle v. Union Forwarding & R. Co.*, 29 U. C. C. P. 76.

71. Eviction.—Where a mortgaged railroad is leased the mere entering of a foreclosure decree during the term is not an eviction of the lessee so long as the decree remains unexecuted; and he cannot set up such decree as an eviction by paramount title, so as to entitle him to withhold rent or to rescind the lease. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 Biss. (U. S.) 456.

And the appointment of a receiver for the road is not an eviction, where the receiver is instructed not to disturb the possession of the lessee. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 Biss. (U. S.) 456.

Where a rolling mill and furnace, together with a railroad, is leased, the use of the latter being essential to the enjoyment of the premises, for the lessor to tear up the track after the lessee has taken possession amounts to an eviction, and is a bar to an action to recover the premises for the non-payment of rent. *Peck v. Hiler*, 24 Barb. (N. Y.) 178, 14 How. Pr. 155.

In such case the fact of the lessee having recovered damages of the lessor for a breach of the covenant for the use of the railroad, will not alter the case, such covenant being a continuing one. *Peck v. Hiler*, 24 Barb. (N. Y.) 178, 14 How. Pr. 155.

Where it is obvious from the construction of the whole lease that the use of the railroad was intended to be secured to the lessee during the term as part of the demised premises, the fact that it was granted in the form of a covenant and separate from the formal demise, will not prevent the enjoyment of the railroad from forming part of the demise. *Peck v. Hiler*, 24 Barb. (N. Y.) 178, 14 How. Pr. 155.

But where certain premises are leased with a railroad track thereon, if it appears that the lessee did not wish to use the track, and had determined to abandon it, he could not claim an eviction because the lessor afterwards tore up the track. *Peck v. Hiler*, 31 Barb. (N. Y.) 117.

72. Right to remove fixtures.—Upon the termination of a lease of grounds

a railroad company may remove tracks that it has laid on the grounds. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

A railroad having a lease of grounds may lay a track and use it, if not forbidden by the terms of the lease, and no waste be committed; but the rails must be removed before the lease terminates; and no easement is acquired, as where the land is appropriated or taken. *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67.

73. Duty efficiently to work the road.—If a line is leased on condition that it shall be used and worked efficiently, and so as to develop the traffic, and the lessees are to receive for their remuneration a fixed portion of the receipts, the obligation to work efficiently and to maintain the traffic remains the same, whether the lessees' working expenses are above or below their share of the receipts. *Dublin & M. R. Co. v. Midland, G. W. R. Co.*, 3 Ry. & C. T. Cas. 379.

A railway company leasing the road of another company under a covenant to "efficiently work and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges and expenses, claims and demands, whether incurred or sustained in consequence of not working, or in any manner connected with the working of the railway and works" is not bound to work the road for passenger traffic even if such traffic presents itself. *West London R. Co. v. London & N. W. R. Co.*, 11 C. B. 327, 7 Railw. Cas. 477, 17 Jur. 301, 22 L. J. C. P. 117.

Although a lessee of a railway has the power to compel another railway company to stop its trains at a point of junction, under an agreement between the latter company and the lessor, it is not bound to exercise that power under a covenant in the lease whereby it agreed to "efficiently work and repair the railway and works demised, and indemnify the plaintiffs against all liabilities, loss, charges and expenses, claims and demands, whether incurred or sustained in consequence of not working, or in any manner connected with the working of the railway and works." *West London R. Co. v. London & N. W. R. Co.*, 11 C. B. 327, 7 Railw. Cas. 477, 17 Jur. 301, 22 L. J. C. P. 117.

74. Duty to maintain gates at farm crossings.—While the provision of the N.

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Y. Act of 1864 (Laws of 1864, ch. 582, § 2), requiring the lessee of a railroad to "maintain fences on the sides of the road so leased * * * with openings or gates or bars therein at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads," does not expressly require such lessee to build and maintain farm crossings, yet it is the duty of such a lessee in possession, with power to make repairs and additions, to construct necessary farm crossings. *Buffalo, S. & C. Co. v. Delaware, L. & W. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.—FOLLOWING *Jones v. Seligman*, 81 N. Y. 190.

This obligation is not confined to domestic corporations or those organized under the general railroad act, but applies to a foreign corporation which, under authority given to it by statute, has leased and is operating a road in the state, and has covenanted by its lease to perform all things in connection with the road which the lessor might be required to perform. *Buffalo, S. & C. Co. v. Delaware, L. & W. R. Co.*, 130 N. Y. 152, 29 N. E. Rep. 121, 41 N. Y. S. R. 259; affirming 27 N. Y. S. R. 216, 7 N. Y. Supp. 604.

75. Duty to pay taxes.—Under a mandate of the supreme court that the petitioner be allowed, in reduction of the rent due from it to the petitioner, all taxes paid to the state in accordance with the provisions of No. 1, Vt. St. 1882, the petitioner cannot deduct an amount in excess of what the taxes would be if computed upon the actual gross receipts of the railroad of the petitioner. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 65 Vt. 366, 26 Atl. Rep. 638.

Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it—*held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes. *McPherson v. Atlantic & P. R. Co.*, 66 Mo. 103. —DISTINGUISHED IN *Gregg v. Farmers & M. Bank*, 80 Mo. 251.

76. Right to compensation for the running of extra trains.—One corpora-

tion leased its railroad to another, which agreed to equip it with engines, cars, and other furniture, and to give as favorable accommodation to its business as if it owned it, and to run regular trains, and also extra trains when required, for which last it should be allowed "the actual cost of running the same"; and it was agreed that the lessees should collect the revenues of the road leased, and, before paying them to the lessors, take out a certain sum semi-annually for running the trains over their road, and a certain proportion of the balance for the use of their own road by such trains. *Held*, that the "actual cost" of the extra trains included only money actually paid out, and not a proportion of the expense of the lessees' road or of the wear and tear of their track. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 9 Gray (Mass.) 226.

The lessees were bound to transport, without extra charge, wood and coal intended for and used upon that part of a brick yard at the junction of the two roads, which bordered on the road leased, and which were drawn over the lessees' road, and over a side track built by agreement between the two corporations, and in part within the location of that road. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 9 Gray (Mass.) 226.

A further agreement for an additional allowance to the lessees for certain freight for a specified time, having been "continued by mutual consent" until a later date, did not entitle the lessees, after that date, to any compensation beyond that stated in the original agreement. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 9 Gray (Mass.) 226.

77. Lease of coal lands—Duty to pay for waste coal.—A corporation leased certain coal lands, agreeing to pay so much a ton for all merchantable coal "exclusive of culm or mine waste that will pass through a mesh $\frac{1}{4}$ inch square." At the time the lease was made there was no market for such waste coal, but during the term it was further separated so as to give it a market value, and a large amount of it was sold. *Held*, that the company was not obliged, under the lease, to utilize the waste, but having done so, it must account therefor to the lessor. (Van Brunt, P. J., dissents.) *Genet v. Delaware & H. Canal Co.*, 35 N. Y. S. R. 552, 58 Hun 492; see 12 N. Y. Supp. 572.

78. Right of way over coal lands—Right to sue for interruption of mining.—Where a railroad company has the right of way over mining lands, and covenants with the owner thereof that upon notice it will change its location, or permit the coal underneath the way to be mined, a tenant of such owner, the terms of whose lease give him the right to mine all the coal in the land demised, may sue in the name of the landlord for breach of such covenant. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468.

The removal of a railroad to another location on the same land, in such a case, was merely contractual, and involved no exercise of the power of eminent domain, and is not within the decisions holding that the power of location when once exercised, is exhausted, and the railroad was therefore liable in damages for the breach of its covenant. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468.

The measure of damages under such circumstances was the value of the coal which was left standing, so as not to let down the surface, and a verdict for these damages *in solido* may be apportioned by the jury between the landlord and the tenant. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468.

The tenant, under the terms of such a lease, does not part with his right to damages for the breach of covenant on the part of the railroad, because he had sold "all of his right, title, and interest" in the colliery. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468.

The fact that the landlord, after suit brought by the tenant, released all his right under his contract with the railroad company would not affect the right of the tenant, but would reduce that portion of the verdict which, in the apportionment by the jury, was allowed to the landlord. *Mine Hill & S. H. R. Co. v. Lippincott*, 86 Pa. St. 468.

d. Ratification and Part Performance.

79. What amounts to a ratification.—A corporation, like a natural person, may ratify any act which it can perform; and the entry into the possession of a leased road in pursuance of a lease executed by its officers without due authority, and operating the same and paying the rent

therefor, as reserved in said lease, is ample evidence of the ratification thereof. *Oregon R. Co. v. Oregon R. & N. Co.*, 28 Fed. Rep. 505, 12 Sawy. (U. S.) 109. *Coxe v. Camden & A. R. Co.*, 17 Phila. (Pa.) 349.

The fact that the legislature, after an unauthorized lease was made, passes a statute forbidding the directors of the company, its lessees or agents, from collecting more than a fixed amount of compensation for carrying passengers and freight, is not a ratification of the lease or an acknowledgment of its validity. *Thomas v. West Jersey R. Co.*, 101 U. S. 71.—APPROVED IN *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801. DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. QUOTED IN *United States v. Trans-Missouri Freight Assoc.*, 53 Fed. Rep. 440; *Naglee v. Alexandria & F. R. Co.*, 32 Am. & Eng. R. Cas. 401, 83 Va. 707.

80. Estoppel by part performance.

—Where one company leases a railroad for a long term, and other companies guarantee the performance of the lease, and the road is run for ten years under the lease, the lessee and guaranteeing companies are not thereby estopped from repudiating the lease as being void for a want of power to make it. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 Am. & Eng. R. Cas. 58, 118 U. S. 290, 6 Sup. Ct. Rep. 1094.—REVIEWED IN *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 10 U. S. App. 98, 2 C. C. A. 174.

Where an unauthorized lease has been made for a long term, and carried out for several years, the lessee may refuse to continue its performance, and he will not be estopped on the ground that it is an executed or partly executed contract. *Oregon R. & N. Co. v. Oregonian R. Co.*, 39 Am. & Eng. R. Cas. 176, 130 U. S. 1, 9 Sup. Ct. Rep. 409.—DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. B. Co.*, 39 Am. & Eng. R. Cas. 213, 131 U. S. 371; *Eastern Townships Bank v. St. Johnsbury & L. C. R. Co.*, 40 Fed. Rep. 423. FOLLOWED IN *Oregon R. & N. Co. v. Oregonian R. Co.*, 145 U. S. 52. REVIEWED IN *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 51 Am. & Eng. R. Cas. 162, 51 Fed. Rep. 309, 10 U. S. App. 98, 2 C. C. A. 174.—*Oregon R. & N. Co. v. Oregonian R. Co.*, 145 U. S. 52, 12

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Sup. Ct. Rep. 814.—FOLLOWING Oregon R. & N. Co. v. Oregonian R. Co., 130 U. S. 1.

When a transaction is complete and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract, in all those instances where the party who has performed cannot, upon rescission, be restored to his former status. *Camden & A. R. Co. v. May's Landing & E. H. C. R. Co.*, 48 N. J. L. 530, 7 Atl. Rep. 523.—DISTINGUISHING *Thomas v. West Jersey R. Co.*, 101 U. S. 71. FOLLOWING *Woodruff v. Erie R. Co.*, 93 N. Y. 609. REVIEWING *Ashbury R. C. & I. Co. v. Riche*, L. R. 7 H. L. Cas. 653; *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258.

81. Part performance as affecting right to rescind.—A stipulation in a railroad lease that the lessor company was to "arrange, provide for, adjust, and classify its indebtedness" is a stipulation in substance which it must perform; and the lessee is not bound to wait for an indefinite or unreasonable time for such arrangement to be effected. But if the lessee acts under the lease before such indebtedness is classified and arranged, a court will refuse to decree a rescission of the lease at the application of the lessee without giving the lessor a reasonable time to comply with the lease. And the court fixed eight months, under the circumstances of the case, as a reasonable time. *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 Biss. (U. S.) 456.

e. Assigning and Subletting.

82. What amounts to an assignment.—A lease of all the property, rights, and franchises of a railroad is such a general assignment as will bind the person taking thereunder as assignee of a lease made to the road, if the assignee accepts the assignment by entering into possession. *Ecker v. Chicago, B. & Q. R. Co.*, 1 Am. & Eng. R. Cas. 357, 8 Mo. App. 223; *Indianapolis Mfg. & C. Union v. Cleveland, C., C. & I. R. Co.* 45 Ind. 281.

83. Ratification by lessor.—A lease of certain railroad tracks and terminal facilities provided that it should be binding on the "lessees, assigns, grantees, and successors" of each party. By various consolidations and leases the property came into the

hands of a third company, which the lessor recognized for more than a year, granting it all the privileges secured by the lease, without questioning its interest in the property, when a bill was filed to determine certain questions growing out of a construction of the lease. Held, that the lessor could not for the first time question the legality of such company's successorship to the property. *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 50 Am. & Eng. R. Cas. 60, 143 U. S. 596, 12 Sup. Ct. Rep. 479; modifying and affirming 45 Fed. Rep. 304.

84. Liability of assignee to lessor.

—Where a contract is entered into between two companies by which one obtains certain running and terminal privileges from the other, and another company succeeds to the property and franchises of the lessee, and the lease is thereafter recognized and acted on, the lessor can recover a reasonable compensation for use and occupation, and no special contract or formal assignment of the lease is necessary. *Jacksonville, L. & St. L. R. Co. v. Louisville & N. R. Co.*, 47 Ill. App. 414.

Where a company, as the assignee of a lease which permitted the construction of a railroad track across the leased premises, and provided for the forfeiture of the lease in default of payment of the rent, entered upon the premises and constructed its tracks thereon, and subsequently refused to pay the rent, the lessor may maintain ejectment against the company, and can do so without entry or demand of possession. *Avery v. Kansas City & S. R. Co.*, 113 Mo. 561, 21 S. W. Rep. 90.—QUOTING *McClellan v. St. Louis & H. R. Co.*, 103 Mo. 296. REVIEWING *Hubbard v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 70; *Kanaga v. St. Louis, L. & W. R. Co.*, 76 Mo. 207; *Horton v. New York C. & H. R. R. Co.*, 12 Abb. N. Cas. (N. Y.) 30.

A lease was made to one as trustee for a partnership, and for an incorporated railroad company, which was to succeed such partnership. The trustee and partnership entered into an agreement that the former should assign his lease to the latter, and that the latter would, and thereby did, assume the covenants of the lease for themselves and for the corporation to succeed them. Subsequently the corporation agreed to assume the covenants, took an assignment of the lease, and entered into pos-

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session of the leased premises. *Held*, that the lessor could maintain an action against the corporation to enforce the covenants in the lease. *Van Schaick v. Third Ave. R. Co.*, 38 N. Y. 346; *affirming* 49 Barb. 409.

85. Violation of agreement not to assign.—Where a lease contains a clause against an assignment of the lease without the written consent of the landlord, if the lease is assigned without such consent, the assignee is chargeable with notice of the terms of the lease, and if the landlord does not accept rent for occupancy of the premises after assignment, he will not be estopped from claiming a forfeiture of the lease by reason of the assignment. *Indianapolis Mfg. & C. Union v. Cleveland, C., C. & I. R. Co.*, 45 Ind. 281.

A covenant by the lessee of a railroad not to assign the road is broken by his assignment of the future gross earnings of the road to a third person, and contracting to use and operate it under the direction of the assignee. (Allen, Blodgett, and Bingham, JJ., dissenting.) *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529.

A lease of A.'s road to B. is not made dependent upon the validity and continuing existence of a lease of C.'s road to B., by a covenant that A. shall receive from B. a monthly statement of the gross receipts of C.'s road, and shall have an opportunity to inspect its books and accounts. *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529.

A clause in a contract leasing to the St. Louis company, its successors and assigns, the right to build a track on land of the Pacific company connecting the main tracks of the two lines provided that none of the rights or privileges thereby granted should be transferred, assigned, or sublet to, or permitted to be used or enjoyed by, any other company or corporation. *Held*, that such clause only restrained a transfer of track over its land or an assignment of its use independently of the St. Louis company, but was not intended to prevent the right or privilege granted passing to an assignee of the railroad of the St. Louis company as a part of such railroad. *Minneapolis & St. L. R. Co. v. St. Paul, M. & M. R. Co.*, 26 Am. & Eng. R. Cas. 638, 35 Minn. 265, 28 N. W. Rep. 705.

86. When liability of lessee for rent ceases.—An unincorporated association or partnership was formed to build a street railway. An individual took a lease of certain premises in his own name for the benefit of this association, the obligations of which lease the association assumed. Subsequently a corporation was formed, composed in part of the members of the association and other persons, and took a general assignment of all the property of the association, and of the lease in question, and for several years occupied the premises and paid rent, when the corporation sold all of its property and assigned the leased premises to third parties. *Held*, that the liability of the corporation for rent ceased when it made the assignment and ceased to use the premises; and it could not be held as *cestui que trust*. *Van Schaick v. Third Ave. R. Co.*, 25 How. Pr. (N. Y.) 446; *reversing* 30 Barb. 189, 8 Abb. Pr. 380.

87. Rights of lessees and their assignees.—Where one not the lessee is in possession of leased premises, the presumption is that he is in as assignee of the lease, and the burden is on him to show the character of his possession. *Ecker v. Chicago, B. & Q. R. Co.*, 1 Am. & Eng. R. Cas. 357, 8 Mo. App. 223.

A sublessee company in possession of a railroad, and operating it for its own benefit, is a lessee within the meaning of New York General Railroad Act of 1850, as amended in 1864, and as such is liable for live stock killed on the track by reason of a failure to maintain proper fences and cattle-guards. *Burchfield v. Northern C. R. Co.*, 57 Barb. (N. Y.) 589.—*QUOTING Tracy v. Troy & B. R. Co.*, 38 N. Y. 437.

Where a railway company which had an agreement with another company, giving it the right to use a portion of its line, leased its road with all powers, privileges, and all benefit to be derived from such agreement to the third company, the agreement, under the special and general acts in question, was binding upon the lessee company and upon the company whose line was to be used, and the lessee was entitled, as against such company, to stand, in respect of the agreement, in the situation of the lessor. *London & S. W. R. Co. v. South Eastern R. Co.*, 8 Ex. 584, 22 L. J. Ex. 193.

88. Right of a licensee to sublet.—Where an arrangement by which one railroad has a right to use the track of another

for hire constitutes a mere license, it has no right to sublet, or to convey to another company the privilege of using the track in common with itself. *Coney Island & B. R. Co. v. Brooklyn Cable Co.*, 53 Hun (N. Y.) 169, 25 N. Y. S. R. 323, 6 N. Y. Supp. 108.

80. Where a lessee company leases its road.—A company leased its railroad for forty years, and a year later the lessee company leased its road to defendant company for twenty years, with the privilege of making the lease perpetual, defendant agreeing to assume the lease of the former road. *Held*, that the assumption of this lease by defendant created no direct obligation to the lessor of the first road leased which could be enforced in an action at law, but it might be enforced in equity. *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483.

In such case defendant elected to surrender the road at the expiration of the twenty years. *Held*, that this did not bind it for the rent of the first road leased after the time of the surrender. *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483.

The president of the first road leased indorsed on the company's bonds that defendant had assumed the lease, and that the rent to be paid was more than sufficient to meet the interest on the bonds; but this seemed to be without the instance or direction of defendant. *Held*, that such indorsements did not prevent defendant from denying its liability on such lease after it surrendered the property. *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483.

As between the original lessor and lessee, the fact that the directors of the lessee failed to make the continuance of the lease dependent on the construction of the road into the state of Minnesota, with connections with the principal cities of that state, as was expected at the time the lease was made, but which was never carried out, is not sufficient to warrant a presumption of fraud on the part of such directors in executing the lease. *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483.

Neither will fraud be presumed against such directors because the rent stipulated for turned out to be larger than the business over the leased road really justified, where the evidence shows that the rent was fixed after a report by competent and disinterested persons. *Jesup v. Illinois C. R. Co.*, 43 Fed. Rep. 483.

5. Joint Liability of Lessor and Lessee.*

90. For damages resulting from construction of road.—Where one railroad is conveyed or leased to another, the vendee or lessee is jointly liable with the original owner or lessor for damages resulting from a permanent injury to property caused by the construction of the road. *Stickney v. Chesapeake & O. R. Co.*, 52 Am. & Eng. R. Cas. 56, 93 Ky. 323, 20 S. W. Rep. 261.—APPROVING *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496, 14 Am. & Eng. R. Cas. 126. REVIEWING *Louisville & N. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. Rep. 8.

Where one company raises the grade of a street and lays an additional track thereon, and another takes possession of, and continues the permanent use of the same, the companies are jointly liable for a permanent injury to adjoining property resulting therefrom, and also for any temporary injury occurring after the lease from causes created by the lessor and continued by the lessee. *Little Miami R. Co. v. Hambleton*, 14 Am. & Eng. R. Cas. 126, 40 Ohio St. 496.

91. For damages resulting from operation of road.—While the company owning a railway, its engines, cars, and equipments, may be liable to a party injured through the negligence of the servants of its lessee operating the same, the lessee company is also liable. *Pennsylvania Co. v. Sloan*, 35 Am. & Eng. R. Cas. 440, 125 Ill. 72, 17 N. E. Rep. 37; affirming 24 Ill. App. 48.

If a train of cars of one company, running on the road of another company, be under the exclusive control of the servants of the latter, the latter is liable for all damages occurring through negligence. But if the servants of both companies jointly control the train, both companies are liable. *Nashville & C. R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347, 12 Am. Ky. Rep. 20.—APPROVED IN *East Tenn., V. & G. R. Co. v. Fain*, 19 Am. & Eng. R. Cas. 102, 12 Lea (Tenn.) 35.

When a railroad is owned by one company, and is, without authority of law, leased to another company, both are liable for injuries inflicted wrongfully by the lessee: the company owning the original franchise because it could not relieve itself,

* Liability of lessor and lessee for negligence, etc., see note, 32 AM. & ENG. R. CAS. 410.

without legislative permission, from liability for the acts and default of its lessee, and the lessee because of its actual operation of the road. *International & G. N. R. Co. v. Dunham*, 31 *Am. & Eng. R. Cas.* 530, 68 *Tex.* 231, 4 *S. W. Rep.* 472.

92. When lessor not a necessary defendant.—Where a suit is brought against a company which operates another's road under a lease, for refusing to receive goods and transport them over the leased line, there is no necessity to make the lessor company a defendant. *Central R. Co. v. Logan*, 30 *Am. & Eng. R. Cas.* 63, 77 *Ga.* 804, 2 *S. E. Rep.* 465.

6. Leasing Mortgaged Roads.

93. When mortgage does not defeat power to lease.—Under section 13 of Mass. St. of 1876, ch. 236, the Eastern R. Co. has merely power to sell property not needed for the operation of its railroad, and to apply the proceeds to a sinking fund, but is not bound to make sales of it; and it is no objection to a lease of its property to another railroad company, under the St. of 1880, ch. 205, that the lease includes such property, and thereby prevents the proceeds of sales being applied to the sinking fund. *Phillips v. Eastern R. Co.*, 22 *Am. & Eng. R. Cas.* 247, 138 *Mass.* 122.

By the terms of what were known as "income mortgage bonds" of a railroad, the interest payable was subject to the condition that the entire earnings of the railroad, after deducting the operating expenses and interest on liens and indebtedness, should suffice to pay the interest upon the bonds. The coupons upon the bonds contained the same condition. The property mortgaged included not only the railroad and its branches, with the franchise, but all property and privileges then owned by the company, or which might thereafter be owned or acquired by it; and the mortgage stipulated that another mortgage or assurance should be given upon after-acquired property, if requested. *Held*, that by the terms of the mortgage and bonds the parties contemplated that the directors should have power to manage and extend the road in the usual manner and were not precluded from exercising the power possessed by them, of leasing the road to another company upon terms which rendered the lessee responsible for mortgages by the

lessor (such responsibility being by way of rent), and that the fact that the lease would reduce the amount available for the payment of the coupons of the "income mortgage bonds" did not constitute any breach of contract between the bondholders and the mortgagor. *Day v. Ogdensburg & L. C. R. Co.*, 35 *Am. & Eng. R. Cas.* 102, 107 *N. Y.* 129, 13 *N. E. Rep.* 765, 11 *N. Y. S. R.* 335; *reversing* 42 *Hun* 654, 4 *N. Y. S. R.* 772.—APPROVED IN *Thomas v. New York & G. L. R. Co.*, 139 *N. Y.* 163.

94. Authority of mortgage trustees to lease.—Where mortgage trustees are in possession of a road after foreclosure, their duty as to the management of the road must be performed so as to meet all the incidents of the case, taking into account the nature of the property, the public demands upon those who operate the road, and the duty of securing the greatest permanent return for the *cestuis que trust*, the nature of the property, and the extent of its equipment; and in view of all these conditions, if it seems best to lease the road, the trustees are authorized to do so. *Sturges v. Knapp*, 31 *Vt.* 1.

The lease of a road by mortgage trustees in possession, for a term of ten years, containing a condition of defeasance, enabling a majority in amount of the bondholders to terminate it in one year by notice, will not be set aside in a court of chancery, at the suit of bondholders, as exceeding the powers of the trustees, as to the term, as it is well known that a lease for a long term can be made on more favorable terms than a lease for a shorter term. *Sturges v. Knapp*, 31 *Vt.* 1.

95. When lessee should be party to foreclosure suit.—Where a suit is commenced to foreclose a railroad mortgage, and the defendant corporation sets up that the road is leased, and that if the lessee had properly used the earnings of the road, as it should have done, the mortgaged debt would have been paid, it is proper to bring in the lessee and compel it to account. *Chamberlain v. Connecticut C. R. Co.*, 54 *Conn.* 472, 4 *N. Eng. Rep.* 477, 3 *Atl. Rep.* 244.

96. When leased property not subject to mortgage lien.—A company in Iowa executed a mortgage on all its property then owned and that might thereafter be acquired. Afterwards it leased certain cars, under a written contract which was

ver recorded. Later the road went into the hands of a receiver pending a foreclosure. The receiver took possession of the leased cars with the other property. *Held*: (1) under the laws of that state, that the failure to record the lease did not render the cars subject to the lien of the mortgage; (2) that the owner of the cars was entitled to possession, and compensation for the time the receiver used the cars. *Meyer v. Western Car Co.*, 2 Am. & Eng. R. Cas. 375, 102 U. S. 1.—DISTINGUISHED IN *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

97. Right of mortgagees to rents.

—The lessee of a railroad, after paying rent due, may appropriate the rest of its earnings to the payment of interest on bonds, or to the improvement of the road, and is not bound to keep the surplus to meet future demands for rent. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 33 Am. & Eng. R. Cas. 16, 125 U. S. 658, 8 Sup. Ct. Rep. 1011.—QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26.

Where the lessee of a railroad applies earnings to payment of interest on mortgage bonds, instead of to payment of rent, and the mortgage is afterwards foreclosed, if the lessor has a prior equitable lien for rent, it is against the bondholders to whom the interest was paid, and not against the fund arising from the foreclosure. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 33 Am. & Eng. R. Cas. 16, 125 U. S. 658, 8 Sup. Ct. Rep. 1011.

A mortgagee out of possession has no lien upon rents. Until he elects to take possession, or moves for a receiver, the rents belong to the lessor, who may contract as he chooses with the lessee or his assignee in regard to them. *Frank v. Erie & G. V. R. Co.*, 33 N. Y. S. R. 235, 122 N. Y. 197, 25 N. E. Rep. 332; *modifying and affirming* 7 N. Y. S. R. 814, 44 Hun 624, *mem.*

When the mortgagee takes possession he does so subject to all arrangements made in good faith between a lessor, lessee, and assignee, for the relief of the latter, unless there was an express promise by him enuring to the mortgagee's benefit. *Frank v. Erie & G. V. R. Co.*, 46 Am. & Eng. R. Cas. 356, 33 N. Y. S. R. 235, 122 N. Y. 197, 25 N. E. Rep. 332; *modifying and affirming* 7 N. Y. S. R. 814, 44 Hun 624, *mem.*

Where a grant of the reversion of an estate expectant on the determination of a lease for years is by way of mortgage, the mortgagee, though entitled to the rents as incident to the reversion, may take them or not at his election. If he allows the mortgagor to receive them, and afterwards elects to take them himself, and gives notice of his election to the tenant, he becomes entitled to all the rents accruing after the execution of the mortgage and in arrear and unpaid at the time of the notice, as well as to those which accrue afterwards. But the rents in arrear at the time the mortgage was executed belong to the mortgagor. *King v. Housatonic R. Co.*, 45 Conn. 226.

A company leased its road to another company for five years, and afterwards mortgaged the same property to trustees for the holders of certain bonds, the mortgage providing that the mortgagees, on default of the payment of the semi-annual interest on the bonds for six months, might enter and take possession of the property and receive the rents and income. The mortgagees entered for default of payment of interest, and gave notice to the lessees to pay to them all rents then due or thereafter accruing. At this time a large sum was due from the lessees for rent, and a few days after the entry a creditor of the lessors factorized the lessees as debtors of the lessors for the rents overdue. *Held*, that these rents were not taken by the attachment, but belonged to the mortgagees. *King v. Housatonic R. Co.*, 45 Conn. 226.

98. How lease is affected by foreclosure.—A railroad company purchased a road at a foreclosure sale, and, *inter alia*, took possession of certain property which the former company had only leased, and continued to use it for a number of years. *Held*, that the relation of landlord and tenant was not created between the owners of the leased property and the purchasers, by operation of the sale; but by the act of the parties the purchasers acquired an equitable estate in the premises the same as the legal estate under the lease, and that both parties were estopped from denying that this was so. *Wiggins Ferry Co. v. Ohio & M. R. Co.*, 52 Am. & Eng. R. Cas. 82, 142 U. S. 396, 12 Sup. Ct. Rep. 188.

Two railroad companies entered into a contract under seal whereby one was allowed to use a portion of the track of the other jointly with it, which contract was acted on

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for some time when the lessee company became insolvent, and its road and franchise were sold at foreclosure to another company, which continued to use the track for a time, but afterwards abandoned it. *Held*, that the purchasing company was liable to the company owning the track according to the terms of the agreement entered into by the insolvent company; and the fact that such purchasing company had given notice that it renounced the benefits of the contract did not affect its liability for such use. *South Carolina R. Co. v. Wilmington, C. & A. R. Co.*, 7 So. Car. 410. See also *Frank v. New York, L. E. & W. R. Co.*, 46 Am. & Eng. R. Cas. 356, 122 N. Y. 197, 25 N. E. Rep. 332, 33 N. Y. S. R. 235; *modifying* 44 Hun 624, *mem.*, 7 N. Y. S. R. 814.

99. Validity of lease of Vermont and Canada railroad—Right of bondholders to object.—The contract of lease between the Vermont & Canada R. Co. and the Vermont Central R. Co., made Aug. 24, 1849, and the addition thereto made July 9, 1850, were not unlawful as being against public law or policy. Those corporations themselves and their stockholders having assented to the validity of those contracts, it is not competent for a bondholder under the first mortgage of the Vermont Central R. Co., given in express subjection to those contracts, to object to their validity, on account of the want of capacity of those corporations to make them. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

Though the charters of those corporations did not authorize such contracts, the general act of 1847 (Comp. St. ch. 26, § 66) did, and the exercise of these powers by the stockholders of those corporations, in authorizing the contract of July 9, 1850, at a meeting held for that purpose, without any objection on the part of any one of them, either at that time or subsequently, is sufficient ground of presumption that the corporations, as such, had accepted them as part of their organic law; and that the stockholders all concurred in the action then taken, and that they assent to its effect for all legitimate purposes touching the rights either of the corporation or of themselves individually as members of such corporation. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.—FOLLOWED IN *Hazard v. Vermont & C. R. Co.*, 12 Am. & Eng. R. Cas. 388, 17 Fed. Rep. 753.

The claim that the indentures of Aug. 24, 1849, and July 9, 1840, are not a lease and security, for rent, but a pretext and cover under which the Vermont Central R. Co. built, with its own means, the Vermont & Canada railroad, the same as if the latter company had not existed, the pretended taking of stock in that company being in fact a loan of money by the stockholders to the Vermont Central R. Co. at a guaranteed interest of eight per cent.—*held*, to be unfounded. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

Though as an open question, independently of the action of the parties, it would seem that the contract of the lease contemplated that the sum on which the eight per cent. should be cast, to arrive at the amount of rent to be paid by the Vermont Cent. R. Co., was to be the actual outlay of money directly for the construction of the Vermont & C. R., still the meaning put upon the contract by the parties themselves by the payment of rent and the adjustment of accounts, appears so clearly to have been that the cost of construction should be measured by the capital stock of the Vermont & C. Co. paid in, with interest on the expenditures from the time they were made in pursuance of the contract of lease, that such must be taken to be the true meaning of the contract in that respect. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1.

7. Procedure.

100. Remedy by action at law.

When an action at law is an adequate remedy for a forfeiture of the estate conveyed by a lease of a railroad, equity may leave the lessor to that remedy. *Boston C. & M. R. Co. v. Boston & L. R. Co.*, 51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529. *Pittsburg & C. R. Co. v. Mt. Pleasant & B. F. R. Co.*, 76 Pa. St. 481.

A railroad was leased, the lessors alleged a breach of covenants, declared the lease forfeited and took possession. A bill was filed by the lessees to restrain the lessors from interfering with them in the use of the road; a preliminary injunction was awarded. Then the lessees filed a cross-bill praying for a decree to reinstate them in possession of the road; answers were filed to both bills and a master appointed. While the matter was before him, the lessor brought ejectment on the ground of the forfeiture.

Held, that pending the equity suit the lessors could not institute another proceeding involving the same question. *Pittsburg & C. R. Co. v. Mt. Pleasant & B. F. R. Co.*, 76 Pa. St. 481.

101. Remedy by bill in equity.—

Where a lease of a railroad for ninety-nine years contained covenants for the payment of monthly instalments of rent to keep the road in repair, and to keep accounts of all matters connected with its business, as affecting the amount of rent to be paid, which covenants were guaranteed by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction, when it prays for specific performance of the obligations of the lease. In such a case, a suit at law on each instalment of rent as it falls due is not an adequate remedy. *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 24 Am. & Eng. R. Cas. 58, 118 U. S. 290, 6 Sup. Ct. Rep. 1094.—APPROVED IN *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801. QUOTED IN *Naglee v. Alexandria & F. R. Co.*, 32 Am. & Eng. R. Cas. 401, 83 Va. 707. REFERRED TO IN *Oregonian R. Co. v. Oregon R. & N. Co.*, 37 Fed. Rep. 733.

Where four companies propose executing a lease jointly, but one of the companies refuses to execute it, thereby causing two others to retract, a court of equity will not compel the fourth company, on the application of stockholders, to execute the lease. *Ives v. Smith*, 8 N. Y. Supp. 46; *affirming* 3 N. Y. Supp. 645.

A court of equity, in the management of a mortgaged railroad, may authorize the receiver to take a lease of another railroad, where it is manifestly for the interest of the creditors and the company. And so on like conditions the court may authorize its receiver to contribute, out of the accrued revenues in his hands, to the building of another railroad. *Gibert v. Washington City, V. M. & G. S. R. Co.*, 1 Am. & Eng. R. Cas. 473, 33 Gratt. (Va.) 586.

One company leased the road of another, agreeing to pay all taxes and assessments and operating expenses, to pay the principal and interest of the mortgage debt, and to pay in addition specified annual

dividends to the shareholders. The lessor company also undertook from time to time to issue its bonds, secured by a mortgage, which were to be negotiated by the lessee company, and the proceeds to be applied to permanently improving the road, any surplus to be used for the discharge of prior indebtedness. New bonds were so issued and negotiated, and after a time the lessee company failed to comply with the covenants in the lease and defaulted in the payment of moneys according to its terms. *Held*, that the lessor company might properly file a bill for an account against the lessee, the necessary computations being so complicated that they could not readily be taken in an action at law. *Pacific R. Co. v. Atlantic & P. R. Co.*, 17 Am. & Eng. R. Cas. 203, 20 Fed. Rep. 277.—FOLLOWED IN *Reed v. Atlantic & P. R. Co.*, 22 Blatchf. (U. S.) 469.

Such a bill might join a prayer for an account with a claim for damages for the loss of the road, and for unpaid dividends in the nature of rent. This would not constitute the same multifarious. *Pacific R. Co. v. Atlantic & P. R. Co.*, 17 Am. & Eng. R. Cas. 203, 20 Fed. Rep. 277.

The assignee of a lease of land through which a company desired to obtain a right of way refused to sell, and the company supposed it had no power under its charter to condemn his interest. Proceedings in which the original lessee had been made a party had been instituted and failed. *Held*, that the remedy of the company was not by bill for injunction against the assignee, but to amend the charter. *Piedmont & C. R. Co. v. Speelman*, 30 Am. & Eng. R. Cas. 316, 67 Md. 260, 9 Cent. Rep. 71, 10 Atl. Rep. 77, 293.

102. Contract right to apply to chancellor—Abolition of before application.—

A railroad lease executed in 1837 provided, *inter alia*, that if the lessor should become dissatisfied with the rent reserved he might apply "to the chancellor of the state of New York" to appoint appraisers. Before he desired to make such application the Code was adopted and the office of chancellor abolished, and the supreme court given the usual jurisdiction of the former chancellor. *Held*, that the application should be made to the supreme court. *New York C. R. Co. v. Saratoga & S. R. Co.*, 39 Barb. (N. Y.) 289.

And where proper application is made to

the supreme court under the above provision, an order made by a justice of that court, on motion at a special term is valid. *New York C. R. Co. v. Saratoga & S. R. Co.*, 39 *Barb.* (N. Y.) 289.

The above lease provided that the application should be upon notice. *Held*, that any defect in the time or mode of service of the notice might be waived; and a failure to object to the irregularity amounted to a waiver. *New York C. R. Co. v. Saratoga & S. R. Co.*, 39 *Barb.* (N. Y.) 289.

103. Pleadings.—Although one railroad may be leased to and operated by another, by which the latter makes itself responsible for acts done on the road leased, yet neither loses its identity, and any tort committed upon the line of the one or the other should be so alleged and proved. Especially is this true where both roads are constructed through the territory of the same county. *Central R. Co. v. Brinson*, 8 *Am. & Eng. R. Cas.* 343, 64 *Ga.* 475.

An amendment alleging that the railroad, on the line of which an injury was received, was held under a lease, and operated by another railroad company, against which suit was brought, was properly allowed. *Central R. Co. v. Whitehead*, 74 *Ga.* 441.

In a suit against two railroad companies, a complaint charging that a horse was killed on the road of one of the companies, where the track was not securely fenced, by the cars of the other company, passing over the road in charge of the officers of the latter company, is not sufficient to charge either company with liability under the statute, as the corporation owning the track was not shown to have authorized the use of its road; nor was the company owning the cars alleged to have been controlling or running the road in the corporate name of the corporation owning the road, either as lessees, assignees, receiver, or otherwise. *Cincinnati & M. R. Co. v. Paskins*, 36 *Ind.* 380, 5 *Am. Ry. Rep.* 570.—**DISTINGUISHING** *Indianapolis & M. R. Co. v. Solomon*, 23 *Ind.* 534.—**FOLLOWED IN** *Cincinnati & M. R. Co. v. Townsend*, 39 *Ind.* 38.

A complaint based on a lease set out "that defendants unjustly claim an estate in these premises, in fee, or for life, or for a term of years, not less than ten years, or in reversion or remainder, by virtue of a lease or conveyance" made by a certain railroad company, which lease or conveyance, and all rights thereunder, the defendant com-

pany now claims to own. *Held*, that this was a sufficient compliance with N. Y. Code Civ. Pro. § 1639, which prescribes that complaints to determine claims to real property shall state "that the defendant unjustly claims an estate therein of the character specified" in the next preceding section. *Phillips v. Rome, W. & O. R. Co.*, 30 *N. Y. S. R.* 41, 9 *N. Y. Supp.* 799; *affirmed in* 128 *N. Y.* 578, *mem.*, 38 *N. Y. S. R.* 1010.

Where both the lessor and the lessee corporations are sued, it being alleged that both have a claim, and both appear, and neither of them enter a disclaimer, or move to dismiss, it cannot be urged on appeal that there was nothing to show that the lessee company made any claim against the plaintiff, and that the complaint as to it should have been dismissed. *Phillips v. Rome, W. & O. R. Co.*, 30 *N. Y. S. R.* 41, 9 *N. Y. Supp.* 799; *affirmed in* 128 *N. Y.* 578, *mem.*, 38 *N. Y. S. R.* 1010.

104. Necessary parties.—Where a lease of a railroad provides that dividends shall be paid directly to the stockholders, the stockholders are not necessary parties to an action for an accounting, and the corporation, being composed of all the stockholders, fully represents their interests, and is the proper party to enforce a claim for unpaid dividends. *Pacific R. Co. v. Atlantic & P. R. Co.*, 17 *Am. & Eng. R. Cas.* 203, 20 *Fed. Rep.* 277.

Where it appears that another railroad company is in possession of the road, it is proper to make that company a party to the suit, to ascertain its interest in it, and that company not responding or showing what its interest is, a decree for leasing the road may be made. *Winchester & S. R. Co. v. Colfelt*, 27 *Gratt.* (Va.) 777, 17 *Am. Ry. Rep.* 121.

A bill by an individual to enforce a railroad lease set out that the road was leased for forty years, and that the lessee in turn leased its road to defendant company for twenty years, and that defendant assumed the first lease, but after the expiration of twenty years refused to pay the rent; and prayed a decree that the original lease be made binding on the defendant for the full term of forty years, and that it be compelled to continue to operate the road and pay the rent. *Held*, that the original lessee was a necessary party. *Jessup v. Illinois C. R. Co.*, 36 *Fed. Rep.* 735.—**QUOTING** Pull-

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man Palace Car Co. v. Missouri Pac. R. Co., 115 U. S. 597, 6 Sup. Ct. Rep. 198.

105. Evidence.—Where a company defends an action on the ground that its road was leased, it is competent to prove by a witness the fact of the lease, after he has admitted that the lease is in writing. (Hall, J., dissenting.) *Central R. Co. v. Whitehead*, 74 Ga. 441.

While it might have been sufficient to have alleged that the defendant controlled and operated the road where the injury occurred, without specifying the particular character of the agreement under which this was done, yet where the plaintiff alleged with needless particularity or unnecessary circumstances what was material and necessary, and what might have been stated more generally, plaintiff was required to prove the fact as alleged; and therefore, having alleged that one railroad operated another under a lease, it was necessary to prove the same. *Central R. Co. v. Whitehead*, 74 Ga. 441.

The fact of the lease could be proved without producing the writing. Nothing in the writing could prevent the liability of the actual carrier, holding itself out to the public as such, if it were negligent, whatever might be its effect as to the ultimate liability between the parties thereto. *Central R. Co. v. Whitehead*, 74 Ga. 441.

Where a company seeks to recover rent for the use of a track under a lease given by its predecessor to the defendant, the orders, deeds, and records in a foreclosure suit, showing a transfer of the rights, property, and franchise of the lessor, are properly admissible on the part of the plaintiff, as tending to show its right to recover under the lease, as the successor of the lessee. *St. Louis & C. R. Co. v. East St. Louis & C. R. Co.*, 139 Ill. 401, 28 N. E. Rep. 1088; *affirming* 39 Ill. App. 354.

In an action on a lease for an instalment of rent payable quarterly in advance, a former judgment between the same parties on the same instrument, in an action for rent, which determined that an instalment fell due on the 1st of March, establishes the fact that another instalment was payable on the 1st of December. *Dry Dock, E. B. & B. R. Co. v. North & E. R. R. Co.*, 3 Misc. (N. Y.) 61.

100. When lessor entitled to interest.—A lease of cars pending foreclosure of a railroad mortgage, although valid

until disaffirmed by the court, is not an instrument in writing such as entitles the lessor to interest under Ill. Rev. St. 1885, p. 1356. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.

Although the lessor still claims a larger sum than that to which he is equitably entitled, yet if he is refused payment of any amount approaching that which is due him, this constitutes an unreasonable and vexatious delay, which will justify the allowance of interest and the aggregate amount due from the date of the filing of the master's report. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.

107. Estoppel—Laches.—One of two trustees who held stock of the defendants, as part of their trust funds, merely expressed an opinion favorable to the lease of the defendants' road to another, but refused to vote for a resolution by the stockholders directing the officers to make the lease, and afterwards voted against ratifying it. *Held*, that he was not estopped by acquiescence from assailing its validity. *Mills v. Central R. Co.*, 24 Am. & Eng. R. Cas. 47, 41 N. J. Eq. 1, 2 Atl. Rep. 453.

The lessee of a railroad took possession thereof on May 29th. The complainants filed their bill to annul the lease on August 29th following. *Held*, that they were not barred by laches from maintaining their suit. *Mills v. Central R. Co.*, 24 Am. & Eng. R. Cas. 47, 41 N. J. Eq. 1, 2 Atl. Rep. 453.

Whether the lease was a judicious and profitable arrangement both for defendants and complainants, or whether the lessee has become insolvent since the lease was made, cannot control or affect complainants' right in the premises. *Mills v. Central R. Co.*, 24 Am. & Eng. R. Cas. 47, 41 N. J. Eq. 1, 2 Atl. Rep. 453.

A railroad company leased the lines of two other companies, and subsequently got into financial difficulties. A receiver was appointed on application of the attorney-general, and afterwards the three companies, having agreed upon a modification of the leases, made application to have the receiver discharged, and the property restored to the lessee company. This was done, the decree expressly reserving to the court the power of alteration or modification. In a suit subsequently brought by one of the lessor companies against the lessee com-

pany to set aside the above agreement modifying the release on the ground of fraud—held, that as the company complainant had not been a party to the suit instituted by the attorney-general, the circumstances did not debar it from moving to set aside the agreement. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

The corporation complainant was held entitled to the relief prayed for, viz., the setting aside of the alleged fraudulent agreement, notwithstanding the fact that it was impossible to restore all parties thereto to the exact status occupied by them before the agreement was entered into. The other parties having entered into such agreement with full knowledge that the stockholders of the corporation defendant claimed that the same was illegal and void, must abide the consequences of the annulment of the agreement, and this notwithstanding that they have paid out money on the faith of the agreement which cannot be restored. *Metropolitan El. R. Co. v. Manhattan El. R. Co.*, 15 *Am. & Eng. R. Cas.* 1, 11 *Daly (N. Y.)* 373, 14 *Abb. N. Cas.* 103.

II. RUNNING POWERS.

1. Under American Authorities.

108. Liability of lessees, generally. *—Under Ind. Rev. St. 1881, § 4001, the owner of locomotives and trains operated and run over another railroad is liable to persons for damages occasioned by such locomotives and trains to the same extent as though the track and road upon which said locomotives and trains were run and operated belonged to the company owning and operating the same. *Wabash R. Co. v. Williamson*, 3 *Ind. App.* 190, 29 *N. E. Rep.* 455.

Where a company has an arrangement for the use of the track of another company, but operates its engines and trains by its own employés, it is held to the same pre-

* Liability of railroad using tracks of another company, see notes, 19 *AM. & ENG. R. CAS.* 7; 10 *Id.* 813; 17 *Id.* 654; 18 *Id.* 139; 25 *Id.* 456.

Company liable for negligence of any company whose lines or stations it uses, see note, 18 *AM. & ENG. R. CAS.* 144.

Injury to passengers and servants where one company is running trains over track of another, see notes, 10 *AM. & ENG. R. CAS.* 114; 17 *Id.* 654.

cautions for the safety of the public at crossings, as is imposed upon the company owning the track. *Webb v. Portland & K. R. Co.*, 57 *Me.* 117.

So far as the question of liability for negligence is concerned, a corporation running its trains over the road of another company is bound by the same laws and ordinances which bind the owner. *McGrath v. New York C. & H. R. R. Co.*, 63 *N. Y.* 522.—FOLLOWS IN *Leonard v. New York C. & H. R. R. Co.*, 10 *J. & S.* 225.

An action for personal injury is sustainable against a company owning the train and employing the engineer, although the accident occurred on the track of another company, which hired the motive power of the first company. *Hanover R. Co. v. Coyle*, 55 *Pa. St.* 396.

109. Liability of lessee for injuries caused by unsafe condition of track.

—Where one company acquires the right to run its trains over a portion of the road of another company by a contract, in which it is agreed its trains, while on such leased road, shall be under the control and direction of the yard master or other servant of the lessor company, the yard master of the latter road, at such place and for the time being, will be the servant of the lessee company, and it will become liable for an injury caused to another from the negligent acts of such yard master, the same as if he was its own employé on its own road. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 *Am. & Eng. R. Cas.* 1, 106 *Ill.* 534, 46 *Am. Rep.* 705.

A railroad company is held to the exercise of due care for the safety of all persons while exercising its franchises, whether on its own road or on that of another company. This duty was imposed by law when it received its franchises, which holds good at all times and in all places, and if the company operates its trains over the road of another by contract or lease, it must see and know that the track is in a good and safe condition, not only for the safety of its passengers, but also for the safety of persons rightfully near to the track and liable to injury by its being used when in an unsafe condition. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 *Am. & Eng. R. Cas.* 1, 106 *Ill.* 534, 46 *Am. Rep.* 705.

Where a company procures, by contract with another such company, the right of running its trains into and out of a depot

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over the track of the latter, it thereby makes that portion of the track so used its own, in so far that it will be responsible for all injuries resulting from negligence in keeping or permitting it to be in an unsafe condition. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 Am. & Eng. R. Cas. 1, 106 Ill. 534, 46 Am. Rep. 705.

In such case the court declined to say whether the lessor company was also liable, but held that if it was, the plaintiff had the option to sue either company alone, and perhaps both, as *tort feorsors*, but that she was not required by any rule to sue either one instead of the other, or to sue both jointly. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 Am. & Eng. R. Cas. 1, 106 Ill. 534, 46 Am. Rep. 705.

110. Liability of lessor to lessee and its employees.—When one company has a right by contract to run its trains over the track of another company, the latter company is liable for injuries caused solely by the negligence of its own switchman in not properly attending to his duty, to an engineer of the former company while operating his engine on said track; and also to the other company for damage to its property. *In re Merrill*, 11 Am. & Eng. R. Cas. 680, 54 Vt. 200.

111. Liability of lessor for negligence of lessee, generally.*—Where a company permits other companies or persons to exercise the franchises of running cars drawn by steam over its road, the company owning the road, and to which the law has intrusted the franchise, is liable for any injury done, as though the company owning the road were itself running the cars. *Macon & A. R. Co. v. Mayes*, 49 Ga. 355.—APPLIED IN *Central R. & B. Co. v. Passmore*, 90 Ga. 203. DISTINGUISHED IN *Georgia R. & B. Co. v. Friddell*, 79 Ga. 489; *Killian v. Augusta & K. R. Co.*, 79 Ga. 234; 4 S. E. Rep. 165. FOLLOWED IN *Abbott v. Johnstown, G. & K. Horse R. Co.*, 2 Am. & Eng. R. Cas. 541, 80 N. Y. 27, 36 Am. Rep. 572. QUOTED IN *Chattanooga, R. & C. R. Co. v. Liddell*, 85 Ga. 482. RECONCILED IN *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706. REVIEWED IN *McCoy v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 445.—*Palmer v. Utah & N. V.*

* Liability of company owning track for injuries during its use by another company, see note, 35 AM. & ENG. R. CAS. 456.

R. Co., 36 Am. & Eng. R. Cas. 443, 2 Idaho 350, 16 Pac. Rep. 553. *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.—DISTINGUISHED IN *Sellers v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654. REVIEWED IN *East Line & R. R. Co. v. Culberson*, 38 Am. & Eng. R. Cas. 225, 72 Tex. 375, 3 L. R. A. 567, 10 S. W. Rep. 706.

This principle does not extend to cases where the cars of the other company are not rightfully on the defendant's road. *Sellers v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654.—DISTINGUISHING *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321.

A chartered railroad company permitting a construction company to use its franchises by running passenger trains over and upon its railway is responsible for torts to persons not connected with either company negligently committed by the servants engaged in such running, and these servants, by whomsoever employed, are to be deemed and treated, relatively to the public, as the servants of the railroad company. *Chattanooga, R. & C. R. Co. v. Whitehead*, 89 Ga. 190, 15 S. E. Rep. 44.

Where a railway company allows another company to operate its road, no other negligence than that of the corporation using the track need be alleged or proved in order to fix the liability of the owner company. *Pennsylvania Co. v. Ellett*, 42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559.

In order to make a railway liable for the negligence of another company using its tracks, it must be shown that such other company was running its train over the tracks of the owner company under a contract with it, or by its permission and consent. *Pennsylvania Co. v. Ellett*, 42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559.

Where a train, while moving on a track belonging to one company, is in the exclusive charge of the servants of another company, the former company is not responsible for the negligence of the servants of the latter company in conducting such movement of the train. *Clymer v. Central R. Co.*, 5 Blatchf. (U. S.) 317.

If an injury results from the negligence of another railroad company which has a joint right with the defendants to use the defendants' track, under a lease from the defendants, and which is accordingly run-

ning trains over the defendants' road on its own account, the defendants are not responsible. *Fletcher v. Boston & M. R. Co.*, 1 *Allen (Mass.)* 9.

112. Liability of lessor for defects in track.—Where a switch is not properly secured or not properly constructed, whether through the negligence of the employes of the company owning the road, or those of another company whom such railroad permits to run trains over its tracks, the company owning the road will be liable. *Peoria & R. I. R. Co. v. Lane*, 83 *Ill.* 448.

Where one company pays for the privilege of running its trains over the track of another company, and an engineer is killed by reason of a defective switching apparatus, it is proper to submit to the jury whether the company owning the track was guilty of negligence in not having adopted a useful improvement in switching, in common use at the time, by which the accident might have been avoided. *Smith v. New York & H. R. Co.*, 19 *N. Y.* 127; *affirming* 6 *Duer* 225.—DISTINGUISHED IN *Coppins v. New York C. & H. R. Co.*, 43 *Hun* 26, 6 *N. Y. S. R.* 572. FOLLOWED IN *Stodder v. New York, L. E. & W. R. Co.*, 2 *N. Y. Supp.* 780.

The owner of a car, which was placed upon a railroad in pursuance of a license or clearance obtained from the company by another in his own name, which other furnished the loading and paid the tolls for the car and the loading, may recover damages in an action against the company for injury sustained by the car while in the custody of that other, under that clearance, in consequence of the insufficiency and the bad condition of the road. *Cumberland Valley R. Co. v. Hughes*, 11 *Pa. St.* 141.

A company, by giving permission to another railroad company to use a part of its track, does not bind itself to make its track safe, nor to put it in repair, nor to make any change in its existing state. *Murch v. Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.—NOT FOLLOWED IN *Nugent v. Boston C. & M. R. Co.*, 38 *Am. & Eng. R. Cas.* 52, 80 *Me.* 62, 12 *Atl. Rep.* 797; *Braslin v. Somerville Horse R. Co.*, 32 *Am. & Eng. R. Cas.* 406, 145 *Mass.* 64, 4 *N. Eng. Rep.* 888, 13 *N. E. Rep.* 65. QUOTED IN *Pierce v. Concord R. Co.*, 51 *N. H.* 590.

Such a company, by contracting to let to another company the use of its track, is under no duty to the passengers of the

other railroad. The claim of such passenger, if injured, is on the company with whom he contracts. *Murch v. Concord R. Corp.*, 29 *N. H.* 9, 61 *Am. Dec.* 631.

113. Liability of company as to hired cars.—A company cannot relieve itself of liability by making an unauthorized lease of its road; but where individuals hire freight cars to be loaded as they choose, the company does not incur any risk for the manner of loading such cars. *Ohio & M. R. Co. v. Dunbar*, 20 *Ill.* 623.—DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 *Fed. Rep.* 165; *West v. St. Louis, V. & F. H. R. Co.*, 63 *Ill.* 545. FOLLOWED IN *Illinois C. R. Co. v. Barron*, 5 *Wall. (U. S.)* 90; *Illinois C. R. Co. v. Finnigan*, 21 *Ill.* 646. QUOTED IN *Balsley v. St. Louis, A. & T. H. R. Co.*, 25 *Am. & Eng. R. Cas.* 497, 119 *Ill.* 68; *Singleton v. Southwestern R. Co.*, 21 *Am. & Eng. R. Cas.* 226, 70 *Ga.* 464, 48 *Am. Rep.* 574.

114. Liability of company where it has the control of the train.—A company is responsible for an injury occasioned by want of proper care and prudence on the part of its servants in the management of a train which is under their exclusive care, direction, and control, although the train belongs to another company. *Fletcher v. Boston & M. R. Co.*, 1 *Allen (Mass.)* 9.

115. Joint liability.—A railway company using, by agreement, the road of another company, will be liable for damages resulting from its negligence, and the owner company, to whom is granted the control and management of the road, will also be liable. *Pennsylvania Co. v. Ellett*, 42 *Am. & Eng. R. Cas.* 64, 132 *Ill.* 654, 24 *N. E. Rep.* 559.

Where a number of railroad companies enter into an arrangement by which the several trains run by each over the roads of the others are to run in the interest of all, each contributing to the expense and sharing such portion of the profits as may be determined by a common agent agreed upon by them, each of the companies will be liable for an injury occurring through the negligence of the employes on any one of such trains. *Jones v. Pennsylvania R. Co.*, 8 *Mackey (D. C.)* 178.

116. Rule as to fellow-servants.—Where an engineer of a company having running privileges over the track of another company is killed through the negligence of switchmen in the employ of the lessor,

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the engineer and switchmen are not fellow-servants, so as to defeat a recovery against the company owning the track. *Smith v. New York & H. R. Co.*, 19 N. Y. 127; *affirming* 6 Duer 225.—APPROVED IN *Young v. New York C. R. Co.*, 30 Barb. 229. DISTINGUISHED IN *Sawyer v. Minneapolis & St. L. R. Co.*, 33 Am. & Eng. R. Cas. 394, 38 Minn. 103, 35 N. W. Rep. 671, 8 Am. St. Rep. 648. QUOTED IN *Svenson v. Atlantic Mail Steamship Co.*, 57 N. Y. 108.

But when a company has the privilege of running its trains over the track of another, subject to the control, rules, and orders of the lessor, the employés of the two companies are fellow-servants of the lessor. *Chicago, B. & Q. R. Co. v. Clark*, 2 Ill. App. 596.—FOLLOWED IN *Chicago, B. & Q. R. Co. v. Van Hagen*, 2 Ill. App. 602.

117. How compensation for use of track determined.—A contract between two companies provided that one should have the right to use certain tracks of the other "upon reasonable terms." Held, that the expense of keeping up the track should be divided between the two companies upon a wheelage basis; and where it appears that the second company comes in as an equal competitor in the business taken up on the portion of the road used in common, and nothing prevents it from sharing in the benefits of the business equally, it should pay interest on one half of the value of the tracks. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 546.

2. Under English Statutes.

118. Generally.—In the absence of evidence to the contrary, trains running over a railway are to be presumed to be the property of, or at any rate under the control of, the company to whom the line belongs, although other companies have running powers over the part of the line in question. *Ayles v. South-Eastern R. Co.*, 37 L. J. Ex. 104, L. R. 3 Ex. 146.

An agreement between two companies, whereby each is given running powers over the lines of the other, and whereby each agrees to send by the other's lines all traffic not otherwise consigned, does not resemble a contract of partnership, or of hiring and service. *Llanelli R. & D. Co. v. London & N. W. R. Co.*, L. R. 7 H. L. Cas. 550, 45 L. J. Ch. D. 539, 23 W. R. 927, 32 L. T.

575; see L. R. 8 Ch. 942, 42 L. J. Ch. 884, 29 L. T. 357, 21 W. R. 889.

One railway company has no right to run over the line of another company, independently of the rules and regulations, which the directors are empowered, by act of parliament, to make for the management of the line. *Rhymney R. Co. v. Taff Vale R. Co.*, 29 Beav. 153, 7 Jur. N. S. 202, 30 L. J. Ch. 482, 9 W. R. 222, 4 L. T. 227; *affirmed* in 4 L. T. 534.

It is doubtful whether the facilities necessary to enable a company to work its traffic over the railway of another company, or, in other words, to exercise its running powers, are facilities an owning company are bound to provide under the Railway and Canal Traffic Act 1854, unless the matters required are such as are necessary to keep their own line in a proper condition for the receipt, forwarding, and delivery of traffic. *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 173.

Where one railway company gives to another company power to use its railway and the works belonging to it, it undertakes to perform all those services which must be performed if the privilege given is to be exercised at all. *Great Western R. Co. v. Bristol Port. R. & P. Co.*, 5 Ry. & C. T. Cas. 94.

119. How compensation for running powers estimated.—In ascertaining the payment to be made by a company for the exercise of running powers over a portion of the line of another company regard is to be had to the extent and remunerative character of the traffic of the running company over or in connection with such portion, and, in the absence of exceptional circumstances, it is proper to take their average net receipts per mile, and to multiply the amount by the mileage of the portion so run over. But if the traffic on the portion run over is exceptionally profitable, then the mileage of such portion should be computed by increasing it so as to make the payment in proportion to such difference. *Carmarthen & C. R. Co. v. Central Wales & C. J. R. Co.*, 2 Ry. & C. T. Cas. 23.

Another mode is to take a percentage for interest and for maintenance and renewal upon the cost or value of the portion so run over, and if the use of the portion of the line be equal by the two companies, the running company should pay one half of

this annual percentage. *Carmarthen & C. R. Co. v. Central Wales & C. J. R. Co.*, 2 Ry. & C. T. Cas. 23.

Whatever the amount to be paid for the use of the line, it should be in the shape of tolls, and should vary with the actual traffic of the running company from time to time; but for the use of the station a fixed rent may be adopted, the amount to be a percentage for interest and for maintenance and renewal, upon the costs of the station, and to be payable by the running company in the ratio which its use of the station bears to the total use made of it. *Carmarthen & C. R. Co. v. Central Wales & C. J. R. Co.*, 2 Ry. & C. T. Cas. 23.

The B. & D. R. Co. had powers under their special act of running over the railway of the C. R. Co., and the terms and conditions upon which they were to exercise such powers for through passenger traffic were referred to the decision of the railway commissioners. It appeared that the G. W. R. Co. worked the line of the B. & D. Co., and would exercise the running powers so claimed. *Held*, that the G. W. Co. should be made parties to the arbitration; that the toll to be paid for the running powers should be a mileage proportion of the through fares less government duty, and a percentage (20 per cent.) for working expenses, and that the conditions of the exercise of such powers should be (1) that if the running company required works to be constructed, they should bear the cost in the first instance, the owning company paying them five per cent. upon the outlay; (2) that the hours of arrival and departure of the trains of the running company should be fixed by them, and if objected to by the owning company, should be fixed by the commissioners; and (3) that in the interest of public safety the trains of the running company, in passing along a viaduct, which crossed an estuary of the sea, should not exceed in weight the ordinary goods trains of the owning company, nor in speed the ordinary passenger trains of the owning company. *Bala & D. R. Co. v. Cambrian R. Co.*, 2 Ry. & C. T. Cas. 47.

By act of parliament the North British R. Co. was given running powers over the Scottish Central line of the Caledonian R. Co., and it was provided that the North B. Co. should fix the rates and fares in respect of traffic passing over the Scottish C. line and the lines of the North B. Co. (called

East Coast traffic), and that the receipts should be divided between the two companies according to mileage, subject to certain minimum rates per mile, in respect of such traffic, which the Caledonian Co. was entitled to receive; provided that when the Caledonian Co. carried competitive traffic at rates or fares below these minimum sums, such lower sums should be adopted in lieu of the minimum sums fixed. The North B. Co. issued season and traders' tickets between places on their own and places on the Scottish C. line, and claimed to fix the rates at which they charged for them, according to the whole amount of the traders' traffic over their system. *Held*, that the Caledonian Co. were only entitled to a sum per mile of the Scottish C. line traveled over by a holder of a season or traders' ticket, not less than the sum per mile which they received from holders of season or traders' tickets issued by themselves in respect of traffic competing with the East Coast traffic, but that the qualification for such traders' tickets issued by the North B. Co. must be in respect of East Coast traffic exclusively. *Caledonian R. Co. v. North British R. Co.*, 2 Ry. & C. T. Cas. 271.

By an act of parliament the M. R. Co. were given running powers over a line of the N. & B. R. Co., twenty-nine miles in length, at such through rates as they might fix on their own responsibility, the amount to be paid to the N. & B. R. Co. to be settled by the railway commissioners. *Held*, that in the absence of special circumstances, where the line run over is of the length of twenty-nine miles, proportion by mileage is a sufficient payment for the exercise of running powers, but the M. Co., being able without consent to fix the rates over the N. & B. R., must pay an additional five per cent. to the N. & B. Co.'s share of net receipts by mileage, forty per cent. of the gross receipts, less terminals, being allowed the M. Co. for working expenses. *Midland R. Co. v. Neath & B. R. Co.*, 2 Ry. & C. T. Cas. 366.

The R. R. Co. had running powers over part of the T. R. to P. Junction (whence a line leased and worked by the T. Co. ran to P. Docks), and it was bound by statute to deliver traffic destined for P. Docks into the sidings of the T. Co. at the said junction; the remuneration for the exercise of such running powers was to be the pay-

ment of a mileage rate in respect of the part of the T. Co.'s line run over. *Held*, that the distance in respect of which payment was to be made ought to be calculated up to the point which the trucks reached when delivered by the R. Co. into the sidings of the T. Co., and not to the point of junction at P. *Taff Vale R. Co. v. Rhymney R. Co.*, 2 Ry. & C. T. Cas. 176.

The T. Co. applied to the commissioners under the Regulation of Railways Act 1873, § 8, to have pecuniary terms settled for accommodation afforded the R. Co. by shunting engines at P. *Held*, that as the same service was performed for all traffic on the P. line, there was no reason why the R. Co.'s traffic should be subjected to a special charge, and, moreover, that a working expense incidental to transport was not accommodation of the sort contemplated by the act, to be specially paid for by the R. Co. *Taff Vale R. Co. v. Rhymney R. Co.*, 2 Ry. & C. T. Cas. 176.

120. Compensation where third rail is necessary for narrow gauge road.—A narrow gauge railway which joined a broad gauge company was, under various acts of parliament, possessed of the right to require the latter to lay down a third rail, so as to render their line capable of carrying narrow gauge traffic, the terms for the construction and the terms for the user of the additional rail, in case of disagreement, to be settled by the board of trade. *Held*, that the broad gauge company was not in so good a position as if it had, at the outset, had unconditional possession of its district, and been required to cede running powers to a competitive company and add to a line not constructed with any such prospect; and, that the right mode of paying it for the extra rail and use of its line was by a mileage division of traffic receipts, its proportion being guaranteed by the running company to amount to not less than 5 per cent. on its expenditure in respect of the extra rail and a sum equal to 3 per cent. thereon in respect of maintenance. *South Devon R. Co. v. Devon & C. R. Co.*, 2 Ry. & C. T. Cas. 348.

Except as regarded local traffic, the running company was allowed to fix the rates at which it carried, the owning company having power to demand a reference to arbitration, pending which the disputed rates were to remain in force. *South Devon R.*

Co. v. Devon & C. R. Co., 2 Ry. & C. T. Cas. 348.

The owning company having, owing to the delay of the running company, incurred its expenditure unnecessarily early, the running company was ordered to pay interest at 5 per cent. upon such expenditures during the delay. *South Devon R. Co. v. Devon & C. R. Co.*, 2 Ry. & C. T. Cas. 348.

The amount of the outlay upon the additional rail being disputed, the court ordered the accounts to be checked by the engineers of both companies, disputes as to amounts to be referred to an independent engineer, to be appointed by the commissioners in default of agreement, and disputes in principle, as to what outlay was incurred in respect of the additional rail, to be referred to the commissioners. *South Devon R. Co. v. Devon & C. R. Co.*, 2 Ry. & C. T. Cas. 348.

121. Duration of term.—An agreement between two railway companies whereby one is given running powers over the line of the other, and the latter company is to be at liberty to call on the former to carry goods and passengers upon its local lines, and whereby both companies bind themselves to send by each other's lines all traffic not otherwise consigned, but containing no mention of any time for which it is to endure, or how it may be terminated, is a permanent agreement, and a notice to terminate it at the end of six months from a given time is invalid. *Llanelli R. & D. Co. v. London & N. W. R. Co.*, L. R. 7 H. L. Cas. 550, 45 L. J. Ch. D. 539, 23 W. R. 927, 32 L. T. 575; affirming L. R. 8 Ch. App. 942.

122. What is local traffic.—Where two companies give mutual running powers to one another over parts of their respective lines, with a stipulation that local traffic shall be respected, by local traffic is meant the traffic between two stations, both being on one of the lines over which the running powers extended. *Midland R. Co. v. Manchester, S. & L. R. Co.*, 22 L. T. 601.

Any differences arising between the two companies occasioned by any hardship felt in the working of such an agreement may be made the subject of arbitration under 22 & 23 Vict. c. 59. *Llanelli R. & D. Co. v. London & N. W. R. Co.*, L. R. 7 H. L. Cas. 550, 45 L. J. Ch. D. 539, 23 W. R. 927, 32 L. T. 575; see L. R. 8 Ch. App. 942, 42 L. J. Ch. 884, 29 L. T. 357, 21 W. R. 889.

Traffic to be carried over line A. by the exercise of the running powers of railway company B. (which company was prohibited from carrying "local traffic" between certain stations) is not local traffic if it is delivered to the stations in question from the line of an independent company. *Plymouth & D. R. Co. v. Great Western R. Co.*, 6 Ky. & C. T. Cas. 101. And see *Caledonian R. Co. v. Glasgow & S. W. R. Co.*, 3 Ky. & C. T. Cas. 395.

123. Right of owning company to demand rebate.—The North W. R. Co. had an agreement, in 1864, for running powers over the Cambrian R. Co.'s line (which joined its line at W., where it formed the only place of junction) and paid a rebate in respect of traffic sent from the Cambrian line to its line. By a subsequent act of parliament, in 1867, the Carnarvonshire and Cambrian R. Cos. had mutual running powers, their lines forming a junction at A. The line of the Carnarvonshire Co., and all its rights and obligations were transferred to the North W. Co. by an act which provided that the North W. Co. should not run over the Cambrian Co.'s line, via A., without the consent of the Cambrian Co., and *vice versa*. After the amalgamation the Cambrian Co. claimed rebate under the agreement in respect of traffic sent to the North W. Co.'s line via A. Held, that the proviso in the act only applied to the mutual running powers given by the act of 1867 above mentioned, and not to the running powers given by the agreement of 1864, which still remained, and that the Cambrian Co. was entitled to the rebate claimed upon such traffic as was sent via A. *Cambrian R. Co. v. London & N. W. R. Co.*, 2 Ky. & C. T. Cas. 311.

124. Right to use horse power.—The respondents owned land and worked a single line of railway four and one half miles long, extending from the town of Swansea to the Mumbles. The applicants were empowered to make a system of tramways in Swansea and the suburbs, forming junctions with the respondents' line, which they had power to pass over and use with their carriages and servants, and for the purposes of traffic of all kinds. At the date of the applicants' act containing this power the respondents' line was worked by horse power; subsequently, and at the date of the application, the respondents used

steam power. Held, that the applicants' running powers entitled them to use respondents' line with horse power. *Swansea Imp. & T. Co. v. Swansea & M. R. Co.*, 3 Ky. & C. T. Cas. 339.

The running powers were to be exercised on terms to be agreed upon, or, in default of agreement, to be settled by arbitration, and the owners of the railway were to make all arrangements required by agreement or arbitration in that behalf. Held, that "terms" included the necessary arrangements for regulating the joint traffic. *Swansea Imp. & T. Co. v. Swansea & M. R. Co.*, 3 Ky. & C. T. Cas. 339.

125. When contract extends to branch lines subsequently acquired.—Company A. made an agreement with company B. to allow B. to carry passengers and goods over the A. line on certain terms. The A. company amalgamated with other companies, obtained several branches, and assumed a different name. The B. company did the same. Held, that the agreement applied to all traffic coming from the B. line upon the A. line, however originating, whether only upon the original B. line, or in, from, or through any of its amalgamated lines. *Lancashire & Y. R. Co. v. East Lancashire R. Co.*, 5 H. L. Cas. 792, 2 Jur. N. S. 767, 25 L. J. Ex. 278, S. C. 9 Ex. 591, 23 L. J. Ex. 157.

126. Fitness of locomotive.—Where an engine encumbers a railway without certificate of approval, the company has the common law right of distress damage feasant. *Ambergate N. & B. & E. J. R. Co. v. Midland R. Co.*, 2 El. & Bl. 793, 18 Jur. 243, 23 L. J. Q. B. 17.

Equity will enforce by injunction the statutory provisions relating to the approval of engines used by one company on the line of another, notwithstanding the practice of companies has been to rely on each other with respect to the fitness of their engines, and notwithstanding, also, that to enforce the right of inspection would occasion great inconvenience to the public traffic, and although it is sought to enforce the statute merely for the purpose of impeding the traffic of a competing company. *Midland R. Co. v. Ambergate, N. & B. & E. J. R. Co.*, 10 Hare 359.

Upon the reference of a difference between two railway companies as to the fitness of a locomotive of the one to run over

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the line of the other—*held*, after inspection of the engine and of the line over which it was intended to run, that the locomotive objected to, a Fairlie engine from sixty to seventy tons in weight and ten feet in extreme width, was, under the circumstances, not unfit to be used upon the line of the objecting company. *East & W. J. R. Co. v. Northampton & B. J. R. Co.*, 2 Ry. & C. T. Cas. 293.

127. Fixing hours of arrival and departure of trains.—It was provided by statute that the C. R. Co. should, for the accommodation of certain traffic, run and carry forward between L. and P. a train in conjunction with every train which should be run by the E. C. Cos., for the accommodation of that traffic, between L. and places on their lines; the speed and places of stoppage of such train to be regulated by the E. C. Cos. *Held*, that the E. C. Cos. could enforce an alteration in the service of trains run in conjunction by the C. Co. without the consent of the latter, but were not entitled to fix the times of arrival and departure of such trains. *Caledonian R. Co. v. Great Northern R. Co.*, 2 Ry. & C. T. Cas. 377.

128. Procedure.—A bill in equity for an injunction to restrain a railway company from preventing a colliery company to run engines and carriages over part of its line, under the powers of the Railways Clauses Act 1845, § 92, will not lie, since equity will not order the performance of acts requiring continuous attention and which cannot be seen to by the court. *Powell Duffryn Steam Coal Co. v. Taff Vale R. Co.*, L. R. 9 Ch. 331, 43 L. J. Ch. 575, 30 L. T. 208; *affirming* 29 L. T. 575, 22 W. R. 182, 26 L. T. 357, 20 W. R. 460.—DISTINGUISHED IN *Woodruff v. Brecon & M. T. J. R. Co.*, L. R. 28 Ch. D. 190, 54 L. J. Ch. 620, 52 L. T. 69, 33 W. R. 125.

A railway company having running powers over the line of another company has the burden to show that regulations made by the owning company, as to the construction of carriages to be used, are unreasonable and unnecessary; such company cannot insist upon its right as conferred by an act of parliament, and at the same time contend that the regulations are unreasonable and inapplicable to its particular traffic. *Rhymney R. Co. v. Taff Vale R. Co.* 29 Beav. 153, 7 Jur. N. S. 202, 30 L. J. Ch. 482, 9 W. R. 222, 4 L. T. 227; *affirmed* in 4 L. T. 534.

III. WORKING AGREEMENTS.

129. Power to make.—A railway company cannot without authority of parliament agree to work the line of another company or to hand over its line for that purpose to another company. *Winch v. Birkenhead, L. & C. J. R. Co.*, 5 De G. & S. 562, 16 Jur. 1035.

Equity will not interfere to prevent a railway company from agreeing with another company for an application to parliament for power to enable one company to work the line of the other. Such an agreement is innocent. *Winch v. Birkenhead, L. & C. J. R. Co.*, 5 De G. & S. 562, 16 Jur. 1035.

One railway company may contract with another to supply it with rolling stock upon receiving a certain annual payment and having certain other advantages, where such companies are authorized by statute to "enter into agreement with respect to the working, maintenance, and management," and "to enter into any contracts or agreements for effecting all or any of the purposes of its act or any objects incidental to the execution thereof." *Attorney-General v. Great Eastern R. Co.*, L. R. 5 App. Cas. 473, 49 L. J. Ch. D. 545, 42 L. T. 810, 28 W. R. 769; *affirming* L. R. 11 Ch. D. 449, 48 L. J. Ch. 428, 40 L. T. 265, 27 W. R. 759.—CONSIDERED IN *Attorney-General v. Shrewsbury Bridge Co.*, L. R. 21 Ch. D. 752, 51 L. J. Ch. 746, 46 L. T. 687, 30 W. R. 916.

A clause in a working agreement between two railway companies that "neither company shall make any bargain, treaty, agreement, or arrangement with any other company, or do any other act directly or indirectly to affect injuriously the traffic of the other company, or prejudice this agreement without the consent of such other company," is prejudicial to the interests of the public, as it does not leave the companies at liberty to accommodate the use of their lines to what is of advantage to traffic, and must be modified. *Huddersfield v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 44.

It is illegal for a railway company constituted under an act of parliament to agree with two other companies that the whole concern, without encumbrance, when completed shall be worked by those two companies, who shall have perfect control and exercise of all the rights of the first

company, and who shall find stock and work the concern for twenty-one years. Such an agreement is a violation of the act under which the first-mentioned company was constituted. *Beman v. Rufford*, 1 *Sim. N. S.* 550, 15 *Jur.* 914, 20 *L. J. Ch.* 537.

Where a railway company has illegally loaned money to another company, and subsequently a statute is passed legalizing such loan, it becomes as lawful for it to apply its funds for the other company as for maintaining its own railway. *Commercial Bank of Canada v. Great Western R. Co.*, 13 *L. T.* 105, 3 *Moore P. C. C. N. S.* 295.

The court is unwilling, except on some real substantial objection to a working agreement, to refuse approval of it, where the company may, perhaps, in consequence lose the opportunity of being able to complete their railway within the time limited by their act; the fact that the company, who under the agreement are to work the line are unable to pay a dividend on their capital, and unable, with their existing resources, to keep their own line in proper repair, is not a sufficient ground for such refusal where they have advantages (such as a line adjoining the line agreed to be worked) over any other company who could compete for the working of the line. *In re Wals. Cork & I. V. R. Co.*, 2 *Ry. & C. T. Cas.* 334.

The A. company being owner of a station enters into an agreement with the B. company to make a new junction between their respective lines, so that B. company may use such station. C. company, having running powers over A. company's line, subsequently enters into agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted, on the ground that C.'s agreement with B. did not give a right to use such junction; and even if it did, such agreement was *ultra vires* and invalid as being a delegation of statutory powers, and, as such, against public policy. *Held* (reversing the decision of the master of the rolls), that the effect in law of the right to make the junction was to make the two lines one continuous line, which the public had a right to use, and therefore also a company working under arrangements with companies owning the two lines; that the agreement, as stated, did not amount to a delegation of statutory powers, nor was it *ultra vires*.

Midland R. Co. v. Great Western R. Co., 42 *L. J. Ch.* 438, 1 *Ry. & C. T. Cas.* 24.

130. Right of third parties to object to.—The S. R. Co. and the N. W. R. Co. applied for the approval of an agreement providing for the working of the line of the former company by the latter in perpetuity; certain other companies and the corporation of and traders at N., a seaport town in communication with the S. line, raised objections to the approval of the agreement, on the ground that it would change the course of traffic which went to N. and send it in the opposite direction, and that part of the S. line was in the most direct line of communication by which certain traffic could be carried by the G. W. Ry. (which competed with the N. W. Ry.) to N., and the working of the S. line by the N. W. Co. would act unfavorably on such traffic. *Held*, that the N. W. Co. must make arrangements to prevent the introduction of changes or conditions of carriage on the S. line which might cause traffic which would otherwise go to N. to go in the opposite direction, and should grant running powers to the G. W. Co. over the part of the S. line lying in the most direct line of communication between the G. W. line and N. *In re Sirhowy R. Co.*, 2 *Ry. & C. T. Cas.* 264.

131. Duty of working company efficiently to work the road.—Under a working agreement by which the working company is to work the railway of the worked company as a part of their system of railways, and "convey traffic thereon in a proper and convenient manner, and so as fairly to develop the traffic of the district," the trains on the worked line must be timed so as to correspond with the trains on the lines of the working company rather than with the trains of another company with which they might be made to connect; the working company must as fully advertise a competitive route over the line of the worked company as they do the route on their own line which competes with it; the working company must give equal facilities as to through booking via the worked line as via their own, must not prefer their own route in the matter of rates, and must not fix the rates on the worked line too high in proportion to the rates on their own line. *Clonmel Traders v. Waterford & L. R. Co.*, 4 *Ry. & C. T. Cas.* 92.

Upon complaint by an owning company

that the working company did not use and work the railway and all the traffic arising from extensions of the railway efficiently, and so as fairly to develop, protect, and maintain the traffic fairly belonging thereto, as provided by the working agreement, the commissioners ordered the working company to run an additional third passenger train each way daily on week days at certain times; such trains to be worked in good connection for through traffic, and the time for stoppages at stations on the owning company's railway not to exceed an allowance at the rate of four minutes for each station stopped at; and further ordered the working company to run not less than two passenger trains each way daily on week days on the branch line of the owning company, timed for convenient connection and correspondence at the junction with the main line with trains arriving at and departing from such junction. *Dublin & M. R. Co. v. Midland G. W. R. Co.*, 3 Ry. & C. T. Cas. 379.

The B. R. Co., under an agreement, worked the line of the E. L. R. Co., extending from L. St. to New Cross and Old K. Road, where it joined their lines. The agreement provided that the B. Co. should so work the E. L. R. "as fairly and efficiently to develop the traffic." Upon complaint by the E. L. Co. that the B. Co.'s mode of working the railway was not favorable to the through passenger traffic between L. and places on the B. Co.'s lines, because (1) the connections at the junctions were such that long lay-overs were caused and through journeys could not be accomplished in any reasonable time; (2) the trains running on the E. L. line were not allowed to use the up and down junctions with the B. Co.'s line at New Cross, but were run on a short branch line into a separate low-level station there; (3) through fares to L. Bridge, a terminus of the B. Co., and L. St. were different, and considerably lower to L. Bridge—held, that, in the absence of any provisions in the agreement as to the running of through trains, the expression "the traffic" under the circumstances must be taken to apply both to through and to local traffic; that the B. R. Co. might withhold through trains if through traffic could be sufficiently encouraged by having a good correspondence between trains; that the fares via L. Bridge and the fares via L. St. ought to be at the same mileage rate, as

competitive traffic could not under the burden of higher fares be fairly developed in the terms of the agreement. *East London R. Co. v. London, B. & S. C. R. Co.*, 2 Ry. & C. T. Cas. 413.

The B. R. Co., under an agreement, worked the line of the E. L. R. Co., which extended from Liverpool Street to New Cross, where it joined their lines. The agreement provided that the B. Co. should so work the E. L. R. "as fairly and efficiently to develop the traffic." Held, that the B. Co. could not be enjoined under the agreement to work the E. L. R. as if it were a trunk line of the B. Co.'s system, and amalgamated with it. *London, B. & S. C. R. Co. v. East London R. Co.*, 3 Ry. & C. T. Cas. 103.

A working agreement provided that "all questions which may arise between the two companies" should be determined by arbitration. Upon complaint, in 1879, by the owning company that the working company did not use and work the railway so as fairly to develop, protect, and maintain the traffic, the commissioners ordered the working company to run an additional third passenger train each way daily on week days at certain times. In 1882 the working company applied to the commissioners to rescind the order. The commissioners refused, but gave leave to either company after 1883 to apply to have the matter again considered. Under such leave the working company applied in 1886, and the commissioners, upon proof that the amount of the traffic was not in proportion to the cost at which it was carried, made an order relieving the working company from the obligation to continue the train. *Midland G. W. R. Co. v. Dublin & M. R. Co.*, 5 Ry. & C. T. Cas. 142.

132. Duty of working company to provide wagons.—The A. R. Co. exclusively worked and managed the B. R. Co. as lessees of the line, under a special act, which provided that the A. Co. "shall provide and employ all such locomotive powers, engines, carriages, wagons, and other rolling stock, plant, stores, materials, and labor as shall be proper and sufficient for the working and user of the demised undertaking, and the reception, accommodation, conveyance, and delivery by the A. Co. of the traffic thereof, and the B. Co. shall not be bound to provide any such thing." Upon refusal by the A. Co. to provide wagons for the trader's traffic on the B. R. Co.—held, that the special act imposed an obligation

on the A. Co. to provide wagons proper and sufficient for the working and user of the B. R., and that any one interested in procuring that accommodation had a ground of complaint under section 2 of the Railway and Canal Traffic Act, 1854, against the A. Co. if they refused to provide it. *Watkinson v. Wrexham, M. & C. Q. R. Co.*, 3 Ry. & C. T. Cas. 164.

133. Duty to run trains between designated stations.—An obligation in an agreement to place trains on the line of another company between A. and C. (A. being a town in which the company undertaking the obligation has two stations) will be fulfilled if the trains run from one of these stations, although it may not be the most convenient, or the one from which the working company work their own traffic, if that station was the only one existing at the date of the agreement. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 5 Ry. & C. T. Cas. 205.

134. Cost of construction and of maintenance.—Where a railway is worked and maintained under an agreement which provides only for repairs and maintenance, and not for the first cost of new works, such works ought, in general, to be made the subject of special arrangements from time to time between the companies; and where no such arrangement has been come to, the company executing the same must bear the cost itself, at any rate where their construction has not been ordered by superior authority. *Dublin & M. R. Co. v. Midland G. W. R. Co.*, 3 Ry. & C. T. Cas. 379.

It is the duty of an owning company to supply a working company with a line capable of being efficiently worked without danger to the public, and therefore, where new works are necessary for that purpose, such works ought to be executed by the owning company at its own expense; and if such company, after due notice, was to refuse or neglect to execute any such necessary works, the working company would be entitled to cause them to be executed, and to charge the cost to the owning company. *Dublin & M. R. Co. v. Midland G. W. R. Co.*, 3 Ry. & C. T. Cas. 379.

An agreement between two companies, confirmed by act of parliament, provided that the one company should forthwith construct and complete their line to the satisfaction of the other company, and the

same when so completed shall be "maintained and worked" by the latter company in perpetuity on certain terms. *Held*, that, after completion, the latter company was entitled to exclusive possession of the line and works, and that the former company had no right to enter on the property to make improvements or repairs. "Maintenance" includes useful and reasonable improvements so long as there is no alteration of purpose. *Sevenoaks, M. & T. R. Co. v. London, C. & D. R. Co.*, 11 Ch. D. 625, 48 L. J. Ch. 513, 40 L. T. 545, 27 W. R. 672, 3 Ry. & C. T. Cas. xxx.

An agreement that the working company shall maintain the railway of the worked company in substantial repair and good working order and condition, the worked company being bound to provide at a certain station proper terminal accommodation to enable the working company to carry on and convey the traffic, and being bound to pay to the working company such toll rent or other consideration for the use of a third company's line and station as the working company might have to pay to such third company—*held*, that the word "maintain" was limited to the railway of the worked company, and did not extend to the station or any portion of the railway of the third company. *Clonmel Traders v. Waterford & L. R. Co.*, 4 Ry. & C. T. Cas. 92.

There being no provision in the agreement as to station services, signaling, disinfecting cattle trucks, and the like, and the working company receiving mileage and terminals for working the traffic, the working company was made to bear these expenses. *Clonmel Traders v. Waterford & L. R. Co.*, 4 Ry. & C. T. Cas. 92.

The S. W. R. Co. were the lessees of the S. R. Co. under a lease whereby it was provided that the lessors should execute all such additional works, if any, in and in connection with the thereby demised railways, and for landowners and others, as might from time to time be required in pursuance of the acts from time to time in force with respect to the management, working, use, and maintenance of the railways, and the works thereof, and the traffic thereon; nevertheless that the lessees should maintain and repair such works when executed. *Held*, that this provision extended to works necessary to afford due facilities for traffic under the Railway and Canal Traffic Act, 1854, including therein work which it is incumbent

on a railway company to provide, if it would avoid contingencies for which it would incur a liability, such as new signals provided for putting the block system in operation. *London & S. W. R. Co. v. Staines, W. & W. R. Co.*, 3 Ry. & C. T. Cas. 48.

By a working agreement made in 1864 between the P. Co. and the C. Co. the C. Co. worked and maintained the P. Co.'s line, retaining a percentage of the gross traffic receipts. A special act subsequently passed gave the G. Co. a joint use with the P. Co. of a section of the latter company's line, on terms of paying interest on half the cost of construction of the section, and of paying in proportion to use towards the cost of maintenance; the section to be maintained and managed by joint committee appointed by the P. Co. and the G. Co.; the interest aforesaid to be treated as part of gross traffic receipts of the P. Co. for the purpose of the working agreement of 1864. *Held*, that the expense of maintaining the section, less any portion for which the C. Co. were responsible, was payable by the G. Co. *Portpatrick R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 189.

The defendant being unable to furnish their railway, and the plaintiffs desiring to have it in operation as a feeder to their line, a correspondence was had between the two companies, and resolutions passed by the plaintiffs, and communicated to defendants, authorizing an arrangement by which the plaintiffs should work the road for a certain period and share the profits with defendants. No formal agreement was made, and the terms were not definitely settled, but the plaintiffs went on and completed the defendants' line, and it ran for some time at a loss. They then sued defendants for the work done, and for the money expended above the receipts. *Held*, that they could not recover, for as to the first demand, the constructing defendants' road was a matter within the scope of their charter; and, as to the second, the agreement relied upon, being special in its terms, was invalid for want of the corporate seal. *Great Western R. Co. v. Preston & B. R. Co.*, 17 U. C. Q. B. 477.

135. Dividing receipts according to mileage—Terminal charges.—A clause in a working agreement between two companies provided for the equal division between the companies of the gross receipts

of traffic on the owning company's railway, deducting one moiety of station to station terminals, and also deducting mileage proportion and terminals due to any other company in respect of such traffic. *Held*, that the receipts subject to such division must comprise one moiety of the two terminals which were included in gross receipts, and not merely one moiety of the terminal at the owning company's end of the journey, and that "any other company" referred to any third company interested in particular traffic, and not to the working company. *Harborne v. London & N. W. R. Co.*, 2 Ry. & C. T. Cas. 326.

By a working agreement between the S. D. R. Co. and the B. R. Co. it was provided that there should be a division of the receipts from the B. road, which was to be worked and managed by the S. D. Co., who were to receive all tolls, fares, rates, and charges arising from the B. Co., including "one half of all terminal charges, and a mileage proportion in respect of the B. Co. of all through fares, rates, and charges." *Held*, that the S. D. Co. were bound to bring into the receipts and to account to the B. Co. for one half of all terminals included in fares, rates, and charges earned on the B. Ry. and the S. D. Ry., and also on the B. road and any other railway or railways. *Buckfastleigh, T. & S. D. R. Co. v. South Devon R. Co.*, 1 Ry. & C. T. Cas. 321.

It appeared that the S. D. Co. in some cases carted the goods to and from the stations, and the cartage rate was included in the goods rate. *Held*, that they were justified in deducting from the receipts to be divided between them and the B. Co. the average cost to the S. D. Co. of performing the cartage. *Buckfastleigh, T. & S. D. R. Co. v. South Devon R. Co.*, 1 Ry. & C. T. Cas. 321.

It also appeared that the S. D. Co., in conveying goods from the B. road to a line leading from their own railway, were compelled, through not having any siding or other accommodation at the junction, to convey goods three miles beyond the junction to a station on their line, and then to send them back to the junction by another train, and they claimed in such cases to credit themselves with the mileage one way—namely, the three miles—in estimating the mileage proportion between the two companies. *Held*, that they were entitled

to do so. *Buckfastleigh, T. & S. D. R. Co. v. South Devon R. Co., 1 Ry. & C. T. Cas. 321.*

The B. line was worked by the S. D. Co. as agents for the B. Co.; all traffic on the B. line being charged for at local rates, which were fixed by the B. Co. The S. D. Co. refused to credit the B. Co. with any allowance for terminal in respect of traffic arising at B. and passing on to their own lines or those of other companies. *Held*, that the B. Co. were entitled to such allowance. *Torbay & B. R. Co. v. South Devon R. Co., 2 Ry. & C. T. Cas. 391.*

Certain companies had agreed to allow the S. D. Co. a special terminal of 8s. per ton for fish. *Held*, that the B. Co. were only entitled to an allowance by the S. D. Co. of the ordinary clearing-house terminal of 1s. 8d. for fish. *Torbay & B. R. Co. v. South Devon R. Co., 2 Ry. & C. T. Cas. 391.*

The A. R. Co. worked under an agreement the B. line (a cross line forming a junction at either end with the A. company's railways), which was leased to them. The third article of the agreement provided that the working company should place to the account of the B. line a due mileage proportion of the gross receipts derived from through traffic. The A. company carried through-goods traffic over the B. line past the junction to their nearest stations on their own lines proper, for the remarshaling of such traffic, and back again to the junctions, and thence to its proper destination, and claimed to include in their mileage, for the purpose of division of receipts, the distance between the junctions and the stations where the traffic was remarshaled, both ways. There was no station suitable for the interchange of through traffic at either junction. There being, in the opinion of the commissioners, nothing in the agreement obliging the A. company to provide such station, and the traffic in question not being so considerable as in the commissioners' opinion to make it reasonable that it should pass from one line to the other without being taken into a station—*held*, that the claim ought to be allowed. *Salisbury & D. J. R. Co. v. London & S. W. R. Co., 3 Ry. & C. T. Cas. 314.*

The B. company contended that the A. company's mileage proportion of receipts for through traffic should be reckoned according to the mileage of the shortest route

over the A. company's lines which could be taken. The commissioners being of opinion that there was nothing in the agreement obliging the A. company to take any particular route—*held*: (1) with regard to joint traffic, that whether the A. company should be allowed to reckon mileage according to the distance of the route taken, or according to the distance of the shortest route, depended upon what was reasonable under the circumstances; (2) with regard to through traffic, the receipts for which passed through the clearing house, that the B. company were entitled to receive the same proportion as they would have received if they had been an independent company. *Salisbury & D. J. R. Co. v. London & S. W. R. Co., 3 Ry. & C. T. Cas. 314.*

136. When parties may arbitrate.—A working agreement provided that the working company should, under the direction of a joint committee, forever maintain, repair, manage, work, and use the railway, and should manage and work the traffic thereon so as fairly to accommodate and develop the traffic of the district, and to promote in all reasonable respects the success of the owning company's undertaking. The agreement further provided that any difference which might arise between the two companies should be referred to and determined by arbitration under the provisions of the Railway Companies Arbitration Act, 1859. *Held*, that no case for arbitration arose until the direction of the joint committee had been had or refused, and one or other of the companies being dissatisfied with the action or non-action of the joint committee, had taken the course prescribed by the agreement. *Limerick & K. R. Co. v. Waterford & L. R. Co., 5 Ry. & C. T. Cas. 87.*

137. Power and jurisdiction of commissioners.—Upon an application to the railway commissioners, under section 8 of the Regulation of Railways Act, 1873, to settle the terms of user under section 17 of the Central Wales Act, 1873, objection was made to the hearing of the application on the ground that the user in question was a user under other powers than those given by the Central Wales Act, 1873. *Held*, by the commissioners, that part of the user was under that act, and that they had jurisdiction to entertain the application. *Great Western R. Co. v. Central Wales & C. J. R. Co., 4 Ry. & C. T. Cas. 358.*

An application was made by the owning company to the railway commissioners under section 8 of the Regulation of Railways Act, 1873, alleging that the working company had not, within the meaning of the agreement, so worked and used the railway as properly to develop and accommodate the through traffic mentioned in the agreement. The commissioners entertained the application, and determined the same in favor of the working company. *Eastern & M. R. Co. v. Midland R. Co.*, 4 Ry. & C. T. Cas. 323.

The G. Ry. Act, 1862, § 59, after reciting that an agreement made in 1862, and schedules to the act, had been entered into between the provisional directors of the G. Ry. Co. and the C. Ry. Co. in relation to the construction and maintenance of the railway and works by the act authorized, and the working and management of the traffic thereon, enacts that "the said agreement is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the companies as if they had been authorized by this act to enter into the said agreement, and as if the same had been duly executed by them after the passage of this act"; and section 61 enacts that "it shall be lawful for the board of trade, if they think fit, on the expiration of ten years from the date of the agreement, and on the expiration of every period of ten years from the time when any revision thereof shall be made by them in manner herein provided, to cause the said agreement to be revised." These powers of the board of trade were, by the Regulation of Railways Act, 1873, § 10, given to the railway commissioners. *Held*, by the commissioners, that they had no jurisdiction to revise the agreement which had been approved by parliament, and which the board of trade never had power to approve. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 132.

Semble, that the power given to the railway commissioners under section 10 of the Regulation of Railways Act, 1873, to approve of working agreements, covers and includes the power to revise such agreements. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 2 Ry. & C. T. Cas. 132.

138. Former powers of board of trade transferred to the commissioners.—The power of the board of trade under a clause in a working agreement between two railway companies em-

powering the board of trade once in every ten years "to cause this agreement to be revised, but in the interest of the public only," was by the act of 1873 transferred to the railway commissioners. *Huddersfield Corporation v. Great Northern R. Co.*, 50 L. J. Q. B. D. 587, 3 Ry. & C. T. Cas. 564.

139. What the terms "local and through traffic" include.—Words "through traffic" in an agreement by which one railway company undertakes to "maintain, manage, man, stock, work, and use the railway" of another company so as "properly to develop and accommodate not merely the through traffic but also the local traffic of the district to be served by the railway," were held by the commissioners to mean such traffic as that for which the said railway provides the shortest and most convenient route, and not that which may be more conveniently or economically carried by any other route. *Eastern & M. R. Co. v. Midland R. Co.*, 5 Ry. & C. T. Cas. 235.

140. How cost of working is calculated.—In calculating the cost of working a section of a railway as an integral part of the whole system, the proportion of locomotive expenses and cost of carriage and wagon repairs to be borne by the section should be arrived at by taking the mean proportion between the proportions of the train mileage on the section to the train mileage on the system, and the traffic receipts on the section to the traffic receipts on the system respectively. *Sevenoaks, M. & T. R. Co. v. London, C. & D. R. Co.*, 3 Ry. & C. T. Cas. 63.

141. Working agreement of road mortgaged to secure bonds.—The B. & L. H. R. Co., being liable upon certain bonds secured by mortgage, entered into agreement with the G. T. R. Co., confirmed by 29-30 Vict. c. 92, by which the latter company was to undertake the working of their railway, the net receipts of the two companies to be divided between them in specified proportions. One clause of this agreement provided that as between the B. & L. H. Co. and the holders of these securities the interest on such securities should be a first charge on the proportion of net receipts payable to that company, and so long as such proportion was duly paid to the company none of the holders should exercise any of their powers or rights against the property or effects of the company, ex-

cept their proportion of net receipts, but those powers and rights should be suspended. By another clause the agreement was declared to be subject and without prejudice to the securities, rights, and interest of the bond creditors of the company. *Held*, assuming that the right to sue on the bonds was included in the powers and rights mentioned, that the effect of the agreement was not to suspend such right so as to be pleadable in bar to an action, though it might give a right of action for the damages sustained by suing in breach of it, or afford ground in equity to restrain the plaintiffs from enforcing the judgment. The effect of 19 Vict. c. 21 was to make defendants liable upon the bonds given by the Buffalo, B. & G. R. Co., as if originally given by defendants. *Corporation of Brantford v. Buffalo & L. H. R. Co.*, 29 U. C. Q. B. 607.

142. Under Regulation of Railways Act, 1873, § 11.—By a statutory agreement between the A. R. Co. and the B. R. Co., whose railways formed a continuous line of railway, it was provided that the B. Co. should work the line of the A. Co. in perpetuity, and provide the necessary rolling stock; that the B. Co. should appoint, pay, and have the exclusive control over the staff required for working the A. company's line, and that the A. Co. should appoint, pay, and have exclusive control over the officials required to manage the directorial and financial departments of their undertaking, and the men required for the maintenance of the permanent way of their line; that the B. Co. should receive for working the traffic fifty per cent. of the gross receipts, and that out of the remaining fifty per cent. the A. Co. should pay (1) the cost of maintaining the permanent way, public and parochial burdens, and government duties; (2) the "general charges" for the directorial and financial business of the company; and (3) out of the balance should pay one quarter to the B. Co. in respect of the contribution of £35,000 to the capital holders in the A. Co. and lastly, that the traffic should be managed and the rates and fares fixed by a joint committee, the B. Co. being, however, the sole judges of the proper times for starting the trains. *Held*, by the court of session (affirming the judgment of the railway commissioners), that the A. Co. was, within the meaning of the Regulation of Railways Act, 1873, a forwarding company, and entitled under section 11

to require that through rates should be fixed for traffic passing to and from stations on its line from and to stations on the B. Co.'s own line. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 145.

The court of session has jurisdiction to entertain the question whether the railway commissioners in making an order fixing such through rates on the application of the A. Co. have, in respect that the A. Co. is not a railway company forwarding traffic within the meaning of section 11 of the Regulation of Railways Act, 1873, exceeded their powers, notwithstanding the limitation of review contained in section 26 of that act. *Greenock & W. B. R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 145.

An agreement between a steamboat company and a railway company that the steam vessels belonging to the former shall ply between two ports "for one year and thereafter until written notice to terminate the agreement six months from the date of such notice," "daily, or at least upon alternate days of each week, the hours of departure of the boats to be determined by steamboat company, regard being had, however, to the convenience of the railway company and to the times of the arrival and departure of their trains," and containing also a clause that any dispute or difference as to the provisions of the agreement should be referred to the decision of an arbitrator to be appointed by the board of trade, whose decision was to be binding, is an arrangement for using, maintaining, or working steam vessels within the meaning of section 11 of the Regulation of Railways Act, 1873. *Belfast C. R. Co. v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 379.

LEGISLATURE.

Cannot enforce forfeiture of franchise, see CHARTERS, 82.

Control of, over land granted to state, see LAND GRANTS, 13, 14.

Delegation of power of, see STATUTES, 7.

Discretion of, as to exercise of power of eminent domain, see EMINENT DOMAIN, 2.

Grants by, of right to lay tracks in streets, see STREET RAILWAYS, 7-15; STREETS AND HIGHWAYS, 30-60.

Power of, as regards aid to railways, see MUNICIPAL AND LOCAL AID, 5-23.

— — — respects land grants, see LAND GRANTS, 2.

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- Power of, as to selection of tribunal to assess land damages, see EMINENT DOMAIN, 448.
- to authorize entry before payment of land damages, see EMINENT DOMAIN, 415.
 - delegate right to condemn lands, see EMINENT DOMAIN, 84.
 - enact fence laws, see FENCES, 1-6.
 - grant exemptions from taxation, see TAXATION, 137, 138.
 - ratify invalid issue of bonds, see MUNICIPAL AND LOCAL AID, 337.
 - regulate elections in aid of railways, see MUNICIPAL AND LOCAL AID, 146.
 - take away or restrict the right of appeal, see EMINENT DOMAIN, 869.
- Regulation of charges by, see CHARGES, 4-19.

LETTERS.

- Admissibility and effect of, in evidence, see DEATH BY WRONGFUL ACT, 244; EVIDENCE, 230.
- Of president, admitting liability, admissibility of, see FIRES, 200.
- Right of express company to carry, see EXPRESS COMPANIES, 5.
- Testamentary, or of administration, see EXECUTORS AND ADMINISTRATORS, 1-3.
- Written by attorneys, admissibility of, as admissions, see EVIDENCE, 197.

LEVY.

- Of attachments, see ATTACHMENT, ETC., 47-49.
- executions, see EXECUTION, 14-16.
 - taxes, see TAXATION, 245-286.

LIBEL.

- In admiralty, for death of passenger, see ADMIRALTY, 3.

LIBEL AND SLANDER.

1. What publications are libelous.*
- Language charging a railroad company with incapacity or neglect in the conduct of

* Liability of corporations for torts, such as assault and battery, malicious prosecution, libel, slander, etc., see notes, 20 AM. & ENG. R. CAS. 637; 31 *Id.* 363; 34 AM. REP. 495.

Liability of company for unauthorized publications by newspapers as to discharge of employes, see 48 AM. & ENG. R. CAS. 115, *abstr.*

Libel and slander upon corporations, see note, 52 AM. & ENG. R. CAS. 156.

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its business, in that it maintains a road more than half of the ties of which are rotten and on which it is dangerous to run trains fast, is actionable without proof of special damage; a demurrer to the complaint setting forth such facts as a cause of action will be dismissed as frivolous. *Ohio & M. R. Co. v. Press Pub. Co.*, 52 *Am. & Eng. R. Cas.* 155, 48 *Fed. Rep.* 206.

In an action based upon a libelous letter from its superintendent in reply to a communication from attorneys, propounding a claim for damages in favor of plaintiff, the defendant will be liable upon proof of malice, or the absence of honest belief in the truth of the statements contained in the letter. *Alabama & V. R. Co. v. Brooks*, 69 *Miss.* 168, 13 *So. Rep.* 847.

In such case the company is not liable if its servant, in making the reply, keeps himself within the privilege of the occasion; otherwise, if he takes advantage of the opportunity maliciously to libel plaintiff or to write concerning him libelous matter which he does not believe to be true. *Alabama & V. R. Co. v. Brooks*, 69 *Miss.* 168, 13 *So. Rep.* 847.

A railroad company supplied certain of its agents with a tabulated list of employes who had been discharged, stating in parallel columns the name and occupation of the employes, and under the heading "Why discharged" the reason. *Held*, where the reason given was "stealing," the statement was libelous, and its issue to agents was a publication. *Bacon v. Michigan C. R. Co.*, 20 *Am. & Eng. R. Cas.* 633, 55 *Mich.* 224, 21 *N. W. Rep.* 324, 54 *Am. Rep.* 372.

The general manager of defendants' railway, without special instructions of the directors, dismissed plaintiff for alleged dishonesty; and by his directions placards describing the offense, and stating plaintiff's dismissal, were posted up in the company's private offices, in some of which they were seen by strangers, and in circular books of the conductors, for the information and warning of the company's employes, 2000 in number. *Held*, that defendants were liable for the publication as being an act done by their general manager in their interest and within the general scope of his duty. The communication to the employes was privileged, made by a person having a duty or interest to persons having a corresponding duty or interest. *Tench v. Great Western R. Co.*, 33 *U. C. Q. B.* 8.

2. — and what are not.— A statement sent out by a railroad company, employing some 24,000 persons, to its employing agents, showing the names of persons who had been discharged, and the cause of their discharge, for the purpose of preventing their re-employment, is not actionable, in the absence of express malice, though false. *Missouri Pac. R. Co. v. Richmond*, 38 Am. & Eng. R. Cas. 241, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. Rep. 555, 29 Cent. L. J. 69.

The mere posting of a notice by a railroad company, forbidding its employés to trade with a certain person, does not constitute libel or slander, though it may be malicious and result in injury to such person. *Payne v. Western & A. R. Co.*, 18 Am. & Eng. R. Cas. 119, 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

It is not unlawful for a railroad company to discharge, nor to publish notice that it will discharge, its employés for trading with a certain merchant, unless thereby a contract between company and employés is broken, and even then no action accrues to the merchant unless the notice is libelous. *Payne v. Western & A. R. Co.*, 18 Am. & Eng. R. Cas. 119, 13 Lea (Tenn.) 507, 49 Am. Rep. 666.

It is not libelous for a railway company to publish that a person was convicted for refusing to pay his fare, if the conviction is described with substantial accuracy; and it is a question for the jury whether the published statement of the conviction was substantially true. *Alexander v. North Eastern R. Co.*, 6 B. & S. 340, 34 L. J. Q. B. 152.

The publication by a railway company that a person had been convicted of an offense against its by-laws and fined, with the alternative of three weeks' imprisonment, is not made libelous by the fact that the alternative imprisonment was fixed at a fortnight only. *Alexander v. North Eastern R. Co.*, 11 Jur. N. S. 619, 34 L. J. Q. B. 152, 6 B. & S. 340, 13 W. R. 651.

3. Privileged communications.— A party cannot be held in damages for allegations set up by him in his pleadings in a suit, which assail the character of the other party, when it appears that the circumstances were such that he might reasonably have believed that the allegations were true. *Wallis v. New Orleans & C. R. Co.*, 29 La. Ann. 66.

A list of railroad employés discharged, and stating the cause of their discharge, which is sent to the agents of the company who were authorized to employ men, and kept for their use, is *prima facie* a privileged communication. *Bacon v. Michigan C. R. Co.*, 31 Am. & Eng. R. Cas. 358, 66 Mich. 166, 33 N. W. Rep. 181, 9 West. Rep. 709. *Hunt v. Great Northern R. Co.*, 48 Am. & Eng. R. Cas. 113 [1891], 2 Q. B. 189.

And although it contains a false statement, damages therefor cannot be recovered unless express malice be shown. *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. Rep. 384.

Written direction by a railroad company to its agents, instructing them not to receive or ship for a designated person any articles or merchandise of any description, except when the freight charges therefor are prepaid, and a request to a connecting line receiving freight therefrom to make a similar order, is a privileged communication, and does not constitute libel, in the absence of express malice. *Allen v. Cape Fear & Y. V. R. Co.*, 35 Am. & Eng. R. Cas. 532, 100 N. Car. 397, 6 S. E. Rep. 105.

Where goods are shipped over two roads with freight unpaid, a statement by the second to the first that the consignees had not taken up the goods because they were unable to pay freight, and communicated by that company to the consignors, is a privileged communication, and is not actionable as slander. *Campbell v. Bostick*, (Tex. Civ. App.) 22 S. W. Rep. 828.

4. Publication.—In the absence of malice or bad faith a report by a corporation to its stockholders is a privileged communication; but this privilege does not extend to the preservation of the report for distribution among members of the corporation, or the members of the community. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 6 Am. Ry. Rep. 493.

5. Ratification.—Proof that a libelous extract from a newspaper to the effect that plaintiff, a ticket broker, was neither safe nor reliable to deal with was kept posted in a conspicuous place in a railroad ticket office for forty days, and that the company's general passenger agent, after notice, refused to interfere therewith, is sufficient evidence to justify a finding that the company had published or ratified the act, or that it was published by an employé in the

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course of his employment. *Fogg v. Boston & L. R. Corp.*, 148 Mass. 513, 20 N. E. Rep. 109.

6. Who may sue.—A corporation may maintain an action for libel; certainly for language used concerning it in the trade or occupation which it carries on. *Ohio & M. R. Co. v. Press Pub. Co.*, 52 Am. & Eng. R. Cas. 155, 48 Fed. Rep. 206.—FOLLOWING *Trenton Mut. L. & F. Ins. Co. v. Perrine*, 23 N. J. L. 402; *Mutual R. F. L. Assoc. v. Spectator Co.*, 18 J. & S. (N. Y.) 460; *Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 146; *Shoe & L. Bank v. Thompson*, 18 Abb. Pr. (N. Y.) 413.

The defendants discharged the plaintiff, a car driver in their service, for a violation of his contract, and said that he had appropriated fares to himself. The plaintiff put himself in the position of having the charge made against him, and he cannot hold the defendants liable for a malicious intent toward him, when the defense which they set up to his action against them was founded on his own act. Therefore the claim of plaintiff for damages on the ground of his having been maliciously and unjustly slandered cannot be maintained. *Hewitt v. New Orleans & C. R. Co.*, 28 La. Ann. 685.

7. Who may be sued.—A corporation is liable in damages for the publication of a libel, as it is for its other torts. *Fogg v. Boston & L. R. Co.*, 148 Mass. 513, 20 N. E. Rep. 109. *Bacon v. Michigan C. R. Co.*, 20 Am. & Eng. R. Cas. 633, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. Rep. 324. *Missouri Pac. R. Co. v. Richmond*, 38 Am. & Eng. R. Cas. 241, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. Rep. 555, 29 Cent. L. J. 69. *Missouri Pac. R. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. Rep. 384. *Whitfield v. South Eastern R. Co.*, El., Bl. & El. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229.

A railroad corporation is liable for the acts of its agents, either *ex contractu* or *ex delicto*, when done in the course of their employment; and this rule includes actions for libel published by agents. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 6 Am. Ry. Rep. 493.—DISAPPROVED IN *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560. FOLLOWED IN *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34. QUOTED IN *Lewis v. Meier*, 4 McCrary (U. S.) 286, 14 Fed. Rep. 311; *New York, L. E. & W. R. Co. v. Bennett*, 50 Fed. Rep. 496,

6 U. S. App. 1, 1 C. C. A. 544; *Jordan v. Alabama G. S. R. Co.*, 20 Am. & Eng. R. Cas. 628, 74 Ala. 85, 49 Am. Rep. 800; *Philadelphia, W. & B. R. Co. v. Hoeflich*, 18 Am. & Eng. R. Cas. 373, 62 Md. 300, 50 Am. Rep. 223; *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328; *Atlantic & G. W. R. Co. v. Dunn*, 19 Ohio St. 162; *Spellman v. Richmond & D. R. Co.*, 35 So. Car. 475. REVIEWED IN *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315; *Vance v. Erie R. Co.*, 32 N. J. L. 334; *Palmer v. Charlotte, C. & A. R. Co.*, 3 So. Car. 580.

A railroad company is liable in damages for a libelous letter written by its superintendent relating to a matter within the scope of his authority, in this case the letter being in response to a claim of damages on account of the loss of baggage of a passenger. *Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 13 So. Rep. 847.

A railroad company is not responsible, under the rule of *respondeat ouster*, for a libel of an employé published by its general superintendent without authority from the corporation; nor is the superintendent himself responsible, when there is no evidence submitted that the libelous article was dictated or even inspired by him. *Henry v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 289, 21 Atl. Rep. 157.

Even if the superintendent had furnished all the information contained in the publication, as imputed to him by the plaintiff, he would not thereby be responsible for the libel in the absence of proof submitted that he went one step further, and procured its publication. *Henry v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 289, 21 Atl. Rep. 157.

8. Pleading.—A complaint in an action for libel by a discharged conductor, stating that he had applied to various other companies, but had been refused employment on account of the publication sent out by defendant, is sufficient to admit evidence on that point, without setting out the names of the companies to which he had made application, in the absence of a demand for more specific averments. *Missouri Pac. R. Co. v. Richmond*, 38 Am. & Eng. R. Cas. 241, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. Rep. 555, 29 Cent. L. J. 69.

Where a railway company is sued for publishing that the plaintiff was convicted of traveling without paying his fare, "meaning thereby that the plaintiff had attempted

to defraud the company," a plea that he was so convicted without expressly justifying the innuendo is good, since the only offense cognizable under the statute is for traveling without previously paying the fare "with intent to avoid payment thereof." *Biggs v. Great Eastern R. Co.*, 16 W. R. 908, 18 L. T. 482.

9. Evidence.—Where a railway company is sued for libel in publishing that the plaintiff was convicted of traveling without a ticket, and in defense pleads the truth, the question for the jury is whether the company's account of the conviction is substantially correct. In such case the plaintiff with a view to the assessment of damages may enter into all the circumstances which led to the conviction, although such evidence tends to show that such conviction was erroneous. *Gwynn v. South Eastern R. Co.*, 18 L. T. 738.

Subsequent publications of a libel, or other like publications, are admissible for the purpose of showing malice on the part of the defendant. *Behee v. Missouri Pac. R. Co.*, 71 Tex. 424, 9 S. W. Rep. 449.

It was shown that a copy of the black list (sought to be proved) had been in possession of an assistant superintendent of the defendant railway company; that said assistant had returned the paper to the general superintendent, and notice to produce had been served upon defendant. *Held*, that the predicate was sufficient to admit secondary evidence to the contents of such paper or list. *Behee v. Missouri Pac. R. Co.*, 71 Tex. 424, 9 S. W. Rep. 449.

A discharged employé having obtained transportation by means of an employé's ticket, the superintendent had a notice put up stating he had been discharged for failing to "ring up" fares. As such a charge does not imply, of necessity, the commission of a crime, opinions of witnesses as to the meaning of the innuendo were incompetent in an action for libel brought against the company. *Pittsburgh, A. & M. Pass. R. Co. v. McCurdy*, 114 Pa. St. 554, 8 Atl. Rep. 230.

10. Questions of law and fact—Malice.—The question whether a libel was published with malice, or with the intent to injure the plaintiff, is for the jury. *Bacon v. Michigan C. R. Co.*, 31 Am. & Eng. R. Cas. 357, 66 Mich. 166, 9 West. Rep. 709, 33 N. W. Rep. 181.

The question whether the occasion is

such as to rebut the inference of malice, if the communication be *bona fide*, is one of law for the court; but whether *bona fides* existed is one of fact for the jury. *Bacon v. Michigan C. R. Co.*, 31 Am. & Eng. R. Cas. 357, 66 Mich. 166, 9 West. Rep. 709, 33 N. W. Rep. 181.

Whether a servant in writing the letter honestly believed the truth of the statements therein is a question for the jury, and his assertion is not conclusive of what the motive was. *Alabama & V. R. Co. v. Brooks*, 69 Miss. 168, 13 So. Rep. 847.

Plaintiff, a street-car conductor, was discharged for allowing another discharged employé to ride on employes' tickets, and the company posted a notice that plaintiff had been discharged "for failing to ring up all fares collected," and that discharged employes were not allowed to ride on employes' tickets. *Held*, in an action for libel, that it was for the court to construe the notice, and to determine, in the absence of evidence, whether the words covered the crime of embezzlement as charged in the innuendo. *Pittsburgh, A. & M. Pass. R. Co. v. McCurdy*, 114 Pa. St. 554, 8 Atl. Rep. 230.

11. Instructions.—Where the cause of discharge of persons from employment is stated to be for stealing, in an action for libel, the evidence on the question of good faith in making the statements should be submitted to the jury, where there was evidence to show that defendant's agents were acting through spite or resentment towards plaintiff. *Bacon v. Michigan C. R. Co.*, 31 Am. & Eng. R. Cas. 357, 66 Mich. 166, 9 West. Rep. 709, 33 N. W. Rep. 181.

In an action for libel in publishing plaintiff's name on the black list as an employé discharged for incompetency, it is error to instruct that the malice essential to such a libel is express malice, which means wicked intent, and that such intent must be proved like any other fact and is never to be presumed. *Behee v. Missouri Pac. R. Co.*, 71 Tex. 424, 9 S. W. Rep. 449.

12. Damages.—Exemplary damages may be recovered, in an action for libel against a corporation, when the evidence shows that it was published with express malice. *Missouri Pac. R. Co. v. Richmond*, 38 Am. & Eng. R. Cas. 241, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. Rep. 555, 29 Cent. L. J. 69.

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tion is made under circumstances such as to repel an inference of malice, exemplary damages are not recoverable. *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 6 Am. Ry. Rep. 493.

A verdict for \$2000 against a railway company for blacklisting a brakeman by falsely publishing that he was discharged for incompetency—*held*, not excessive. *Missouri Pac. R. Co. v. Behr*, 2 Tex. Civ. App. 107, 21 S. W. Rep. 384.

LICENSE.

Construction of road under, effect on landowner's right to sue in ejectment, see EJECTMENT, 6; EMINENT DOMAIN, 1020. Distinguished from easement, see EASEMENTS, 3.

From plaintiff's grantor, to flood land, as a defense, see FLOODING LANDS, 59.

Of ferries, see FERRIES, 2.

— railway engineers, see INTERSTATE COMMERCE, 212.

To enter, as a defense to landowner's action for trespass, see EMINENT DOMAIN, 1073.

— before payment of damages, when implied, see EMINENT DOMAIN, 422.

— manufacture or sell patented articles, see PATENTS FOR INVENTIONS, 13.

— use right of way, see EMINENT DOMAIN, 224.

I. NATURE, VALIDITY, AND EFFECT.. 261

II. REVOCATION..... 263

I. NATURE, VALIDITY, AND EFFECT.

1. Generally.—Acts done under a parol license, prior to a revocation thereof, do not constitute trespass. *Buchanan v. Logansport, C. & S. W. R. Co.*, 71 Ind. 265.

Where a licensee has a right to the possession of land for a specified purpose, and commits no act which his license does not cover, the owner thereof cannot destroy such right. *Buchanan v. Logansport, C. & S. W. R. Co.*, 71 Ind. 265.

2. License to enter and use land, generally.—Permission by a company to employes to occupy land within the inclosure of its road does not extend to other persons who are not employes. *Galena & C. U. R. Co. v. Jacobs*, 20 Ill. 478.

An incorporated railway company is a trustee of the right of way for the commonwealth for the use of her citizens, and a permissive privilege from such company

differs entirely from a privilege on private property by individuals, where the expenditure of money is to be attributed to a mutual understanding that the privilege should remain unaltered. *Heyl v. Philadelphia, W. & B. R. Co.*, 51 Pa. St. 469.

3. License to construct track and use a right of way.—Where a landowner gives a railroad company a parol license to occupy his land, he cannot recover damages for such occupancy as long as the license remains unrevoked. *Miller v. Auburn & S. R. Co.*, 6 Hill (N. Y.) 61.—REVIEWED IN *Eggleston v. New York & H. R. Co.*, 35 Barb. (N. Y.) 162.

But a landowner cannot grant a right to enter upon and occupy his lands for an indefinite length of time, unless it be by conveyance sufficient to create a freehold under the statute of frauds. *Miller v. Auburn & S. R. Co.*, 6 Hill (N. Y.) 61.

A mere parol license to construct a railway track over the land of another is within the statute of frauds, and a claim of right under such license cannot be enforced in equity, even after the expenditure of a large sum of money in constructing the road and track, made on the faith of it. Such a license, if perpetual, would be to create an interest in the land, which cannot be granted by parol. *St. Louis Nat. Stock Yards v. Wiggins Ferry Co.*, 112 Ill. 384.—CRITICISING *Russell v. Hubbard*, 59 Ill. 335. FOLLOWING *Woodward v. Seely*, 11 Ill. 157.

Where a company, under a license from the owner, takes possession of ground for a right of way, and expends money in the construction and maintenance of its line of road thereon, it acquires, in the absence of any limitation appearing, a right of way of the full statutory width of one hundred feet. *Campbell v. Indianapolis & V. R. Co.*, 30 Am. & Eng. R. Cas. 304, 110 Ind. 490, 9 West. Rep. 371, 11 N. E. Rep. 482.—EXPLAINED IN *Indianapolis & V. R. Co. v. Reynolds*, 116 Ind. 356, 19 N. E. Rep. 141. QUOTED IN *Hargis v. Kansas City, C. & S. R. Co.*, 43 Am. & Eng. R. Cas. 599, 100 Mo. 210, 13 S. W. Rep. 680.

Where the owner of land has allowed the construction of a railroad over it, he is chargeable with knowledge that the road is of such a permanent nature that it cannot well be removed or abandoned. *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336.

Permission to build a road over one's

land implies authority to use it afterwards. *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336.

Where a company enters upon land and constructs its road under the mere license of the owner of the land, such license is a protection for acts done under it. *Kremer v. Chicago, M. & St. P. R. Co.*, 51 Am. & Eng. R. Cas. 382, 51 Minn. 15, 52 N. W. Rep. 977.

Where a company would be entitled to protection in laying a track over lands condemned under its charter, from an overflow of water, its licensees to lay a track over the same lands are entitled to the same protection. *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 166.

4. License to carry away stone.—Where a landowner grants permission to railroad contractors to take stone from his land for the construction of the road, by implication a license is also given to haul the stone across the land to the railroad, if necessary, doing no unnecessary damage. *Clark v. Vermont & C. R. Co.*, 28 Vt. 103.

5. License to erect grain-house.—Where a company gave plaintiffs a license to erect a grain-house upon its grounds, at a point to be designated by an officer of the road—*held*, that the purchase by plaintiffs of a lot adjacent to the company's grounds, with the expectation of using it in connection with the building, did not render the license an easement appurtenant to the lot, and which could not be revoked by the company, nor give plaintiffs a right of action for damages against another who, with the consent of the company, erected a building upon the site desired by plaintiffs. *Kipp v. Coenen*, 55 Iowa 63, 7 N. W. Rep. 417.

6. License to erect mill and dam.—Where the, general superintendent, who is the chief executive officer of a railroad, grants a license to an adjoining landowner to erect a mill and dam partly on the land of the road so as to overflow a part of it, and it is done at much expense to the licensee, and is beneficial to the road, the company is bound thereby, especially where it is in plain view of the road and no objection is made by the directors. *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

And where such dam is washed away, the right of the licensee, or one holding under him, to rebuild is not lost, where such superintendent has assured him that he shall not be molested, and where there has

been no laches in rebuilding. *Southwestern R. Co. v. Mitchell*, 69 Ga. 114.

7. License to erect a wharf.—A license or permission by the board of canal commissioners to the plaintiff's ancestor to construct a wharf on the brim side of a state canal by excavating twelve feet back into his lot from the water-line, and the subsequent erection of the wharf and use for many years, could not divest the title of the commonwealth to the land thereby occupied, if it was within the line of survey reported by the viewers. *Haldeman v. Pennsylvania C. R. Co.*, 50 Pa. St. 425.

8. License to use railway switch.—In the absence of direct proof of a license, there must be an uninterrupted use of a railroad switch for twenty-one years to entitle the user to claim as licensee. *Heyl v. Philadelphia, W. & B. R. Co.*, 6 Phila. (Pa.) 42.

9. Existence of license, when a question of fact.—A space in close proximity to a station was, before the railroad was constructed, a part of a highway by dedication. The tracks of the railroad were laid across it, and its ordinary use by the public was greatly reduced, and for thirty-five years its principal use was by persons going to and from the passenger station of the company, and teams going to and from its freight station. The company claimed that upon these facts a license must be inferred for such use and an abandonment of the road by the public for general use. The court below found that no such license existed. *Held*, that, this being a question of fact, the finding was conclusive; but that if the question was to be regarded as one of law, there was nothing in the character of the use which compelled the court to infer the license as a matter of law. *Hartford v. New York & N. E. R. Co.*, 59 Conn. 250, 22 Atl. Rep. 37.

Where a railway company relies on a license from the owner of land, but on this point the evidence is conflicting and contradictory, and is properly submitted to the jury, their finding that no license was given will not be disturbed by the court. *Missouri, K. & T. R. Co. v. Ward*, 10 Kan. 352.

10. Knowledge and ratification of license by grantee of licensor.—The occupancy and use of land by a company for a roadbed and track for the running of trains is sufficient notice to one claiming

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under the licensor of the company's equity, for that which will put a party upon inquiry is notice. *Campbell v. Indianapolis & V. R. Co.*, 30 *Am. & Eng. R. Cas.* 304, 110 *Ind.* 490, 9 *West. Rep.* 371, 11 *N. E. Rep.* 482.—FOLLOWED IN *Evansville & T. H. R. Co. v. Nye*, 113 *Ind.* 223.

A tenant in common conveyed an undivided moiety of his land; a railroad company afterwards erected a warehouse on it; the other tenant then conveyed his half to the same grantee, reciting that the company had erected the warehouse, and in consideration were to allow a passage over their other ground to other land of the grantors, their heirs and assigns. The grantee used the right of way. *Held*, that this was evidence for the jury of ratification by the grantee of the license to the company. Valuable improvements having been made on the faith of the license, it was not within the statute of frauds, and a subsequent ratification by parol was equivalent to precedent authority. *Cumberland Valley R. Co. v. McLanahan*, 59 *Pa. St.* 23.

11. Timber Licenses.—The timber licenses claimed by the plaintiff as licensee of the Ontario government were subject to the right of the Canada Central R. Co., acquired before confederation, to construct their road across the crown lands, over which the license in question extended; and the defendants, assignees of the railway company, were therefore not liable in trespass for entering upon and cutting timber on the said lands in prosecution of the work of building the said railway. *Foran v. McIntyre*, 45 *U. C. Q. B.* 288.

II. REVOCATION.

12. What licenses are revocable.*

—A license to build a railroad upon one's land would excuse any acts properly done under the license while the same was in force, but such license might be revoked at pleasure as to everything in the future. *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 *N. H.* 483. *Wood v. Michigan Air Line R. Co.*, 52 *Am. & Eng. R. Cas.* 37, 90 *Mich.* 334, 51 *N. W. Rep.* 263.

A parol license to enter upon the right of way belonging to a railroad company for

the purpose of constructing a crossing may be revoked. *Northern Pac. R. Co. v. Burlington & M. R. Co.*, 1 *Am. & Eng. R. Cas.* 8, 2 *McCrary (U. S.)* 203, 4 *Fed. Rep.* 398.

Any license pertaining to land may be revoked, so far as it is not executed; otherwise, a mere license might operate to convey an interest in land. *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 *N. H.* 483.

A right to come upon land of another, and remain for an indefinite time, can be granted only by deed; and where the license is by parol, it may be revoked at any time, even if money be paid for it, and expense incurred in erecting buildings or other permanent improvements on the premises. *Helfield v. Central R. Co.*, 29 *N. J. L.* 571; reversing 29 *N. J. L.* 206.—REVIEWED IN *New Jersey Midland R. Co. v. Van Syckle*, 37 *N. J. L.* 496.

A license even under seal is as revocable as one by parol; on the other hand, a license by parol, coupled with an interest and founded on a consideration, is as irrevocable as if made by deed. *Williamston & T. R. Co. v. Battle*, 66 *N. Car.* 540.

A railroad company agreed with a coal company that it might place its cars upon the railroad for the shipment of coal on the following conditions: (1) to allow one fourth of one per cent. per ton a mile for cars so used; (2) to make good any damages to the cars caused by accidents, the fault of the road; (3) to keep the cars in repair, and to charge for this service the actual cost thereof as charged in first-class shops; (4) that the company would make no actual agreement to give the cars prompt transit, but in any event to give such cars a proportion of the whole amount of power used. *Held*, that such an agreement constituted a mere license revocable at the will of the railroad company. *Baltimore & O. R. Co. v. Potomac Coal Co.*, 51 *Md.* 327.

Where a landowner granted a parol license to a railway company to construct, maintain, and operate its road over his land, and he contended that such license was granted in consideration of the promise of exceptional privileges to him, which promise had not been performed and was denied by the company, after it had constructed its tracks over his land—*held*: (1) that the company has not so clearly established an unconditional license on the faith of which it had acted as to entitle it to an injunction against a revocation of the same; (2) that

* Parol licenses, nature and revocation of, generally, see note, 31 *AM. ST. REP.* 712.

When license to enter on land may be revoked, see note, 30 *AM. & ENG. R. CAS.* 307.

the remedy of the company by condemnation, with the right to restrain the landowner pending proceedings if necessary, is sufficient. *Baltimore & H. R. Co. v. Algire*, 25 Am. & Eng. R. Cas. 147, 65 Md. 337, 4 Atl. Rep. 293.

A land-grant railroad issued circulars promising permits of settlement on the land on condition of immediate improvement, before its title to the land had been perfected. Held, that this amounted to a mere license, revocable at any time before it had been accepted or acted on by a settler. *Ellsworth v. Southern Minnesota R. Co.*, 31 Minn. 543, 18 N. W. Rep. 822.

13. License to sell lunch on trains.—A mere implied license to sell lunches on a railroad train, no matter how long enjoyed, for which no consideration has been paid, is revocable at any time; and such revocation results from notice not to prosecute the business in the future. *Fluker v. Georgia R. & B. Co.*, 38 Am. & Eng. R. Cas. 379, 81 Ga. 461, 8 S. E. Rep. 529, 2 L. R. A. 843.

14. What licenses are irrevocable.—A license, coupled with an interest, is not revocable as long as the interest exists. *United States v. Baltimore & O. R. Co.*, 1 Hughes (U. S.) 138.

One who permits a railway company to enter upon his land and clear a right of way for its roadbed without objection, under verbal authority from him so to do, cannot afterwards repudiate the permission and maintain an action in trespass to try title to recover the strip so used for operating the road. *Texas & St. L. R. Co. v. Jarrell*, 60 Tex. 267.

Where a railroad company for certain privileges was permitted by parol to construct upon the plaintiff's land a dam, a canal, and a water-wheel, for the purpose of keeping its tank supplied with water, the license was irrevocable, and might be enforced in equity notwithstanding the statute of frauds. *Meetze v. Charlotte, C. & A. R. Co.*, 23 So. Car. 1.

And this special contract being valid and therefore of force, the plaintiff, upon the withdrawal by the railroad company of such privileges, could not bring an action for the value of the use and occupation of the land, but only for damages for breach of the special contract. *Meetze v. Charlotte, C. & A. R. Co.*, 23 So. Car. 1.

15. Estoppel of licensor to revoke.—A mere permission to occupy land is a

license, which may be revoked by the licensor or his grantee, unless some act is done which operates by way of estoppel to make the license irrevocable. *Lake Erie & W. R. Co. v. Kennedy*, 132 Ind. 274, 31 N. E. Rep. 943.

16. —where licensee has expended large sums of money.—A naked parol license to enjoy an easement over land is revocable by the licensor at any time while it remains executory, but an executed parol license to use another's land, granted upon a consideration, or upon the faith of which money has been expended, cannot be revoked. *Messick v. Midland R. Co.*, 128 Ind. 81, 27 N. E. Rep. 419.

The rule that a naked parol license may be revoked does not extend to cases where such licensee, relying upon the grant, has, with the knowledge of the licensor, expended large sums of money. In such a case the licensor has no right to revoke such license. *Buchanan v. Logansport, C. & S. W. R. Co.*, 71 Ind. 265. *Campbell v. Indianapolis & V. R. Co.*, 30 Am. & Eng. R. Cas. 304, 110 Ind. 490, 9 West. Rep. 371, 11 N. E. Rep. 482.

A mere license to a railroad to enter and lay its track, not subsidiary to a valid grant, may be revoked at pleasure, and does not create or transfer any interest in the land, even though granted for a valuable consideration, and for a purpose which involves the expenditure of money upon the faith of it; and the mere fact that the licensor, without objection, permits the licensee to expend money on the land upon the faith of the license will not operate as an estoppel. *Minneapolis Mill Co. v. Minneapolis & St. L. R. Co.*, 51 Minn. 304, 53 N. W. Rep. 639. *Murdock v. Prospect Park & C. I. R. Co.*, 73 N. Y. 579; reversing 10 Hun 598.—APPLYING *Washington Cemetery v. Prospect Park & C. I. R. Co.*, 68 N. Y. 591. APPROVING *Watson v. Chicago, M. & St. P. R. Co.*, 46 Minn. 321, 48 N. W. Rep. 1129.—APPLIED IN *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 51 N. Y. S. R. 520. FOLLOWED IN *Jamaica & B. Plankroad Co. v. New York & M. B. R. Co.*, 25 Hun (N. Y.) 585.

Where an individual lays a side track between a regular railroad track and car works for the purpose of delivering cars to or from the railroad, the railroad company is not estopped from revoking the license

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to connect the side track to the railroad by the fact that the person laying the side track had expended large sums of money in erecting the car works. *Jackson v. Philadelphia, W. & B. R. Co.*, 4 Del. Ch. 180. —APPLYING Pitkin *v.* Long Island R. Co., 2 Barb. Ch. (N. Y.) 221.

17. What operates as a revocation—Death.—A parol license by a landowner that a company may lay its track on and occupy certain land, is no defense to an action to recover the land, as it may be revoked at any time; and the death of the owner, or a subsequent conveyance by him, is a revocation. *Eggleston v. New York & H. R. Co.*, 35 Barb. (N. Y.) 162. —DISTINGUISHING *Doe v.* North Staffordshire R. Co., 4 Eng. L. & Eq. 216; *Doe v. Leeds & B. R. Co.*, 6 Eng. L. & Eq. 283; *Stone v. Commercial R. Co.*, 4 M. & C. 122; *Burkinshaw v. Birmingham & O. J. R. Co.*, 4 Eng. L. & Eq. 489. —REVIEWING *Miller v. Auburn & S. R. Co.*, 6 Hill (N. Y.) 61.

The decease of either party to such a license, or the conveyance by either of the rights affected by the license, operates as a revocation. *Blaisdell v. Portsmouth, G. F. & C. R. Co.*, 51 N. H. 483.

The owner of land gave permission, through her agent, to a company to build its road over her land, but with the understanding that it should not thereby acquire any rights to the soil. Held, that the permission was not revoked and its effect was not changed by the fact that the agent, from time to time thereafter, claimed that the company was trespassing. *Harlow v. Marquette, H. & O. R. Co.*, 41 Mich. 336.

18. Effect of revocation.—Where a company enters upon land and constructs its road under the mere license of the owner of the land, such license is a protection for acts done under it; but upon its revocation the company may be ejected from the premises, unless the right to continue to occupy the same is acquired by purchase or condemnation. The landowner's right of action is not impaired by mere inaction or delay in bringing suit within the statutory time. *Kremer v. Chicago, M. & St. P. R. Co.*, 51 Am. & Eng. R. Cas. 382, 51 Minn. 15, 52 N. W. Rep. 977.

One who persists in using a license to sell lunches on a train after notice of its termination may be prevented from so doing by such force, not extending to violence to life or limb, as may be necessary to effec-

tuate his expulsion from the premises. *Fluker v. Georgia R. & B. Co.*, 38 Am. & Eng. R. Cas. 379, 81 Ga. 461, 8 S. E. Rep. 529, 2 L. R. A. 843.

LICENSE TAXES.

Decisions under state laws regarding, see TAXATION, 392-399.

In cities, see MUNICIPAL CORPORATIONS, 6.

Of street railways, see STREET RAILWAYS, 285-293.

—ticket brokers, see TICKETS AND FARES, 150.

Validity of, under interstate commerce law, see INTERSTATE COMMERCE, 208-214.

LICENSEES.

Assaults upon, see ASSAULT, 5.

At stations, duty towards, see STATIONS AND DEPOTS, 73, 74.

Duty of company to persons riding on passes, see PASSES, 9-19.

—to, distinguished from duty to trespassers, see TRESPASSERS, INJURIES TO, 25.

Injuries to, see LICENSEES, INJURIES TO.

On trains, rights of, see CARRIAGE OF PASSENGERS, 89-91.

Persons on premises or track under implied license, see TRESPASSERS, INJURIES TO, 11.

Right of, to sublet, see LEASES, ETC., 88.

— — — sue for damages caused by fire, see FIRES, 151.

— — — — killing stock, see ANIMALS, INJURIES TO, 316.

LICENSEES, INJURIES TO.

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I. WHO DEEMED TO BE LICENSEES.

1. Generally.*—Where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is, at best, but a licensee, towards whom the company owes no special duty. *Diebold v. Penn-*

* Implied licenses to go upon railroad track, see note, 13 L. R. A. 634.

sylvania R. Co., 50 N. J. L. 478, 12 Cent. Rep. 799, 14 Atl. Rep. 576.—QUOTED IN *Woolwine v. Chesapeake & O. R. Co.*, 36 W. Va. 329, 50 Am. & Eng. R. Cas. 37, 15 S. E. Rep. 81.—*June v. Boston & A. R. Co.*, 153 Mass. 79, 26 N. E. Rep. 238.

2. Persons on premises engaged in work.—A workman who goes in a railroad yard for the purpose of doing work for the company is not a mere licensee as regards the amount of care that the company owes him. *Collins v. New York, N. H. & H. R. Co.*, 23 J. & S. (N. Y.) 31, 8 N. Y. S. R. 164; affirmed in 112 N. Y. 665, mem., 20 N. E. Rep. 413, mem., 20 N. Y. S. R. 977, mem.—FOLLOWING *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119.

An employé of a railroad who is engaged in delivering a car to another railroad corporation upon the latter's tracks in the regular course of business between the two corporations is not a mere licensee. *Turner v. Boston & M. R. Co.*, 158 Mass. 261, 33 N. E. Rep. 520.

A request to assist in unloading the lumber from a car carries with it the right to be at any proper place to do the work, whether such place be on or off the car. *Chicago & I. Coal R. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. Rep. 728.

Where a person who was shipping a heifer upon defendant company's train, with the consent of a station master, assists to shut a horse-box, and while so doing is injured by the servants of the company, the company is liable, as he was neither a trespasser, nor a volunteer servant, but a licensee. *Wright v. London & N. W. R. Co.*, 33 L. T. 830, L. R. 1. Q. B. D. 252, 45 L. J. Q. B. D. 570; affirming L. R. 10 Q. B. 298, 44 L. J. Q. B. 119, 32 L. T. 599.

3. Persons on premises by invitation.—The mere passive allowance of footmen to travel along the right of way of a railway company does not impose upon the company the duty to provide against danger of accident to which they may thereby expose themselves; yet if the company, directly or by implication, induces persons to enter on and pass over its right of way, it may thereby assume an obligation that it is in a safe condition. *Lake Shore & M. S. R. Co. v. Bodemer*, 54 Am. & Eng. R. Cas. 177, 139 Ill. 596, 29 N. E. Rep. 692; affirming 33 Ill. App. 479.

A railroad company by the formation of a crossing may extend an invitation to per-

sons to use such crossing for the purpose of access to the premises of others, though not necessarily to any public way beyond. *Hanks v. Boston & A. R. Co.*, 35 Am. & Eng. R. Cas. 321, 147 Mass. 495, 7 N. E. Rep. 139, 18 N. E. Rep. 218.

Where it is shown that a crossing eighty feet in length and twelve feet in width, extending over six railroad tracks, had been carefully planked and extended into the premises of a private firm, and that it was frequently traveled for the purpose of obtaining access to such premises, there is sufficient evidence to present for the determination of the jury the question whether such an inducement or invitation had been held out to the public to use the crossing for any lawful purpose as a person injured was entitled to avail himself of. *Hanks v. Boston & A. R. Co.*, 35 Am. & Eng. R. Cas. 321, 147 Mass. 495, 7 N. E. Rep. 139, 18 N. E. Rep. 218.

A mere permission or license from a railroad company to persons to cross its tracks is not an invitation. *Wright v. Boston & A. R. Co.*, 28 Am. & Eng. R. Cas. 652, 142 Mass. 296, 7 N. E. Rep. 866.

Whether the construction of a crossing over a railroad is such as of itself to amount to an invitation, or evidence for the jury of an invitation, by the railroad company to the public to use the same for its convenience, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. *Wright v. Boston & A. R. Co.*, 28 Am. & Eng. R. Cas. 652, 142 Mass. 296, 7 N. E. Rep. 866.

Plaintiff was injured while crossing defendant's track. At the point in question a public road came down to the track; on the further side of the track were chemical works surrounded by a fence, in which, opposite to the road, was a gate, marked, "No admittance." The chemical company maintained by defendant's license a crossing between the gate and the road for the convenience of its own business. There was also a public way leading to the chemical works at a little distance. Plaintiff found the gate open and drove through it to reach the chemical works, and was returning by the same way at the time of the accident. Held, that there was no invitation or license by the defendant to plaintiff to use the crossing, and that the defendant therefore owed plaintiff no duty to look out

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for him, or take precautions against his presence, and that, as there was no evidence that the defendant was negligent after it knew that plaintiff was on the track, he could not recover. *Donnelly v. Boston & M. R. Co.*, 42 *Am. & Eng. R. Cas.* 182, 151 *Mass.* 210, 24 *N. E. Rep.* 38.

4. — visitors.—Pupils visiting the power house of a traction company, at the request of their teacher, and by permission of the president of the company, merely for the purpose of viewing the machinery, are there as licensees, and the company is not bound to provide for their safety, and is not liable for an injury to one of the pupils who steps into a vat of hot water which is open and unprotected. *Benson v. Baltimore Traction Co.*, 77 *Md.* 535, 26 *Atl. Rep.* 973.

5. Persons habitually walking on or across tracks.—A license to walk on a track cannot be established by proof showing that the place was remote from any station, and that persons living near it had been in the habit of walking on it; that the engineer had seen persons walking on it, though not more frequently than on other portions of the track similarly situated; and that no steps had been taken to prevent such persons from so doing. *Missouri Pac. R. Co. v. Brown*, (Tex.) 18 *S. W. Rep.* 670. —FOLLOWING *Illinois C. R. Co. v. Hammer*, 72 *Ill.* 350; *Illinois C. R. Co. v. Hetherington*, 83 *Ill.* 510; *Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 *Ind.* 50; *St. Louis A. & T. R. Co. v. Crosnoe*, 72 *Tex.* 79, 10 *S. W. Rep.* 342.

Where the pedestrians use a railroad track as a thoroughfare, despite posted notices and other warnings forbidding it, a license for such use is not established. *Hyde v. Missouri Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 157, 110 *Mo.* 272, 19 *S. W. Rep.* 483.

Where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury. *Slattery v. Dublin, W. & W. R. Co.*, *L. R.* 3 *App. Cas.* 1155, 3 *Ry. & C. T. Cas.* xiii.

6. Distinguished from trespassers.*

—Where a railroad company, either expressly or by clear implication, licenses the public to use its track in a city, town, or village, it cannot treat one who avails himself of the license as a trespasser. *Palmer v. Chicago, St. L. & P. R. Co.*, 31 *Am. & Eng. R. Cas.* 364, 112 *Ind.* 250, 11 *West. Rep.* 676, 14 *N. E. Rep.* 70. *Louisville, N. A. & C. R. Co. v. Phillips*, 31 *Am. & Eng. R. Cas.* 432, 112 *Ind.* 59, 13 *N. E. Rep.* 132. —DISTINGUISHING *Barker v. Hudson River R. Co.*, 4 *Daly (N. Y.)* 274; *Zimmerman v. Hannibal & St. J. R. Co.*, 71 *Mo.* 476; *Wilbrand v. Eighth Ave. R. Co.*, 3 *Bosw. (N. Y.)* 314; *Jersey City & B. R. Co. v. Jersey City & H. Horse R. Co.*, 20 *N. J. Eq.* 61; *Adolph v. Central Park, N. & E. R. R. Co.*, 65 *N. Y.* 554, mem.; *Chicago West Division R. Co. v. Bert*, 69 *Ill.* 388. QUOTING *Smedis v. Brooklyn & R. B. R. Co.*, 88 *N. Y.* 13; *Kansas Pac. R. Co. v. Pointer*, 9 *Kan.* 620.

Where a company, through its employees and officers, has knowledge of the constant use of a footpath across its track, makes no objections thereto, and directs no obstructions to such use, it will be presumed to assent to it, thus giving all who use such crossing a license therefor. A person who is injured while crossing the track at such place is not a trespasser upon the railroad, but is entitled to all the rights of one rightfully upon it, and may recover for injuries resulting from the company's want of care. *Clampit v. Chicago, St. P. & K. C. R. Co.*, 49 *Am. & Eng. R. Cas.* 468, 84 *Iowa* 71, 50 *N. W. Rep.* 673. *Philadelphia & R. R. Co. v. Troutman*, (Pa.) 6 *Am. & Eng. R. Cas.* 117, 11 *W. N. C.* 453. —FOLLOWING *Pennsylvania R. Co. v. Lewis*, 79 *Pa.* St. 33.

A company, by acquiescing for a long time in laborers crossing its yards in going to and returning from their work, thereby licenses them to do so, and imposes upon itself a precautionary duty as to such persons, as they are not to be regarded as trespassers; but they are not absolved from all care for their own safety. *Illinois C. R. Co. v. Dick*, 91 *Ky.* 434, 15 *S. W. Rep.* 665.

A contractor to fence the right of way was authorized to use a hand-car in transporting his employes to and from their labor. In going to labor the hand-car col-

* Persons on the track by license of company, see notes, 34 *Am. & Eng. R. Cas.* 20; 15 *Id.* 438, 446.

lided with an occasional train, and in the collision the plaintiff, one of the fence gang, was injured. In a suit for damages by him against the railway company it was not proper to instruct the jury that the plaintiff was required to exercise "the highest degree of care." The plaintiff was not a trespasser, nor was he on the track by mere courtesy or permission. Ordinary care was all that was imposed upon him under the circumstances. *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631.

II. COMPANY'S DUTY TO LICENSEES.*

1. In General.

7. Duty to use care.—A licensee assumes the risks incident to the business of the company whose way he uses; but if injury be caused by negligence of the company, he may recover therefor. *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 17 N. W. Rep. 406, 46 Am. Rep. 667.—QUOTED IN *Hogan v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 439, 59 Wis. 139.

It cannot be said that railroad companies owe no duty of care to those who are rightfully on their right of way, even though the general public be excluded therefrom. *Chicago & N. W. R. Co. v. Dunleavy*, 39 Am. & Eng. R. Cas. 381, 129 Ill. 132, 22 N. E. Rep. 15; affirming 27 Ill. App. 438.

Where a person goes upon a siding to assist in moving a car up to an elevator, where it is to be unloaded, it cannot be said that he was at the place merely by the license of the company, but was rightfully there and doing a lawful act; but even if he were there merely by license, the company would be liable if it injured him by a careless or heedless act. *Conlan v. New York C. & H. R. R. Co.*, 74 Hun 115, 26 N. Y. Supp. 659, 56 N. Y. S. R. 316.—DISTINGUISHING *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

Where the rules of a company permit a brakeman to have charge of a train, his negligence in injuring a person who is unloading a car on a siding may be imputed to the

*Duty of company to persons on its trains who are not passengers or employes, see note, 23 AM. & ENG. R. CAS. 467.

Duty of railroad company towards persons with whom it has no contract relations, but who are lawfully on its cars or premises, see exhaustive note, 90 AM. DEC. 55.

company so as to make it liable. *Conlan v. New York C. & H. R. R. Co.*, 74 Hun 115, 26 N. Y. Supp. 659, 56 N. Y. S. R. 316.

8. Degree of care.—A railway company is chargeable with the exercise of at least ordinary care towards all persons who may lawfully be upon its premises, transacting business with it. *Spotts v. Wabash Western R. Co.*, 111 Mo. 380, 20 S. W. Rep. 190.

In passing through cities and towns greater care must be exercised than on that portion of the road where human beings have no right nor license to be, especially at night. *Louisville & N. R. Co. v. Howard*, 19 Am. & Eng. R. Cas. 98, 82 Ky. 212.

There is a clear distinction between the care which a railroad company is bound to exercise towards mere trespassers and towards those who are on its right of way by the license of the company, and in case of a long and constant user of such way the company and its servants are charged with notice of it, and cannot neglect precautions to prevent danger to persons traveling thereon. Wilful injury is not the only ground of liability in such a case. *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 17 N. W. Rep. 406, 46 Am. Rep. 667.

9. Persons engaged in loading or unloading cars.*—Where a strong, capable man drives a team alongside of a car on a side track, for the purpose of unloading goods from the car and taking them away, knowing one of his horses to be easily frightened, no additional duty is thereby imposed upon the company to exercise greater care in running engines or trains past the place to prevent frightening the horse. *Chicago & N. W. R. Co. v. Clark*, 2 Ill. App. 116.

If an injury is occasioned by the negligence of another railroad company, whose car, for the purpose of being loaded by the plaintiff, has been placed upon a side track of the defendants which is in constant use by other roads, such other company is bound to use reasonable care to prevent a collision; and if it fails to do so, and the plaintiff receives an injury from a collision while engaged in loading the car, he cannot recover against the company whose cars

*Injuries to persons loading or unloading cars, see note, 19 AM. & ENG. R. CAS. 120.

caused the collision. *Fletcher v. Boston & M. R. Co.*, 1 *Allen (Mass.)* 9.

While a railroad company may not be bound to ring a bell to warn a person who is unloading a car on a siding of the approach of a train on the same track, still if the jury find that the company did not give proper notice, they may take into consideration the fact that no signal was given. *Conlan v. New York C. & H. R. R. Co.*, 74 *Hun* 115, 26 *N. Y. Supp.* 659, 56 *N. Y. S. R.* 316.

10. Signals—Speed.—While the statute may not in terms require a signal under certain circumstances, the common law requires, at all times, the exercise of ordinary prudence and care in the avoidance of injury to others; and as the instrumentalities used are more dangerous, a greater degree of caution is imposed and required. *Barton v. New York C. & H. R. Co.*, 1 *T. & C. (N. Y.)* 297; affirmed in 56 *N. Y.* 660, *mem.*

Although the company is not absolutely bound to ring a bell or blow a whistle as the train approaches the crossing, it is bound to give some notice and warning; and the fact that the bell was rung does not establish, as matter of law, that the company used reasonable care. As to whether any other precautions should have been taken, and as to what is sufficient in such a case, are questions for the jury. *Swift v. Staten Island R. T. R. Co.*, 45 *Am. & Eng. R. Cas.* 180, 123 *N. Y.* 645, 3 *Silv. App.* 184, 25 *N. E. R. p.* 378, 33 *N. Y. S. R.* 604; affirming 52 *Hun* 614, 24 *N. Y. S. R.* 359, 1 *Silv. Sup. Ct.* 375, 5 *N. Y. Supp.* 316.—REVIEWED IN *Friess v. New York C. & H. R. R. Co.*, 51 *N. Y. S. R.* 391.

Though a company has a right to run its trains at any speed it may choose, when not prohibited so to do, yet if the rules of the company require trains to be run slowly on certain parts of the track, and those rules have usually been complied with, the public have a right to conclude that they will be observed on any given occasion, and to act accordingly. *International & G. N. R. Co. v. Gray*, 27 *Am. & Eng. R. Cas.* 318, 65 *Tex.* 32.

The employés operating a train are chargeable with notice that reliance will be placed upon their obeying the statute laws and rules of the company, and the latter is liable for any failure to do so from which injury to person or property results. So held, where plaintiff, riding on a hand-car by

permission of the company, was injured in a collision with a train, behind time and running at an unusual speed, which failed to give proper signals. *International & G. N. R. Co. v. Gray*, 27 *Am. & Eng. R. Cas.* 318, 65 *Tex.* 32.—FOLLOWED IN *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 *Tex. Civ. App.* 230.

A mere licensee upon a track was injured by the backing of a train which had been standing thereon, caused by the coupling of an engine to such train. His presence was unknown to, and unexpected by, the servants of the company operating the train, and could not reasonably have been anticipated by them. The usual signals of ringing the bell and sounding the whistle of the locomotive were given, and the train was being operated and the business conducted, when the accident happened, in the usual manner. Held, that the requirements of ordinary care and diligence were fully complied with, and that the company was not required to give any other notice, signal, or warning of the movement of the train or coupling of the cars. *Hogan v. Chicago, M. & St. P. R. Co.*, 15 *Am. & Eng. R. Cas.* 439, 59 *Wis.* 139, 17 *N. W. Rep.* 632.

S. was walking on his regular route from his work at the Ophir mine, along the track of the V. & T. R. R. Co., on a public street much frequented by foot passengers in Virginia City; there was no sidewalk or passageway provided along the street; there was a heavy snowstorm with such high winds as to prevent his seeing more than ten feet ahead of him; there was snow on the rails, which deadened the sound of the engine or train on the track; he was at a place where it was the usual custom of the railroad company when moving its trains or locomotives to give signals, either by the whistle of the locomotive, or the ringing of the bell; he was looking ahead whenever he could, and was listening for the sound of the whistle or bell, which he could have heard if such signals had been given; none was given; he was, without any warning, knocked down by a locomotive or tender backing along the track near a regular crossing. Held, that upon this statement of plaintiff's case the court did not err in refusing to grant a nonsuit. *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.—DISTINGUISHING *Illinois C. R. Co. v. Godfrey*, 71 *Ill.* 500; *Hickey v. Boston & L. R. Co.*, 14 *Allen (Mass.)* 429; *Chicago & R. I. R. Co.*

v. Still, 19 Ill. 508; *Dascomb v. Buffalo & S. L. R. Co.*, 27 Barb. (N. Y.) 321; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 60; *Runyon v. Central R. Co.*, 25 N. J. L. 556; *Stevens v. Oswego & S. R. Co.*, 18 N. Y. 422; *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358; *Havens v. Erie R. Co.*, 41 N. Y. 296; *Wilds v. Hudson River R. Co.*, 29 N. Y. 315; *Toledo & W. R. Co. v. Goddard*, 25 Ind. 185.

11. Duty to keep premises in safe condition.*—The owner of premises is under no legal duty to keep them in good repair for the accommodation of persons who go upon them for their own convenience merely; and where a person has a license to go upon the grounds, he takes them as he finds them, and accepts whatever perils he incurs in the use or enjoyment of such license. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. Rep. 121, 13 West. Rep. 425; *Atchison, T. & S. F. R. Co. v. Parsons*, 42 Ill. App. 93.

Unless it appear that such owner was aware of its dangerous or defective condition, or might have known thereof by the exercise of due care, and that the same was unknown to the person injured. *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85.—FOLLOWING *Goldstein v. Chicago, M. & St. P. R. Co.*, 46 Wis. 406; *Durkin v. Troy*, 61 Barb. (N. Y.) 437.—DISTINGUISHED IN *Skottowe v. Oregon S. L. & U. N. R. Co.*, 22 Oreg. 430.

But when the owner by enticement, allurement, or inducement, express or implied, causes another to come upon his lands, he then assumes the obligation of providing for the safety and protection of the person so coming, and for a breach of this duty is liable for any injury which may result from coming upon his lands; but the enticement, allurement, or inducement must be equivalent to an express or implied invitation. Mere acquiescence in the use of the land is not sufficient; but such invitation may be implied. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 425, 16 N. E. Rep. 121; *Nichols v. Washington, O. & W. R. Co.*, 32 Am. & Eng. R. Cas. 27,

83 Va. 99, 5 Am. St. Rep. 257, 5 S. E. Rep. 171.

Where a railroad company builds houses for its workmen so that there is no access to or from them except across the company's track, a workman who is boarding with the occupant of one of the houses may recover for an injury received while crossing the track, caused by the negligent manner of running a train. *McDermott v. New York C. & H. R. R. Co.*, 28 Hun. (N. Y.) 325; affirmed in 97 N. Y. 654, mem.—REVIEWING *Driscoll v. Newark & R. L. & C. Co.*, 37 N. Y. 637.

It is the duty of the company to keep its premises in safe condition for the use of a friend of its passenger aiding him to enter or leave its cars. *Texas & P. R. Co. v. Best*, 66 Tex. 116, 18 S. W. Rep. 224.—FOLLOWING *Hamilton v. Tex. & P. R. Co.*, 64 Tex. 251.

But this duty does not extend to those at the station at an unusual hour for the purpose of bidding farewell to a person about to leave on a freight train in charge of live stock, and who is a passenger only in a limited and restricted sense. *Towd v. Chicago, M. & St. P. R. Co.*, 58 Am. & Eng. R. Cas. 18, 84 Wis. 105, 54 N. W. Rep. 24.

12. — free from pits and excavations.—Where one merely permits others, for their own accommodation, to pass over his lands, he is under no legal duty to keep them free from pitfalls or obstructions which may result in injury. *Aliter*, if he invite or induce such passage. *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

M. while crossing the private grounds of a railroad company fell into an unprotected pit between the tracks, and was injured. He had often crossed there before, and so had other persons. There was, at most, only a license by the company to cross, and no invitation. Held, that defendant was not liable for the injury. *Morgan v. Pennsylvania R. Co.*, 19 Blatchf. (U. S.) 239, 7 Fed. Rep. 78.

13. — illustrations.—The owner or occupier of a dock is liable for damages to a person who makes use of it by his invitation, express or implied, for an injury caused by any defect or unsafe condition of the dock which he negligently causes or permits to exist, provided, of course, the person himself exercises due care. *Pennsylvania R. Co. v. Atha*, 22 Fed. Rep. 920.

* Liability of owner of dangerous premises for injury to one lawfully thereon, see note, 26 AM. REP. 562.

Injury to person going upon premises by invitation, owing to their defective condition, see note, 1 AM. & ENG. R. CAS. 78.

A person telegraph or paying a fri office is ow company fo ience, and v near its trac sages are se ties for pay voluntary li tant risks a upon the o premises in such visitor for such wil done such l of its agent Chesapeake Cas. 37, 36 —QUOTING R. Co., 10 A sylvania R. Diebold v. l 478; Pittsb ham, 29 Oh C. & H. R.

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W. Va. 648
14. Ass see.—Whe upon the p other, or u acquiescend premises as ever perils & W. R. C West. Rep QUOTED IN R. Co., 89

A person who, without invitation, visits a telegraph office merely for the purpose of paying a friendly call to the operator, which office is owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, from which occasional messages are sent and received for outside parties for pay, he visits said office as a mere voluntary licensee, subject to the concomitant risks and perils, and no duty is imposed upon the owner or occupant to keep its premises in safe and suitable condition for such visitors, and the owner is only liable for such wilful or wanton injury as may be done such licensee by the gross negligence of its agents or employés. *Woolwine v. Chesapeake & O. R. Co.*, 50 Am. & Eng. R. Cas. 37, 36 W. Va. 329, 15 S. E. Rep. 81. —QUOTING *Sweeney v. Old Colony & N. R. Co.*, 10 Allen (Mass.) 368; *Gillis v. Pennsylvania R. Co.*, 59 Pa. St. 129. REVIEWING *Diebold v. Pennsylvania R. Co.*, 50 N. J. L. 478; *Pittsburgh, Ft. W. & C. R. Co. v. Birmingham*, 29 Ohio St. 364; *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 243.

A railroad company has a platform and mail crane near a post-office at which the mail train does not stop, but the postal clerk from the mail car with a "catcher" takes in from the crane the mail pouch suspended thereon, without the train slackening speed. A person who stations himself on the company's land, near the mail crane, for the purpose of witnessing the catch, or for some other purpose of like kind, as a mere voluntary licensee, is subject to the concomitant risks and danger of injury thus assumed, and the company does not owe him the duty of keeping the mail crane in suitable and safe condition. The railroad company is only liable for such wanton injury as may be done to such licensee by the gross negligence of the company, its agents and servants. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 782.

14. Assumption of risks by licensee.—Where a person has a license to go upon the grounds or the inclosure of another, or uses such grounds with the mere acquiescence of the owner, he takes the premises as he finds them, and accepts whatever perils he thereby incurs. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 425, 16 N. E. Rep. 121. —QUOTED IN *Stewart v. Cincinnati, W. & M. R. Co.*, 89 Mich. 315.

Where an individual is permitted to use a track for the purpose of foot passage, he must be supposed to have exercised the privilege with full knowledge of the ordinary use of the track by the company, and the ordinary risks attendant upon its use by foot passengers; and where such person sues for an injury, it is error to refuse to instruct the jury that the plaintiff assumed the risk of being injured by the ordinary operation of trains. *Williams v. Delaware, L. & W. R. Co.*, 18 N. Y. S. R. 857, 2 N. Y. Supp. 435.

15. Persons on trains.*—A company is not bound to hold a train for one who has not put himself in the relation of a passenger, and is not liable to him for an injury occurring while attempting to get on the train after it has started. *Spannagle v. Chicago & A. R. Co.*, 31 Ill. App. 460.

Where a newsboy has a license to pass on and off street-cars merely for the purpose of selling his papers, the company is not liable for an injury received by the driver permitting him to get off from the front platform without checking the speed of the car. *Fleming v. Brooklyn City R. Co.*, 1 Abb. N. Cas. (N. Y.) 433. —APPLIED IN *Buckley v. New York & H. R. Co.*, 11 J. & S. (N. Y.) 187; *Finley v. Hudson Elec. R. Co.*, 46 N. Y. S. R. 202.

Even if a party is wrongfully on an engine, and is permitted and invited to remain there, this will not excuse the want of ordinary care to prevent injury to him. *Lake Shore & M. S. R. Co. v. Brown*, 31 Am. & Eng. R. Cas. 61, 123 Ill. 162, 14 N. E. Rep. 197.

One going on a train to collect change which the conductor owed him out of a bill given for his fare, he having alighted at his station, but again re-entered cars, must use proper care in getting off the train, as he is not entitled to the care required towards passengers. *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 Ohio St. 222, 15 Am. Ry. Rep. 298.

2. Persons Walking on or Crossing Track.

16. Generally.†—A railroad constructed sidings and a canal on a large lot,

* Injuries to persons assisting passengers to board cars, see note, 41 AM. & ENG. R. CAS. 168. See also CARRIAGE OF PASSENGERS, 80-91.

† Duty of company to trespassers and licensees on track, see 31 AM. & ENG. R. CAS. 373, *abstr.*

and left it unfenced, for the convenience of persons in loading and unloading lumber. The public also used the lot in passing from one part of the city to another. *Held*, that the permission thus to use the lot bound the company so to use the sidings as not to endanger life; hence it was negligence to detach cars and send them unattended down a grade, around a curve, over said lot. *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269.—*DISTINGUISHING Philadelphia & R. R. Co. v. Hummell*, 44 Pa. St. 375; *Gills v. Pennsylvania R. Co.*, 59 Pa. St. 129.

The approach to a station of the Grand Trunk railway from the highway was by a planked walk crossing several tracks, and a train stopping at the station sometimes overlapped this walk, making it necessary to pass around the rear car to reach the platform. J., intending to take a train at this station before daylight, went along the walk as his train was coming in, and seeing, apparently, that it would overlap, started to go around the rear, when he was struck by a shunting engine and killed. It was the duty of this shunting engine to assist in moving the train on a ferry, and it came down the adjoining track for that purpose before the train had stopped. Its headlight was burning brightly, and the bell was kept ringing. There was room between the two tracks for a person to stand in safety. In an action by the widow of J. against the company—*held*, that the company had neglected no duty which it owed to the deceased as one of the public, and there could be no recovery. *Jones v. Grand Trunk R. Co.*, 18 Can. Sup. Ct. 696; *affirming* 16 Ont. App. 37.

Held, per Strong and Patterson, JJ., that while the public was invited to use the planked walk to reach the station, and also to use the company's premises, when necessary, to pass around a train covering the walk, there was no implied guaranty that the traffic of the road should not proceed in the ordinary way, and the company was under no obligation to provide special safeguards for persons attempting to pass around a train in motion. *Jones v. Grand Trunk R. Co.*, 18 Can. Sup. Ct. 696.

17. Where persons habitually cross track.*—The company cannot,

because a way is not a public crossing, negligently and recklessly run its cars over persons who are in the habit of using it as a crossing. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.

18. — without objection from company.—If persons are accustomed to cross a switch track in a railroad yard without objection from the company, the company must use reasonable diligence to prevent accidents to persons crossing, and will be liable for injuries to a person crossing the track caused by sending cars swiftly along it without any one at the brake. *St. Louis, A. & T. R. Co. v. Crosnoe*, 37 Am. & Eng. R. Cas. 313, 72 Tex. 79, 10 S. W. Rep. 342.—*QUOTING Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. Rep. 539; *Louisville & N. R. Co. v. Schuster*, (Ky.) 7 S. W. Rep. 875.

Where stairs were constructed down an embankment or bluff by the side of a railroad track by persons having occasion to cross said track, on their way to their several occupations, from day to day, and a crossing over the ditch by the track was made of railroad ties, and the stairs and crossing were used by pedestrians in crossing said track for a considerable time without opposition on the part of the railroad company, or the erection of any fence or other obstacles to prevent such use, though the same was known to the company's employés, the conduct of the company amounted to a license to cross its track at such point, and one who was injured through the negligence of the company while crossing its track at such point was entitled to recover damages therefor. *Clampitt v. Chicago, St. P. & K. C. R. Co.*, 49 Am. & Eng. R. Cas. 468, 84 Iowa 71, 50 N. W. Rep. 673.

19. — with knowledge and acquiescence of company.—If, by the implied assent of a company, the public is permitted to cross the track and is accustomed to do so, it is the duty of those in charge of the trains to be on the lookout for persons using the crossing, and to give reasonable notice of their approach. *Louisville & N. R. Co. v. Schuster*, (Ky.) 35 Am. & Eng. R. Cas. 407, 7 S. W. Rep. 874.—*FOLLOWING Paducah & M. R. Co. v. Hoehl*, 12 Bush (Ky.) 50; *Louisville & N. R. Co. v. Howard*, 82 Ky. 218.

Where the company tacitly permits the public to use as a crossing the junction of

* When license to cross track imposes duty on company, see note, 14 Am. & Eng. R. Cas. 681.

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the railroad and a private road kept open for use by its employes, the company owes to the public that same degree of care in handling its trains over and across this way as though it had been a public way, except, perhaps, a statutory duty of ringing its bell or blowing its whistle on approaching the way. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 87 Mich. 400, 49 N. W. Rep. 670.

In an action against a railroad company for alleged negligence, causing the death of plaintiff's intestate, it appeared that the decedent was run over and killed in attempting to cross defendant's tracks at a point where the owners of adjoining lands had a right of way, and where the public for thirty years had been in the habit of crossing. Held, that the acquiescence of defendant for so long a time in this public use amounted to a license or permission to all persons to cross at this point, and imposed a duty upon it, as to persons so crossing, to exercise reasonable care in the movement of its trains, so as to protect them from injury. *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289; affirming 28 Hun 441.—DISTINGUISHED IN *Lewis v. New York, L. E. & W. R. Co.*, 123 N. Y. 496. FOLLOWED IN *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. Rep. 539, 5 N. Y. S. R. 722, 58 Am. Rep. 512. QUOTED IN *Winslow v. Boston & A. R. Co.*, 11 N. Y. S. R. 831; *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11; *Taylor v. Delaware & H. Canal Co.*, 113 Pa. St. 162.—*Swift v. Staten Island R. T. R. Co.*, 15 Am. & Eng. R. Cas. 180, 123 N. Y. 645, 3 Silb. App. 184, 25 N. E. Rep. 378, 33 N. Y. S. R. 604; affirming 52 Hun 614, 24 N. Y. S. R. 350, 1 Silb. Sup. Ct. 375, 5 N. Y. Supp. 316.—APPLIED IN *Larkin v. New York & N. R. Co.*, 46 N. Y. S. R. 658.—*Troy v. Cape Fear & V. V. R. Co.*, 34 Am. & Eng. R. Cas. 13, 99 N. Car. 298, 6 S. E. Rep. 77, 6 Am. St. Rep. 521. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11, 12 N. E. Rep. 451.—QUOTING *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289. REVIEWING *Pittsburgh, Ft. W. & C. R. Co. v. Bingham*, 29 Ohio St. 364; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Keefe v. Milwaukee & St. P. R. Co.*, 21 Minn. 207. *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67.

Although a company has, by permitting
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people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license so to do, it owes no duty of active vigilance to those crossing to guard them from accident. The company is not restricted by the license in the use of its track; nor will a departure in some degree or particular by its employes from the ordinary course of procedure make it liable for an injury resulting therefrom, unless the doing of an act is shown which might reasonably be expected to cause injury to a person lawfully on the track under the license; the licensees acting under it take the risks incident to the business. *Sutton v. New York C. & H. R. R. Co.*, 66 N. Y. 243; reversing 4 Hun 760.—APPLIED IN *Morris v. Brown*, 111 N. Y. 318, 18 N. E. Rep. 722, 19 N. Y. S. R. 355, 7 Am. St. Rep. 751; *Powers v. New York C. & H. R. R. Co.*, 60 Hun (N. Y.) 19. APPROVED IN *Byrne v. New York C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. Rep. 539, 5 N. Y. S. R. 722, 58 Am. Rep. 512. DISTINGUISHED IN *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 119; *Barry v. New York C. & H. R. R. Co.*, 13 Am. & Eng. R. Cas. 615, 92 N. Y. 289. QUOTED IN *Davis v. Chicago & N. W. R. Co.*, 15 Am. & Eng. R. Cas. 424, 58 Wis. 646, 46 Am. Rep. 667. REVIEWED IN *Griswold v. Chicago & N. W. R. Co.*, 23 Am. & Eng. R. Cas. 463, 64 Wis. 652; *Woolwine v. Chesapeake & O. R. Co.*, 50 Am. & Eng. R. Cas. 37, 36 W. Va. 329, 15 S. E. Rep. 81.

If persons are in the habit of crossing a railway track in no definite path, the company, although acquiescing in such habit, is not bound to take precautions for their safety. *Harrison v. North Eastern R. Co.*, 22 W. R. 335, 29 L. T. 844.

20. — without invitation from company.—If a person attempts to cross the track merely by the license or permission of the company, and not under circumstances from which an inducement or invitation to persons having occasion to pass thereon to treat the same as a highway and to use it for any lawful purpose can be inferred, no recovery can be had for negligence causing the death of such person. *Hanks v. Boston & A. R. Co.*, 35 Am. & Eng. R. Cas. 321, 147 Mass. 495, 7 N. Eng. Rep. 139, 18 N. E. Rep. 218.

Proof that a path had existed over defendant's track for twenty-five years, and that the company had not fenced it, and in cleaning its ditches had thrown the dirt on

the fact that pedestrians, by license or custom, travel upon a railroad track at a particular place makes it the duty of the servants of the company to exercise greater caution and prudence in the operation of its road at that place, whatever may be the extent of the duty which the company owes to such persons, and neither a train nor a single car should be moved at such a place without some servant in a position to give warning of its approach and control its movement. *Shelby v. Cincinnati, N. O. & T. P. R. Co.*, 85 Ky. 224, 3 S. W. Rep. 157.

If the company discovers a licensee on such a place of crossing, it is its duty to use every precaution to prevent injuring him. *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.

25. Question of fact for jury.—When a railroad company has for years, without objection, permitted the public to cross its tracks at a certain point not in itself a public crossing, it owes the duty of reasonable care towards those crossing; and whether in a given case such reasonable care has been exercised or not is ordinarily a question for the jury under all the evidence. *Taylor v. Delaware & H. Canal Co.*, 28 Am. & Eng. R. Cas. 656, 113 Pa. St. 162, 8 Atl. Rep. 43.—QUOTING *Barry v. New York C. & H. R. R. Co.*, 92 N. Y. 289.

III. CONTRIBUTORY NEGLIGENCE OF LICENSEE.

26. Failure to use ordinary care.—Even if a party has an implied license to walk in the private yards of a railroad, his failure to exercise ordinary care in doing so will defeat a recovery for injuries received, though the train injuring him failed to give the signals of its approach required by an ordinance. *Missouri Pac. R. Co. v. Moseley*, 57 Fed. Rep. 921.

Where an individual has nothing more than an implied license to walk on a track, and walks along the end of the ties in daylight, facing an approaching train, which is in full view when a thousand feet away, but continues until he is struck and killed, there can be no recovery for his death, though the train was violating an ordinance by running at too great a rate of speed. *Baltimore & O. R. Co. v. State*, 69 Md. 551, 18 Md. L. J. 824, 16 Atl. Rep. 212.—FOLLOWING *State v. Baltimore & O. R. Co.*, 69 Md. 494.

Where the plaintiff, standing on his wagon loading shingles from a car to which his

team was tied, sees a car which has been switched on the same track coming faster than usual down the grade to the car where he is working with increasing speed, and does not sit down, though he has left the lines tied to the car and the horses are hitched to the wagon, he does not exercise such common prudence as to entitle him to recover. *Hicks v. Missouri Pac. R. Co.*, 46 Mo. App. 304.

27. Failure to keep lookout and heed warnings.—Although a person walking upon a railroad track is not a trespasser, but is using the track by virtue of a license by the company, he is bound to exercise ordinary care to avoid injury, and he has no right of action for injuries caused through his failure to keep a lookout for approaching trains, especially when the train which caused the injury was only moving at the rate of five miles an hour. *McAdoo v. Richmond & D. R. Co.*, 41 Am. & Eng. R. Cas. 524, 105 N. Car. 140, 11 S. E. Rep. 316.

Although it should appear that the defendant's employees in charge of a train failed to ring the bell, and that the place where an accident occurred was frequented by people who were in the habit of using the track for the purpose of foot travel, the company is not rendered liable thereby, if the accident was merely caused by the concurrent acts of the defendant's negligence in failing to ring the bell, and of the deceased's contributory negligence in being on the track without paying any heed to passing trains. *Guenther v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. Cas. 47, 95 Mo. 286, 14 West. Rep. 735, 8 S. W. Rep. 371.—FOLLOWED AND QUOTED IN *Dlauihi v. St. Louis, I. M. & S. R. Co.*, 105 Mo. 645.

The plaintiff, who was somewhat intoxicated, could have reached his destination by a street, but left it and undertook to cross defendant's tracks at a place where he had nothing more than a mere license to cross, and where the view of an approaching train was somewhat obstructed, though he could have seen it by proper vigilance in time to have avoided it, but with his face turned in the opposite direction he did not see the approaching train before he was struck, and failed to hear warnings given him by others. *Held*, that his contributory negligence caused the injury, and a nonsuit was properly allowed. *Harder v. Rome, W. & O. R. Co.*, 17 N. Y. S. R. 570, 49 Hun 610, 2 N. Y. Supp. 70.

28. Recovery notwithstanding.—A company is not relieved from liability for killing a person on its track, who is not a trespasser, by his negligence, if it could have avoided the injury by the exercise of reasonable care after discovering such negligence. *Valin v. Milwaukee & N. R. Co.*, 82 Wis. 1, 51 N. W. Rep. 1084.

When one who is not a trespasser is injured on railroad tracks by being run over by an engine, and the accident occurs in a city, and is due in part to a disregard of municipal regulations, the company is liable, notwithstanding contributory negligence on the part of the injured person, if those in charge of its engine saw, or by the exercise of ordinary care could have seen, the perilous condition of the person in time to have averted the injury. *Mauerman v. St. Louis, I. M. & S. R. Co.*, 41 Mo. App. 348.

29. Question of fact for jury.—As it is lawful for one to go on railroad premises for the purpose of unloading cars, he cannot be declared guilty of contributory negligence as a matter of law. Whether he is in fact is a question for the jury to be determined from the facts of the case. *Barton v. New York C. & H. R. R. Co.*, 1 T. & C. (N. Y.) 297; affirmed in 56 N. Y. 660, mem.

A woman, carrying a large bundle of clothing on her head, was walking south along an unused dummy track in Vicksburg, whereon many persons were accustomed to walk. Parallel with this on one side was a public street, and on the other defendant's railroad. A locomotive and five cars met and passed her, going north on the main line. They then stopped and ran back, two cars being diverted by a "running or flying switch" to a side track, which curved and crossed the dummy line and adjacent street south of where she then was. As the train repassed her the engineer and others made great efforts to warn her of the danger of the detached cars rapidly approaching behind her, but, because of the bundle on her head, these efforts were unavailing, and as she reached the crossing the cars struck and injured her. Held, proper to instruct that, if these facts existed, defendant was guilty of negligence, and to submit to the jury whether, under the circumstances, the woman acted with reasonable prudence. *Alabama & V. R. Co. v. Summers*, 68 Miss. 566, 10 So. Rep. 63.

On these facts the question of contribu-

tory negligence was properly submitted to the jury. The court cannot say as matter of law that it was contributory negligence on the part of the woman not to foresee and guard against the unlawful act of the defendant in making the flying switch and starting the cars on their dangerous course behind her. *Alabama & V. R. Co. v. Summers*, 68 Miss. 566, 10 So. Rep. 63.

LIENS.

Enforcement of, see EQUITY, 17.

For taxes, see REVENUE, 12; TAXATION, 300-310.

— purchaser takes subject to, see MORTGAGES, 258.

Mortgage of rolling stock is subject to pre-existing, see MORTGAGES, 53.

Mortgages of after-acquired property do not displace, see MORTGAGES, 42.

Not affected by receiver's sale, see RECEIVERS, 114.

Of attorneys, see ATTORNEYS, 16-20.

— bondholders, see BONDS, 32.

— bailees, see BAILMENT, 4.

— carriers, for charges, see CARRIAGE OF LIVE STOCK, 108; CARRIAGE OF MERCHANDISE, 375-390, 552; CHARGES, 60-72; EXPRESS COMPANIES, 55.

— upon baggage, see BAGGAGE, 91-94.

— construction companies, see CONSTRUCTION OF RAILWAYS, 126.

— corporations, on shares, see STOCK, 34.

— coupons, see COUPONS, 10.

— creditors, on subscriptions, waiver of, see STOCKHOLDERS, 60.

— judgments, see JUDGMENT, 37, 48.

— mortgages, when attach, see MORTGAGES, 41.

— — leased property not subject to, see LEASES, ETC., 96.

— receivers' certificates, see RECEIVERS, 101-103.

— state aiding railroad, see STATE AID, 8-12.

— subsidy bonds, see KANSAS PACIFIC R. CO., 2.

— vendor, see EMINENT DOMAIN, 863; VENDOR AND PURCHASER, 5.

— warehousemen, see WAREHOUSEMEN, 7.

Priority between deeds of trust and other, see DEEDS OF TRUST, 11.

— executions and other, see EXECUTION, 16.

— of mortgage over judgment and execution liens, see MORTGAGES, 123, 124.

— receivers' certificates over other, see RECEIVERS, 99.

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Protection of prior, in mortgage, see MORTGAGES, 87-106.

Purchaser at execution sale, when takes subject to, see EXECUTION, 27.

— foreclosure sale, when takes subject to, see MORTGAGES, 255.

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I. IN GENERAL.

1. Different kinds of liens, and how created.—A lien is not the result of any form of expression, but the name given to a right, and what creates the right produces the lien. *Houston & T. C. R. Co. v. Bremond*, 66 Tex. 159, 18 S. W. Rep. 448.

Liens are of two kinds, general and particular, or special. A particular lien is the right to retain a thing for some charge or claim growing out of or connected with that identical thing. A general lien is the right to retain a thing not only for charges and claims specifically arising out of or connected with the identical thing, but also for a general balance of account between the parties in respect to other dealings of a like nature. *Woodruff v. Nashville & C. R. Co.*, 2 Head (Tenn.) 87.

Every express executory agreement in writing whereby the contracting party indicates an intention to make some particular property, real or personal, or a fund therein identified, a security for a debt or other obligation, or whereby he promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property which is enforceable against the property. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 43 Am. & Eng. R. Cas. 356, 33 W. Va. 761, 11 S. E. Rep. 58.

2. Necessity of possession—Transfer of lien.—Where the consignor remains owner of the goods consigned, no special

property can exist in the factor, or any lien general or special, unless he have possession, either actual or constructive, of the goods. If the goods are *in transitu*, or if the factor has only a right of possession, the lien does not attach. *Woodruff v. Nashville & C. R. Co.*, 2 Head (Tenn.) 87.

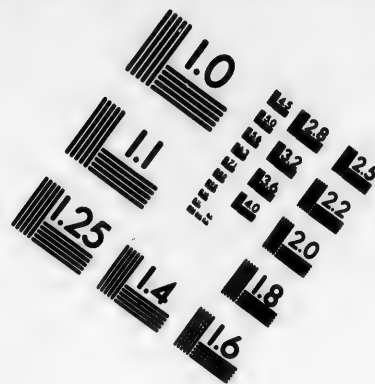
Though it has been held that a general lien given to a corporation for any indebtedness of its members is an incident of the relationship, and not of the debt, and hence does not pass with the latter, the reason of the rule does not apply to a lien given to secure, not indebtedness generally, but a particular demand. In such a case the lien passes with the debt or ceases. *Houston & T. C. R. Co. v. Bremond*, 66 Tex. 159, 18 S. W. Rep. 448.

3. For purchase price of rolling stock.—A lien for the purchase money of rolling stock reserved by contract under Va. Code, § 2462, requiring among other things that each locomotive or car shall be plainly marked with the name of the vendor on each side, followed by the word "owner," is not inconsistent with the lien given by section 2485, which gives a prior lien to all persons who furnish supplies necessary for the operation of a railroad. *Newgass v. Atlantic & D. R. Co.*, 56 Fed. Rep. 676.—FOLLOWING *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 703, 3 Sup. Ct. Rep. 594.

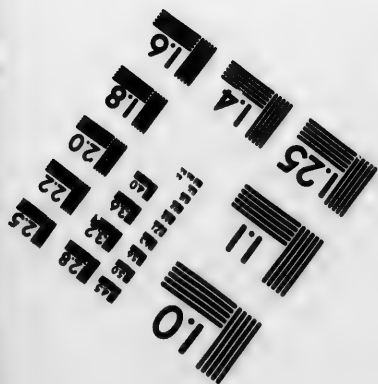
Where cars are placed upon a railroad under a contract, termed a lease, providing for the payment of the purchase price in instalments, reserving the right to the vendor to retake possession and sell upon default of any of the payments, they are "furnished" within the meaning of Va. Code, § 2485, giving a lien for supplies furnished. *Newgass v. Atlantic & D. R. Co.*, 56 Fed. Rep. 676.

Before such cars were furnished the legislature passed an act providing for a supply lien, but it was declared unconstitutional because of a defect in its title, and subsequently this act was carried into a codification of the laws, and the act adopting the code was passed before the cars were furnished, but it did not go into effect until after they were furnished. Held, that the statute did not create a lien on the cars. *Newgass v. Atlantic & D. R. Co.*, 56 Fed. Rep. 676.

4. For price of rails and other material.—A written contract with a railroad

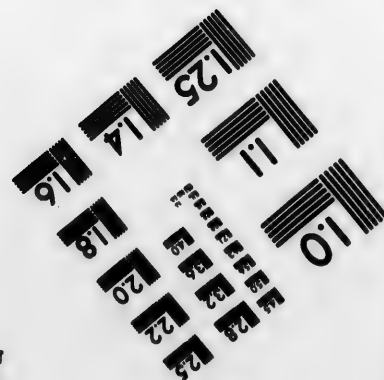


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**23 WEST MAIN STREET
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49.4 49.7 49.9 50.1 50.4
49.5 49.8 50.0 50.2 50.5
49.6 49.9 50.1 50.3 50.6
49.7 50.0 50.2 50.4 50.7
49.8 50.1 50.3 50.5 50.8
49.9 50.2 50.4 50.6 50.9
50.0 50.3 50.5 50.7 51.0
50.1 50.4 50.6 50.8 51.1
50.2 50.5 50.7 50.9 51.2
50.3 50.6 50.8 51.0 51.3
50.4 50.7 50.9 51.1 51.4
50.5 50.8 51.0 51.2

company and a construction company selling rails and other material, to be used in Illinois, in building a railroad, and providing that the seller shall have a lien thereon until fully paid for, is not a waiver of a statutory lien given the seller. *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 16 *Am. & Eng. R. Cas.* 626, 109 *U. S.* 702, 3 *Sup. Ct. Rep.* 594.—FOLLOWED IN *Newgass v. Atlantic & D. R. Co.*, 56 *Fed. Rep.* 676.

5. For medical services, and board of, injured employe.—A charge for medical services and board furnished by a hospital to an injured railroad employe is not within the meaning of Va. Code, § 2485, giving a lien for "expenses necessary for the operation of a railroad." *Newgass v. Atlantic & D. R. Co.*, 56 *Fed. Rep.* 676.

6. Bill-holders' lien.—The eleventh section of the charter of the Monroe R. & Banking Co. gives to bill-holders a paramount lien, for the payment of their bills, upon that part of the road only which was built by the company. *Collins v. Central Bank*, 1 *Ga.* 435.

Such portion of the road as was built by the contractors under a mortgage thereon, to secure them for the work done, and materials and equipments furnished, is liable to them, and their lien is paramount to that of bills or notes, the lien of the latter only attaching upon such portion of the road as was built by the company. *Collins v. Central Bank*, 1 *Ga.* 435.

The statutory lien of bill-holders under that charter attaches equally upon all the property and effects of that company. *Woodward v. Central Bank*, 4 *Ga.* 323.

7. Boarding-house keepers' lien.—S. having a boarding-house keeper's lien, under the laws of Massachusetts (Gen. St. ch. 157), upon a trunk for board, did not lose it by sending it to New Hampshire, by the defendants, under instructions not to deliver it until her claim upon it for board was paid. *Jaquith v. American Exp. Co.*, 60 *N. H.* 61.

II. MECHANICS' LIENS.*

1. The Statutes.

8. Kansas.—Laws of 1865, ch. 45, which purported to authorize mechanics' liens upon railroads, was repealed by the general

* Decisions of the various states, relating to mechanics' lien laws, as applicable to railroads, see notes, 20 *AM. & ENG. R. CAS.* 502; 8 *L. R. A.* 700.

statutes, known as the revision of 1868. *Burgess v. Memphis, C. & N. W. R. Co.*, 18 *Kan.* 53, 15 *Am. Ry. Rep.* 181.

9. Massachusetts.—A debt due for labor performed in constructing a railroad under a contractor does not constitute a lien under the act of 1873, ch. 353, § 1, where the contract between the company and the contractor was made before the passage of the statute, though the labor was performed afterwards. *Parker v. Massachusetts R. Co.*, 115 *Mass.* 580.—FOLLOWING *Donahy v. Clapp*, 12 *Cush. (Mass.)* 440.

And such lien cannot be created on the theory that the statute, so far as it enabled plaintiff to sue the corporation for the work done under the contractor, affected his remedy only. The statute gives a new and distinct right and exposes the corporation to a new liability. *Parker v. Massachusetts R. Co.*, 115 *Mass.* 580.

10. Missouri.—The Railroad Lien Act of March 21, 1873, did not go into effect until ninety days after its passage. *Andrews v. St. Louis Tunnel R. Co.*, 16 *Mo. App.* 299.

11. Nebraska.*—Comp. St. Neb. ch. 54, § 2, gives a lien upon a railroad to all persons who shall perform labor or furnish material in the construction of such railroad. *Stewart-Chute Lumber Co. v. Missouri Pac. R. Co.*, 39 *Am. & Eng. R. Cas.* 566, 28 *Neb.* 39, 44 *N. W. Rep.* 47.

12. North Carolina.—The statutes of March 28, 1870, and March 1, 1873, the first giving a lien to mechanics and laborers in certain cases, and the other regulating sales under mortgages given by corporations, do not give to those performing labor and furnishing materials in the construction of railroads a lien upon the property and franchises of the corporation owning and operating such roads. *Buncombe County Com'rs v. Tomney*, 20 *Am. & Eng. R. Cas.* 495, 115 *U. S.* 122, 5 *Sup. Ct. Rep.* 626, 1186.—DISTINGUISHING *Brooks v. Burlington & S. W. R. Co.*, 101 *U. S.* 443.

The proviso of section 3 of said act of 1873 has reference to the debts and contracts of private corporations formed under the act of February 12, 1872, and not those of railroad corporations organized, for public use, under the act of February 8, 1872.

* Validity of act of March 3, 1881, giving right to mechanics' lien on railroad for materials furnished, see 47 *AM. & ENG. R. CAS.* 295, *abstr.*

Buncombe County Com'rs v. Tommey, 20 Am. & Eng. R. Cas. 495, 115 U. S. 122, 5 Sup. Ct. Rep. 626, 1186.

13. Ohio.—The Mechanics' Lien Law, as amended March 30, 1875 (72 Ohio L. 166), does not provide a remedy in favor of a creditor of a subcontractor against funds in the hands of the owner of the building, due, or to become due, to the original contractor. *Stephens v. United Railroads Stock Yard Co.*, 29 Ohio St. 227.

14. Texas.—The object and purpose of the statute is to secure to mechanics, laborers, and operatives, and no others, wages due or owing to them for work and labor done and performed in constructing, repairing, or operating the road. It is the wages for the individual personal labor of the mechanic, laborer, or operator that it has reference to. It does not extend to work and labor done by others, nor to the use of teams, nor to the use of tools and implements other than such as are personally used by the person claiming wages, nor to money paid out for the company, nor to supplies furnished the company. *Texas & St. L. R. Co. v. Allen*, 1 Tex. App. (Civ. Cas.) 291.—QUOTING Atcherson v. Troy & B. R. Co., 6 Abb. Pr. (N. Y.) 329; *Balch v. New York & O. M. R. Co.*, 46 N. Y. 524.

15. Washington.—Though the Mechanics' Lien Law of 1873 and that of 1877 are in many respects similar, yet after a careful comparison it is held that the latter is a substitute for and not a continuance of the former; and the liens or rights accruing under the old law only survive by reason of section 38 of the new, which expressly provides therefor. *Seattle & W. W. R. Co. v. Ah Kow*, 2 Wash. T. 36, 3 Pac. Rep. 188.

16. Canada.—There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien. *King v. Alford*, 24 Am. & Eng. R. Cas. 331, 9 Ont. 643.

The Mechanics' Lien Act was intended to place mechanics on a more favorable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of

land. *King v. Alford*, 24 Am. & Eng. R. Cas. 331, 9 Ont. 643.

2. Who may Claim a Lien.

17. Contractors.*—(1) *In general.*—Under the California and Georgia statutes, a lien for work or materials cannot be acquired on a portion of a railroad; and where the contract is entire, but payment to be made from time to time as the work progresses, successive liens cannot be filed as the different payments fall due. *Cox v. Western Pac. R. Co.*, 44 Cal. 18, 5 Am. Ry. Rep. 198. *Farmers' L. & T. Co. v. Candler*, 47 Am. & Eng. R. Cas. 296, 87 Ga. 241, 13 S. E. Rep. 560.—QUOTING *Knapp v. St. Louis, K. C. & N. R. Co.*, 7 Am. & Eng. R. Cas. 395, 74 Mo. 374.

The Ga. Act of 1869, giving a lien to mechanics and laborers, does not extend to contractors for the construction of a railroad. *Savannah & C. R. Co. v. Callahan*, 49 Ga. 506.

Where a corporation having a line of railroad in operation to a town or city within a county contracts for the construction of a part of the road leading from such town or city to a point beyond the county limits, the contractors may acquire a lien upon the part which they construct or aid in constructing, although a portion of it lies within the county in which a part of the road is completed and in operation. *Midland R. Co. v. Wilcox*, 43 Am. & Eng. R. Cas. 629, 122 Ind. 84, 23 N. E. Rep. 506.

In enforcing the lien, one notice filed in each of the proper counties will cover the entire line where it is included in one contract, and where the work has been done upon it and the materials furnished for it as a continuous line. *Midland R. Co. v. Wilcox*, 43 Am. & Eng. R. Cas. 629, 122 Ind. 84, 23 N. E. Rep. 506.

Under the Indiana Act of 1883, as amended in 1885, giving a lien for work done or materials furnished a railroad, a contractor who has notice of the pendency of actions by subcontractors, material-men, and laborers is bound by judgments obtained against the road therein; and such judgments constitute a payment to the contractors, and amount to a credit to the company, and abate the contractors' lien to that

* Contractors' lien for labor, see 52 AM. & ENG. R. CAS. 17, *abstr.*

Contractors' right to retain possession of road until paid in full, see 52 AM. & ENG. R. CAS. 15, *abstr.*

extent. *Midland R. Co. v. Wilcox*, 43 Am. & Eng. R. Cas. 629, 122 Ind. 84, 23 N. E. Rep. 506.

Where a construction contract is declared *ultra vires*, and therefore void, but the contractor is allowed compensation for the work already performed, he is entitled to a lien, under the Pennsylvania resolution of January 21, 1843, for the amount so allowed. *New Castle Northern R. Co. v. Simpson*, 26 Fed. 1 ep. 133.

In an indenture of mortgage executed by a railroad corporation to trustees to secure bonds issued to raise moneys to pay off its existing indebtedness and to complete and equip its road, the corporation covenanted with the trustees, among other things, that the expenditure of all sums of money realized from the sale of the bonds should be made with the approval of at least one of the trustees, and his assent in writing should be necessary to all contracts made by the company before the same should be a charge upon any of the sums received from such sales. *Held*, that a contractor agreeing with a corporation to construct a portion of the road, and obtaining the assent of two of the trustees to his contract, and subsequently doing the work, did not acquire any lien for the payment of his work under this covenant of the indenture upon the fund received by the corporation from the bonds. *Dillon v. Barnard*, 21 Wall. (U. S.) 430.

R. agreed to quarry and furnish defendants, who were railroad contractors, a quantity of stone, the contractors making money advances, under an agreement in writing, but not recorded, that they had a first lien on all material to secure the advances. After a quantity of stone had been quarried R. executed a bill of sale on the stone to plaintiff, which was duly recorded. *Held*, that the bill of sale was valid as against defendants' lien. In order to take such a sale out of the operation of the registry laws there must be an immediate delivery, followed by actual and continued possession. *Howitt v. Gzowski*, 5 Grant's Ch. (U. C.) 555.

(2) *Priority over mortgages and other liens.** — Contractors for work in the con-

struction of a railroad have a lien expressly given them by the statute (par. 55, ch. 82, Ill. Rev. St.) superior to all mortgages or other liens accruing after the commencement of the work. *St. Louis & P. R. Co. v. Kerr*, 48 Ill. App. 496.

Under the joint resolution of the legislature of Pennsylvania of January 21, 1843, restricting the right of railroad companies to sell or mortgage their property while in debt to contractors, laborers, or materialmen, it was intended to give an unpaid contractor a priority of claim over every right that could be acquired by a mortgage, or under a mortgage made after the debt to the contractor was incurred. *Fox v. Seal*, 22 Wall. (U. S.) 424. — FOLLOWED IN *Tyrone & C. R. Co. v. Jones*, 79 Pa. St. 60. QUOTED IN *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

It was further intended that the property, into whosoever hands it might come, should remain subject to the paramount claim of the contractor so long as the debt to him remained unpaid, which had the effect of giving him a lien of indefinite duration. *Fox v. Seal*, 22 Wall. (U. S.) 424.

And such lien was not merged in a judgment obtained by the contractor against the company. In whatever shape the debt was it had the effect of a statutory privilege or lien upon the property; and a lien would exist after the judgment had expired by lapse of time. *Fox v. Seal*, 22 Wall. (U. S.) 424.

And where the road is mortgaged after the contractor has reduced his claim to judgment, and he wishes to revive it by *scire facias*, it is not necessary to give notice to the mortgagees as terre-tenants. Such mortgagees are not terre-tenants. *Fox v. Seal*, 22 Wall. (U. S.) 424.

Under the enabling act of April 4, 1862, which recognizes such liens, and points out a mode of making them available, all that is necessary to enable the contractor, laborer, or workman to proceed by *scire facias* against a person or company claiming to hold or own the property under a mortgage made in contravention of the act of 1843 is that he has obtained a judgment against the company which gave the mortgage. It is not required that his judgment shall be a lien on the property. *Fox v. Seal*, 22 Wall. (U. S.) 424.

A sale of the railroad property under a foreclosure decree which directs it to be

* Priorities as between contractors who hold a lien on the road and purchasers of certificates and bonds, see 24 AM. & ENG. R. CAS. 200, *abs'r.*

sold "subject to any lawful claims or rights which may exist prior or paramount to said mortgage" does not divest a lien held by a contractor under the resolution act of 1843. *Fox v. Seal*, 22 Wall. (U. S.) 424.

And a subsequent statute authorizing the corporation to borrow money and pledge its income and property to secure payment will not be construed as a repeal of the resolution of 1843, so as to divest the lien created thereby. *Fox v. Seal*, 22 Wall. (U. S.) 424.

A railroad contractor has a lien on the road for his pay in the hands of purchasers at a foreclosure sale, under a mortgage executed subsequent to the work, even though the purchasers at the sale had no notice of such claim. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.—QUOTING *Fox v. Seal*, 22 Wall. (U. S.) 424.—*Tyrone & C. R. Co. v. Jones*, 79 Pa. St. 60.—FOLLOWING *Fox v. Seal*, 22 Wall. (U. S.) 424.

(3) *Effect of reorganization.*—A railroad contractor is entitled, under Mo. Rev. St. 1879, §§ 3200-3216, to one valid lien for work done and material furnished, and if the first is defective he may file another within ninety days from the time the work is finished. Such lien is valid not only against the company with which the contract was made, but also against another company taking the property with notice of the obligation. Nor, in case of sale by the company with which the contract was made to another company, will the fact that the contractor accepted money due him on his contract from the second company release the first one from its liability on its contract. *Williams v. Chicago, S. F. & C. R. Co.*, 112 Mo. 463, 20 S. W. Rep. 631.—DISTINGUISHING *Allen v. Frumet M. & S. Co.*, 73 Mo. 688; *O'Connor v. Current River R. Co.*, 111 Mo. 185.

With a view of securing the completion of a railroad, a statute was passed authorizing the company and its "Class A" shareholders to transfer to a new company all its property, upon condition that the new company forthwith discharge the liabilities of the old company, including claims of certain contractors. Plaintiff was a contractor, and before the transfer filed a bill against the old company, and after the transfer obtained a decree for the amount of his claim. Held, that the statute did not create a lien in his favor against the property of the new company which could be enforced by bill in

equity. *Brookfield v. New Brunswick & C. R. & L. Co.*, 13 New Brun. 409.

18. Subcontractors.*—Where a statute only allows subcontractors to acquire a lien on the road when the company owes the contractor, a fraudulent admission by the company of indebtedness to the contractor which in fact does not exist, and obtaining judgment for the amount in a state court, will not conclude a federal court in a separate suit wherein the rights of bondholders are concerned. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

Where two companies are chartered, one in Georgia, and the other in Tennessee, but controlled by the same stockholders, to build a road that is intended to be a common enterprise, and the Georgia company issues its bonds to pay a contractor in Tennessee, and the company in that state executes a mortgage on its road to secure such bonds, the holders of such bonds acquire an equitable lien on the road sufficient to entitle them to contest a fraudulent judgment which would have the effect of giving subcontractors liens on the road. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

The subcontractors in Tennessee could not object to such mortgage on the ground that it was given after the Tennessee company became insolvent, and was therefore, under the state law, void. If such subcontractors had any lien on the road, it was prior to the mortgage, and the validity or invalidity of the mortgage does not affect them. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

Neither could a general creditor object to such mortgage on the ground that it gave unlawful preferences, where his claim came into existence after the mortgage was executed. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

The Ill. Act of April 3, 1872, p. 279, which gives subcontractors a lien upon railroads for labor and materials furnished, relates only to labor and materials furnished after its passage, and gives no right to a lien for labor and materials furnished before its passage. *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429.

Under the act of 1861, p. 142, relating to liens for labor, one has no lien unless his

*Subcontractors' lien. Delivery of materials outside of state, see 47 AM. & ENG. R. CAS. 286, abstr.

contract was directly with the railroad company, and he commences proceedings to enforce it within three months after an action accrues. *Arbuckle v. Illinois Midland R. Co.*, 81 Ill. 429.

The stipulations in a general contractor's contract for the construction of a railroad were required to be performed in such manner as not to relieve him from the immediate charge and responsibility of the work, and were such that the company might forfeit the same for neglect to put on a sufficient force to complete the work in the time stipulated, or require him to make up balances due to laborers or persons furnishing materials or supplies monthly. *Held*, that the relations of the subcontractor to the general contractor were such that the work done and materials furnished under subcontractors should be regarded as materials furnished or labor done under his contract, so as to enable those furnishing the same to enforce a lien against the railroad under the statute. *Solomon v. Nicholas*, 113 Ill. 351, 1 N. E. Rep. 901.

Provision is made to protect subcontractors to the extent of the price agreed to be paid by the corporation to the chief contractor. The subcontractor acquires a lien upon the property of the corporation by giving the notice prescribed in the section next following. The notice was given in this instance by the subcontractors, and this suit was commenced within the time provided by the statute. It is clear that as against the railroad company a statutory lien was acquired by the steps thus taken. *St. Louis & P. R. Co. v. Kerr*, 48 Ill. App. 496.

Ind. Act of March 6, 1883, as amended by the act of April 13, 1885, gives to persons who furnish material for, or do work in, the construction of a railroad a lien for the reasonable value of such work and materials. A subcontractor who has been paid by the original contractor more than the reasonable value of the work done, materials furnished, and services rendered, although not the full contract price, cannot enforce a lien against the railroad company for the difference between the amount the original contractor agreed to pay and the amount he actually did pay. *Morris v. Louisville, N. A. & C. R. Co.*, 123 Ind. 489, 24 N. E. Rep. 335.

Where contractors to build a railway were, according to the contract, fully paid

before the completion of the work, without any notice of lien claims by subcontractors, such liens could not be enforced against the company or its property. *Roland v. Centerville, M. & A. R. Co.*, 11 Am. & Eng. R. Cas. 47, 61 Iowa 380, 16 N. W. Rep. 355.

Where the action is to establish and foreclose an alleged mechanics' lien for work done on the railroad, and it appears that the company with which plaintiffs contracted has conveyed the road prior to the making of the contract, plaintiffs cannot recover against such other company on the ground that they are principal contractors; nor can they recover as subcontractors where they have not complied with the statute relating to subcontractors, and have not framed their suit on that theory. *Templin v. Chicago, B. & P. R. Co.*, 34 Am. & Eng. R. Cas. 107, 73 Iowa 548, 35 N. W. Rep. 634.

Where one company sells and conveys an unfinished railroad to another company and binds itself to complete the road, the first company becomes a principal contractor with the second road, and persons contracting with the first company to do work are subcontractors. *Templin v. Chicago, B. & P. R. Co.*, 34 Am. & Eng. R. Cas. 107, 73 Iowa 548, 35 N. W. Rep. 634.

Where a contract to build a railway is sublet, and the principal contractors do not profess to act as the agents of the railway company, their subcontractors cannot enforce a mechanic's lien against the railway company for the work done by them. *Blanding v. Davenport, I. & D. R. Co.*, 57 Am. & Eng. R. Cas. 428, 88 Iowa 225, 55 N. W. Rep. 81.

Minn. Mechanics' Lien Law, as amended in 1874, construed as giving a right of lien, not only to subcontractors for the construction of a railway, but to subcontractors in the second degree. *Spafford v. Duluth, R. W. & S. R. Co.*, 48 Minn. 515, 51 N. W. Rep. 469.

19. Material-men.*—(1) In general.—The Ark. Railroad Lien Act of March 19, 1887, creates a lien in favor of one who furnishes materials to build any railroad,

* Liens for materials supplied in the construction of railroads, see note, 39 AM. & ENG. R. CAS. 575.

Proportion of materials furnished to contractor and his assignee. Filing claim for, see 43 AM. & ENG. R. CAS. 641, *abstr.*

whether incorporated or not. *Brown v. Buck*, 54 Ark. 453, 16 S. W. Rep. 195.

The Illinois statute giving a lien on railroads does not extend beyond subcontractors. One furnishing materials to a subcontractor has no lien against the company or its property. *Cairo & St. L. R. Co. v. Watson*, 85 Ill. 531.

Under Kan. Laws 1872, ch. 136, § 1, laborers, mechanics, and material-men furnishing work or materials in the construction of a railroad may recover against the obligors on a bond given by the contractor in pursuance of the statute, or against the company where no bond is given, for everything furnished by them which goes into the construction of a railroad, whether such laborers, etc., are employed by the contractor, by a subcontractor, or sub-subcontractor. *Parkinson v. Alexander*, 37 Kan. 110, 14 Pac. Rep. 466.

But persons furnishing only provisions or goods which do not go into the construction of the railroad cannot so recover, unless the provisions or goods are furnished to the contractor himself. *Parkinson v. Alexander*, 37 Kan. 110, 14 Pac. Rep. 466.

Where materials are furnished to a railroad contractor, and only a part of such materials is used in the construction of the road, a lien can only be obtained for the part actually used. *Heltzell v. Chicago & A. R. Co.*, 20 Mo. App. 435.

Where materials are furnished a railroad without any contract as to how they shall be used, and they are suitable either for constructing an unfinished part of the road or for carrying on a finished portion, the person furnishing them has a lien under the Kentucky Act of March 20, 1876, for any part that may be used in operating the railroad; and another lien under the Contractors' Act of March 27, 1888, for the part used in constructing the road. *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.

But where such person loses his lien under the latter act by reason of a failure to file a statement within the time required, the burden of proof is on him to show what part of the materials was used in carrying on the road. *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.

Under the provisions of Minn. Gen. St. 1878, ch. 90, § 1 (now repealed), which gave a lien to a subcontractor who fur-

nished materials for the construction, alteration, or repair of any line of railway in the state, it was not essential to an enforcement of the lien that said materials should have been furnished or delivered by the subcontractor within the limits of the state. *Thompson v. St. Paul City R. Co.*, 45 Minn. 13, 47 N. W. Rep. 259.

Materials furnished to a contractor for, and used by him in, the construction of a railroad are to be regarded as furnished to the railroad. *Heltzell v. Chicago & A. R. Co.*, 16 Am. & Eng. R. Cas. 619, 77 Mo. 315.

() What deemed "materials," etc.—Coal cars used in a mine are within the meaning of Alabama Code 1886, § 3018, giving a lien for "any material, fixtures, engine, boiler, or machinery" furnished for any improvement or building on real estate. *Central Trust Co. v. Sheffield & B. Co., I. & R. Co.*, 42 Fed. Rep. 106.

In order to obtain a lien under Mo. Rev. St. § 6741, it is not necessary to show that the materials furnished to a railroad were actually used in the construction of the road. *Central Trust Co. v. Chicago, K. & T. R. Co.*, 54 Fed. Rep. 598.

So such lien may exist for tearing down a building, or for constructing a temporary bridge, or laying drain pipes while constructing a road. *Andrews v. St. Louis Tunnel R. Co.*, 16 Mo. App. 299.

Lumber, posts, building paper, and lath, sold by dealers in lumber to a subcontractor engaged in building a railroad, and delivered to him to be used in the erection of shanty boarding houses and stables on or near the line of the railroad for the use of the men and animals employed and used by such subcontractor in and upon such work, are materials furnished in the construction of the railroad, within the intent and meaning of the statute. (Maxwell, J., dissents.) *Stewart-Chute Lumber Co. v. Missouri Pac. R. Co.*, 39 Am. & Eng. R. Cas. 365, 28 Neb. 39, 44 N. W. Rep. 47.—APPLYING Winslow v. Urquhart, 39 Wis. 260. DISTINGUISHING *Basshor v. Baltimore & O. R. Co.*, 65 Md. 99, 3 Atl. Rep. 285.

The lien attached immediately upon the furnishing of such material to the subcontractor in good faith by the material-man, and it is not necessary to allege or prove the actual application of such material to the purpose intended. (Maxwell, J., dissents.) *Stewart-Chute Lumber Co. v. Mis-*

souri Pac. R. Co., 39 *Am. & Eng. R. Cas.* 566, 28 *Neb.* 39, 44 *N. W. Rep.* 47.

Giant powder furnished by the manufacturer to a contractor for the construction of a railway, and used by the latter in the progress of such work, is "material," within the purview of the Oregon Lien Law of 1885, for the value of which such manufacturer is entitled to a lien on the railway, or such portion thereof as the powder was used in the construction of. *Giant-Powder Co. v. Oregon Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 622, 42 *Fed. Rep.* 470, 8 *L. R. A.* 700, 14 *Sawy. (U. S.)* 560.—APPLYING *Brooks v. Burlington & S. W. R. Co.*, 101 *U. S.* 443. DISTINGUISHING *Basshor v. Baltimore & O. R. Co.*, 65 *Md.* 99, 3 *Atl. Rep.* 285.

(3) — and what not.—In providing that a material-man shall have a lien for all materials furnished for, or used in and about, the construction of bridges, the law means such materials as ordinarily enter into or are used in the construction of bridges, and are fairly within the express or implied terms of the contract between the owner and contractor. It does not mean the machinery that may be used for the manufacture of the materials themselves. *Basshor v. Baltimore & O. R. Co.*, 65 *Md.* 99, 3 *Atl. Rep.* 285.—DISTINGUISHED IN *Stewart-Chute Lumber Co. v. Missouri Pac. R. Co.*, 28 *Neb.* 39.

Where a contractor for building a bridge buys machinery for crushing stone to be used in the manufacture of artificial stone for the masonry work, and also appliances to carry the manufactured stone to the place where it is to be used, the seller of such machinery and appliances has no lien therefor under the provision of *Md. Mechanics' Lien Law* which gives a material-man a lien for all materials furnished for, or used in and about, the construction of bridges. *Basshor v. Baltimore & O. R. Co.*, 65 *Md.* 99, 3 *Atl. Rep.* 285.—DISTINGUISHED IN *Giant-Powder Co. v. Oregon Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 622, 42 *Fed. Rep.* 470, 8 *L. R. A.* 700, 14 *Sawy. (U. S.)* 560.

Materials furnished for temporary structures only, and never incorporated in the permanent work, are not proper subjects, under the statute, for a lien upon the completed roadbed. *Knapp v. St. Louis, K. C. & N. R. Co.*, 6 *Mo. App.* 205; affirmed on another point in 74 *Mo.* 374.

Lubricating or illuminating oils are not materials within the meaning of *Mo. Rev.*

St. § 3200, providing for a lien to persons who shall furnish "ties, fuel, bridges, or materials" to a railroad. *Central Trust Co. v. Texas & St. L. R. Co.*, 23 *Fed. Rep.* 703.

Articles furnished to a railroad company, such as trucks, scales, and letter-presses, which do not pass into the structure of the road, are not "materials," within *Mo. Rev. St.* § 3200, relating to liens. *Central Trust Co. v. Texas & St. L. R. Co.*, 27 *Fed. Rep.* 178.—FOLLOWING *Central Trust Co. v. Texas & St. L. R. Co.*, 23 *Fed. Rep.* 703.

20. Assignee of contractor.—A mechanic's lien on a railroad may be assigned. *Texas & St. L. R. Co. v. Allen*, 1 *Tex. App. (Civ. Cas.)* 291.

Contractors' liens, under the Indiana statute, are assignable in equity, especially where the claim has been definitely fixed prior to the assignment. *Midland R. Co. v. Wilcox*, 43 *Am. & Eng. R. Cas.* 629, 122 *Ind.* 84, 23 *N. E. Rep.* 506.—OVERRULING *Pearsons v. Tinker*, 36 *Me.* 384; *Caldwell v. Lawrence*, 10 *Wis.* 273.

Where defendant agrees to deal with the assignee of the original contractor "as if he were the original contractor," he can enforce a lien under *Ala. Code* 1876, §§ 3440-3447, as the original contractor. *Pensacola R. Co. v. Schaffer*, 76 *Ala.* 233.

21. Necessity of direct contract with owner.—The lien given to contractors is confined to those contractors employed by the company owning the railroad or its agent in that regard; and the right of lien does not extend to subcontractors who procure the work to be done on their own account in pursuance of a contract between themselves and the primary contractors. *Cartter v. Rome & C. Constr. Co.*, 89 *Ga.* 158, 15 *S. E. Rep.* 36. *Blanding v. Davenport, I. & D. R. Co.*, 57 *Am. & Eng. R. Cas.* 428, 88 *Iowa* 225, 55 *N. W. Rep.* 81. *Horton v. St. Louis, K. C. & N. R. Co.*, 84 *Mo.* 602. *McGugin v. Ohio River R. Co.*, 33 *W. Va.* 63, 10 *S. E. Rep.* 36. *Richardson v. Norfolk & W. R. Co.*, 37 *W. Va.* 641, 17 *S. E. Rep.* 195.

A mechanic's lien may be authorized by an oral or implied contract. The fact that the contract was in writing would not exclude parol evidence to show the purpose for which the materials included in the contract were used. *Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184, 714.

One who furnishes labor and materials for a railroad under a contract with a sub-

contractor does not come within the provisions of the Kentucky Act of 1888, providing that persons furnishing labor or materials for a railroad or other work of public improvement, by contract with the owner or by a subcontract thereunder, shall have a lien thereon for the price of such labor and materials. *Central Trust Co. v. Richmond, N., I. & B. R. Co.*, 54 *Fed. Rep.* 723.

A party who has sold materials to another, used in the construction of a road, has no privilege on the work, where the materials are not sold to the owner or his agent or subcontractor. *Woodward v. American Exposition R. Co.*, 30 *Am. & Eng. R. Cas.* 256, 39 *La. Ann.* 566, 2 *So. Rep.* 413.

Mass. Act of 1873, ch. 353, giving a right of action against a railroad to any person who has performed labor or furnished materials under an agreement with the company or with any person having authority to contract therefor, applies to persons furnishing labor under a contract with the company. *Hart v. Boston, R. B. & L. R. Co.*, 121 *Mass.* 510.

The above statute is not unconstitutional when applied to future contracts. *Hart v. Boston, R. B. & L. R. Co.*, 121 *Mass.* 510.

A party furnishing materials to a company under a contract with its president is an "original contractor" within the meaning of the Mechanics' Lien Law. In such case the contracts of the president are those of the company. *Hearne v. Chillicothe & B. R. Co.*, 53 *Mo.* 324.

3. What Property may be Reached.

22. In general.—Prior to the Mo. Act of March 21, 1873 (Acts 1873, p. 58), a strip of land granted to a company for a right of way could not be subjected to a mechanic's lien. It was not the design of the Mechanics' Lien Law (2 Wagn. St. p. 907) to allow a railroad to be sold out in detached parcels. *Schulenburg v. Memphis, C. & N. W. R. Co.*, 67 *Mo.* 442.—QUOTING *McPheeters v. Merrimac Bridge Co.*, 28 *Mo.* 467; *Prop'rs of Locks & Canals v. Nashua & L. R. Co.*, 104 *Mass.* 9. REVIEWING *Dunn v. North Mo. R. Co.*, 24 *Mo.* 493.—FOLLOWED IN *Skrainka v. Rohan*, 18 *Mo.* App. 340.

The general phrase in the Oregon Act of 1885, "any other structure," following, as it does, a specific enumeration of works declared to be subject to a lien for labor and materials furnished for their construction—

such as a "building," "ditch," "flume," and "tunnel"—must be held to include a railway. *Giant-Powder Co. v. Oregon Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 622, 42 *Fed. Rep.* 470, 8 *L. R. A.* 700, 14 *Sawy. (U. S.)* 560.

A railroad constructed by a lessee for mining coal in the slope of a mine is not an improvement or fixture to which a mechanic's lien will attach under the Pa. Act of 1858. *Esterley's Appeal*, 54 *Pa. St.* 192.

While a mechanic's lien for work on railroads is given upon the roadbed and equipments of the railroad, it is contemplated by the statute that it shall be enforced against so much of the property only as shall be sufficient to satisfy the judgment, thus limiting the lien to the amount of the judgment. *Texas & St. L. R. Co. v. Allen*, 1 *Tex. App. (Civ. Cas.)* 291.

The Texas statute giving mechanics a lien on the railway for work performed in the construction, limits the lien to roadbed and equipment; and the movable property of the railroad, which is not included in the "equipments of the road," is not subject to a lien. *Texas & St. L. R. Co. v. Allen*, 1 *Tex. App. (Civ. Cas.)* 291.

23. Lien covers whole road, not a part merely.—Under Ind. Act of 1883, giving a lien to persons who work upon or furnish materials for a railroad, as amended in 1885, the lien given is in legal contemplation upon the road as a unit, and not upon a detached portion thereof, such as a bridge, embankment, or excavation. *Midland R. Co. v. Wilcox*, 43 *Am. & Eng. R. Cas.* 629, 122 *Ind.* 84, 23 *N. E. Rep.* 506.

In Iowa a mechanic's lien for work on a section of a road attaches to the whole road, and becomes superior to the lien of an existing mortgage. *Meyer v. Egbert*, 101 *U. S.* 728.—FOLLOWING *Brooks v. Burlington & S. W. R. Co.*, 101 *U. S.* 443.

A lien for materials furnished for the construction of a railroad embraces only the completed portion of the road; but the fact that the road, as projected when the materials were furnished, was not fully completed will not defeat the lien. *Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184, 714.

Where a part only of a railroad lies within the state, the lien for materials given by sections 3200-3216, Mo. Rev. St., is to be enforced against the whole of that part, and not against a section or portion of it only. *Ireland v. Atchison, T. & S. F. R.*

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Co., 20 *Am. & Eng. R. Cas.* 493, 79 *Mo.* 572.
—FOLLOWING *Knapp v. St. Louis, K. C. & N. R. Co.*, 74 *Mo.* 374; *Cranston v. Union Trust Co.*, 75 *Mo.* 29.

24. Bridges, culverts, trestles, etc.

—Ordinary lien laws giving to mechanics and laborers a lien on buildings, including the lot upon which they stand, or a lien upon a lot or farm or other property for work done thereon, or for materials furnished in the construction or repair of buildings, should not be interpreted as giving a lien upon the roadway, bridges, or other property of a railroad company, such as may be essential in the operation and maintenance of its road for the public purposes for which it was established. *Buncombe County Com'rs v. Tomney*, 20 *Am. & Eng. R. Cas.* 495, 115 *U. S.* 122, 5 *Sup. Ct. Rep.* 626, 1186. *Graham v. Mt. Sterling Coalroad Co.*, 14 *Bush (Ky.)* 425.—QUOTING AND FOLLOWING *Applegate v. Ernst*, 3 *Bush* 650.—DISTINGUISHED IN *Ludlow v. Cincinnati Southern R. Co.*, 7 *Am. & Eng. R. Cas.* 231, 78 *Ky.* 357.—*Dunn v. North Mo. R. Co.*, 24 *Mo.* 493.—QUOTED IN *Schulenburg v. Memphis, C. & N. W. R. Co.*, 67 *Mo.* 442. REVIEWED IN *Skrainka v. Rohan*, 18 *Mo. App.* 340; *Hill v. La Crosse & M. R. Co.*, 11 *Wis.* 214.—*Fowler v. Buffalo & J. R. Co.*, 1 *Sheld. (N. Y.)* 525. *La Crosse & M. R. Co. v. Vanderpool*, 11 *Wis.* 119.

A railroad bridge is subject to the mechanics' lien provided for by section 1 of the act of May 4, 1877 (74 *Ohio L.* 168). *Smith Bridge Co. v. Bowman*, 41 *Ohio St.* 37.—DISTINGUISHING *Rutherford v. Cincinnati & P. R. Co.*, 35 *Ohio St.* 559. REVIEWING *Dayton, X. & B. R. Co. v. Lewton*, 20 *Ohio St.* 401. And see *Rutherford v. Cincinnati & P. R. Co.*, 35 *Ohio St.* 559.—DISTINGUISHED IN *Smith Bridge Co. v. Bowman*, 41 *Ohio St.* 37.

Wis. Act of 1861, ch. 215, amending *Rev. St. ch. 153*, relating to mechanics' liens, and declaring that it shall apply to bridges in the state or repairs thereon, does not act retrospectively, so as to give a lien on a railroad bridge constructed before its passage. *Vanderpool v. La Crosse & M. R. Co.*, 44 *Wis.* 652.

Under *Wis. Rev. St. § 3314*, which provides that "every person who as principal contractor performs any work or labor * * * in or about the erection * * * of any bridge * * * shall have a lien thereupon, and upon

the interests of the owner of such * * * bridge, in and to the land upon which the same is situated," contractors are entitled to liens upon railroad bridges. *Purtell v. Chicago F. & B. Co.*, 39 *Am. & Eng. R. Cas.* 242, 74 *Wis.* 132, 42 *N. W. Rep.* 265.

25. Depots and other buildings.—

The Connecticut statute giving a lien upon buildings for work done or materials furnished applies to buildings erected for a railroad. *Botsford v. New Haven, M. & W. R. Co.*, 41 *Conn.* 454, 7 *Am. Ry. Rep.* 153.

A building erected by a company to be used as a freight depot and office rooms, on land held by it in fee, is not subject to a mechanic's lien under the general Mechanics' Lien Law. *Skrainka v. Rohan*, 18 *Mo. App.* 340.—FOLLOWING *Schulenburg v. Memphis, C. & N. R. Co.*, 67 *Mo.* 442. REVIEWING *Dunn v. North Mo. R. Co.*, 24 *Mo.* 493.

A depot building—held, as against a mechanic's lien, to be properly connected with the line of the railroad, and regarded as part of the mortgaged premises, which were described by a general description covering the railroad, land, depots, station-houses, etc., acquired, and to be acquired. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; reversed in 34 *N. J. Eq.* 266.

A stable built and occupied by a passenger-railway company is liable to a mechanic's lien. *Melvin v. Hestonville & M. R. Co.*, 5 *Phila. (Pa.)* 13.

Where lumber dealers sell lumber to a railroad company, but the superintendent of the company takes a part of it and builds a house belonging to himself, the dealers cannot claim a mechanic's lien on the house. *Gillespie v. Stanton*, 8 *Baxt. (Tenn.)* 284.

The rule that a railroad is an entire thing cannot be applied so as to cut off a mechanic's lien upon a depot building. Such property does not become a part of the entirety for that purpose, until the lien is discharged, any more than it would if the lien had been created by a mortgage executed by the company. *Hill v. La Crosse & M. R. Co.*, 11 *Wis.* 214.—QUOTING *Platt v. New York & B. R. Co.*, 26 *Conn.* 544; *Boston, C. & M. R. Co. v. Gilmore*, 37 *N. H.* 410; *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.

A building erected for a railroad company is as clearly within the letter and the spirit of the mechanics' lien statute as any

other building. The object of the statute is to furnish protection to those who expend their labor and materials in improving the property of others; and railroads are not an exception to this rule. *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214.

A mechanic's lien does not attach upon an engine house and turntable built for a railway company, and confessedly necessary for the proper working of the railway; and such engine house and turntable, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien. *King v. Alford*, 24 Am. & Eng. R. Cas. 331, 9 Ont. 643.—FOLLOWING *Breeze v. Midland R. Co.*, 26 Grant's Ch. (U. C.) 225.

Plaintiffs contracted to erect a depot for defendant company to be put up in sections and paid for as the sections were completed. One section was erected, and, upon the company failing to pay therefor, plaintiffs secured a mechanic's lien thereon and brought suit to enforce the same. *Held*, that such a lien was clearly within the statute, and it was not against public policy to allow the lien to be foreclosed because part of the company's track was on the ground. *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214.—REVIEWING *Dunn v. North Mo. R. Co.*, 24 Mo. 493.

The statute provides that in cities a mechanic's lien shall extend to the interest of the owner of the building in the lot on which it is situated, not exceeding in extent one acre. The depot grounds in question embraced a city block composed of several lots. *Held*, that the word "lot" as used in the statute had no reference to the lines of lots as they might be platted, but referred to the particular piece of ground used in connection with the building, not to exceed one acre. *Hill v. La Crosse & M. R. Co.*, 11 Wis. 214.

26. Rolling stock.—The rolling stock of a railroad does not constitute a part of its real estate, and a mechanic's lien upon the railroad does not embrace such property. *Neilson v. Iowa Eastern R. Co.*, 51 Iowa 184, 714.—FOLLOWING *Randall v. Elwell*, 52 N. Y. 521; *Chicago & N. W. R. Co. v. Ft. Howard*, 21 Wis. 45; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372. NOT FOLLOWING *Pennock v. Coe*, 23 How. 117; *Gue v. Tide Water Canal Co.*, 24 How. 257; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609;

La Crosse & M. R. Co. v. James, 6 Wall. 750; *Scott v. Clinton & S. R. Co.*, 6 Biss. 529; *Farmers' L. & T. Co. v. St. Joseph & D. C. R. Co.*, 3 Dill. 412; *Pierce v. Emery*, 32 N. H. 485. QUOTING *State Treasurer v. Somerville & E. R. Co.*, 28 N. J. L. 21.

Coal cars are not subject to a mechanic's lien, under the Md. Act of 1845, ch. 176. The word "machine" as used in the statute applies only to fixed or stationary machinery, and does not extend to movable machines. *New England Car Spring Co. v. Baltimore & O. R. Co.*, 11 Md. 81.—QUOTING *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 152.

27. Subscriptions to stock.—Where a company has contracted with a subscriber to its capital stock to apply the subscription to the construction of a particular part of its road, a contractor who has done the work on that part of the road under a contract with the company has no lien on the subscription to secure the payment of his claim, unless he has contracted therefor, and the president and directors of the company are not liable for the appropriation of the subscription to the payment of other debts of the company so long as the subscriber does not complain. If such a trust exists in favor of the contractor, he cannot enforce it without alleging that a sufficient amount to pay his claim remains in the hands of the company after constructing the portion of the road to which the subscription was to be applied. *Myer v. Dupont*, 16 Am. & Eng. R. Cas. 621, 79 Ky. 416.

4. Duration and Expiration—Discharge—Waiver.

28. Duration of the lien.—Where a material-man has an open, running account with a railroad company, the whole of the account is preserved by a lien, where the last items of the account accrued subsequently to the time within which a lien could be filed. *Central Trust Co. v. Texas & St. L. R. Co.*, 23 Fed. Rep. 673.—FOLLOWED IN *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 704.

Where materials are furnished for the construction of a railroad in car-load lots, under separate and independent orders, no lien therefor can be acquired under article 4, chapter 47, of the Mo. Rev. St. 1879, for such car-loads as were furnished more than ninety days before the filing of the account claimed

to be a lien, although others were furnished within that time. *Heltzell v. Chicago & A. R. Co.*, 16 *Am. & Eng. R. Cas.* 619, 77 *Mo.* 315.

29. Forfeiture of the lien, generally.—Proving a claim for more than the amount actually due does not work a forfeiture of the lien under the statute. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 1 *Am. & Eng. R. Cas.* 205, 33 *N. J. Eq.* 192.

Certain municipalities were authorized to issue debentures under by-laws to aid in the construction of a railroad. The contractors agreed with the company to take a certain amount of their remuneration in these debentures, and, the work having been commenced, certain of these debentures were issued to the company. The contractors afterwards failed to carry on the works, and, disputes having arisen between them and the company, all matters in difference were left to arbitration, and an award thereunder was made in favor of the contractors for the sum of £27,645, payable by instalments. One of these instalments having become due, and been left unpaid, the contractors filed a bill to have the debentures delivered over to them in the proportion stipulated for according to the terms of the contract. *Held*, that although the contractors would have been entitled to a specific lien on these debentures under their original agreement, the fact that they had referred all matters in difference to arbitration, and had obtained an award in their favor for a money payment, precluded them from now obtaining that relief. *Sykes v. Brockville & O. R. Co.*, 9 *Grant's Ch. (U. C.)* 9.

30. Waiver by taking collateral security.—A person having a statutory lien on materials sold to a railroad which had to be asserted in a given time does not waive the lien by agreeing to give credit beyond the time upon receiving security, where the security is not given. *Chicago & A. R. Co. v. Union Rolling Mill Co.*, 16 *Am. & Eng. R. Cas.* 636, 109 *U. S.* 702, 3 *Sup. Ct. Rep.* 594.

Under Iowa Code of 1873, § 2129, providing that no person is entitled to a mechanic's lien who takes collateral security on the same contract, the holder of a claim for labor or materials for a building does not waive his right to a mechanic's lien by taking security upon the same property, unless it affirmatively appears that it was his intention to look to such security, and not to his mechanic's lien. *Hale v. Burlington,*

C. R. & N. R. Co., 2 *McCrary (U. S.)* 558, 13 *Fed. Rep.* 203.

But if the security be taken upon other property than that upon which the party has a mechanic's lien, it is collateral, and the mechanic's lien is thereby waived. So where a party furnishes materials for the construction or repair of a railroad, and takes a collateral security upon railroad bonds secured by a mortgage upon one division of the road, including the rolling stock, he thereby waives his mechanic's lien. *Hale v. Burlington, C. R. & N. R. Co.*, 2 *McCrary (U. S.)* 558, 13 *Fed. Rep.* 203. —*REVIEWING Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184.

A provision in a contract between a railroad company and a construction company that the latter is to be paid from funds arising from a subscription to the stock of the road by a certain county is not such taking of collateral security as will defeat a mechanic's lien on the road, under the laws of Iowa, providing that persons constructing roads shall have a lien thereon prior to a mortgage lien, unless the holder of the former takes collateral security for his claim. *Meyer v. Delaware R. Constr. Co.*, 100 *U. S.* 457, 21 *Am. Ry. Rep.* 465.

Where a contract for work upon a railroad contains a clause reciting that the money for the work shall be paid by the citizens of a certain county, this does not constitute the contractor the holder of collateral security, so as to prevent him from acquiring a mechanic's lien on the road. *Delaware R. Constr. Co. v. Davenport & St. P. R. Co.*, 46 *Iowa* 406.

A waiver of a mechanic's lien will not be inferred merely from the taking of collateral security from another, and in a manner not inconsistent with the retention of the lien. *Kilpatrick v. Kansas City & B. R. Co.*, 57 *Am. & Eng. R. Cas.* 398, 38 *Neb.* 620, 57 *N. W. Rep.* 664.

The acceptance of a promissory note without security is not a waiver of the lien given to the laborers by the New Jersey statute. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 1 *Am. & Eng. R. Cas.* 205, 33 *N. J. Eq.* 192.

5. Notice of Claim, or Lien.

31. Time within which lien must be filed, generally.*—Where a contrac-

* Time within which contractors' lien must be filed, see 52 *AM. & ENG. R. CAS.* 18, *abstr.*

tor has so far abandoned the prosecution of his work as to allow the statutory period to run against the filing of a mechanic's lien, he cannot, *sua sponte*, for the mere purpose of securing a lien, furnish some material after the statute has run against the last preceding item. *Central Trust Co. v. Chicago, K. & T. R. Co.*, 54 *Fed. Rep.* 598.

A mechanic's lien against a railroad will be considered to have been filed within thirty days from the completion of the work, within the meaning of the statute, where it appears that, although the work done within that time was not contemplated by the contract, the obligation of the contractor to the company was not extinguished; and it is proper to count as part of the work two weeks spent by the direction of the chief engineer in removing materials wrongfully placed upon the land of another by the contractor, whose obligations to the company did not terminate until such materials were removed. *Gordon Hardware Co. v. San Francisco & S. R. R. Co.*, 47 *Am. & Eng. R. Cas.* 293, 86 *Cal.* 620, 25 *Pac. Rep.* 125.

Where a party fails to file his lien within the time required by statute, and allows a mortgage on the road to be foreclosed and the property bought in by the bondholders, and a new company formed, and it appears that the bondholders have acted in good faith, the mechanics' lien cannot be enforced. The mere entry on the books of the company of the amount of the claim cannot be considered as notice to the bondholders that the party was entitled to a lien. *Bear v. Burlington, C. R. & M. R. Co.*, 48 *Iowa* 619.

Under Mo. Rev. St. § 6743, requiring a mechanic's lien for labor done or materials furnished to be filed within ninety days, such lien must be filed within ninety days of the date of the last item under each separate account. *Central Trust Co. v. Chicago, K. & T. R. Co.*, 54 *Fed. Rep.* 598.

General contractors in May, 1874, filed a bill to assert a mechanic's lien against a railroad company, predicated on notice of lien recorded in the chancery court of Richmond city, 27th December, 1873, and nowhere else. Lien claimed for \$5000 worth of lumber furnished railroad company at different times and places; part for constructing wharves in H. county, within one mile of corporate limits of said city; another part for constructing tunnel in said city;

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third part for constructing coal bins and trestles at S. in A. county; and residue for constructing round house at H. in W. Va. Lien claimed on whole property of railroad company in this state, and particularly on the wharves, etc., and the tunnel, etc. The items extend from July 1 to December 8, 1873; but the last lumber furnished for the tunnel was on September 8, 1873. *Held*: (1) they have no statutory lien against the railroad company; (2) they have no equitable right to priority over the mortgages, on the principles affirmed in *Williamson v. Washington City, V. M. & G. S. R. Co.*, 33 *Gratt.* 624, and *Gilbert v. Washington City, V. M. & G. S. R. Co.*, 33 *Gratt.* 586, 645, because such claim was asserted first here in argument, but not in the record; and because the materials were purchased for the construction, not for the maintenance, of the road; (3) the wharves are within the jurisdiction of said city, which extends one mile beyond its corporate limits, but, in the sense of the statute, they are not within the city; (4) the tunnel is within the city, but the last item of the account for lumber furnished for the tunnel is dated September 8, 1873, and the lien claim was not filed within the prescribed time. *Boston v. Chesapeake & O. R. Co.*, 12 *Am. & Eng. R. Cas.* 263, 76 *Va.* 180.—DISAPPROVED IN *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250.

32. Filing claim by subcontractor.

—A subcontractor on a railroad, to secure a mechanic's lien for work done, must file his claim therefor within sixty days from the last day of the calendar month in which the work was performed, the word "done" in the statute having reference to the time of the performance of the work, and not to the time when the work of the subcontractor is completed, and each month's work for this purpose being considered as separate from that of other months. *Sandval v. Ford*, 55 *Iowa* 461, 8 *N. W. Rep.* 324.

Where a subcontractor settles with his contractor and a balance is found due, and he files the claim in due time, and in a subsequent suit his lien is established, in a subsequent foreclosure proceeding wherein the lien holder is a party the mortgagees cannot object to the validity of the lien because he has not also presented to the company the settlement certified by the contractor showing the balance. *Brooks v. Burlington & S. W. R. Co.*, 101 *U. S.* 443.

33. Subcontractors' notice to owner.

The filing of a statement of account required to be filed with the clerk by a subcontractor within thirty days, to establish his lien, or, if he claims a lien upon a railway, within sixty days of the last day of the month in which the work was done, does not entitle the subcontractor to his lien unless he shall, within the proper time, give written notice of the filing thereof to the owner, or his agent or trustee. Any other than the written notice contemplated by statute will not avail. *Lounsbury v. Iowa, M. & N. P. R. Co.*, 49 Iowa 255.

As to notice, there is no distinction between railroad and other subcontractors, the former, like the latter, being required to give notice of their claims within thirty days from the completion of their work to prevent payments being made to their principals. *Sandval v. Ford*, 55 Iowa 461, 8 N. W. Rep. 324.

Under the laws of Oregon, providing that every subcontractor or laborer performing work or furnishing materials for any contractor of a railroad company may acquire a lien upon the property of the company to the extent of the amount due from it to the original contractor at the time a required notice of the lien is given, the prescribed notice creates and originates the lien, and if, before such notice is given, a general creditor of the contractor has acquired a right by garnishment under an attachment or execution to have the debt of such contractor applied in satisfaction of his claim, the lien of the subcontractor will not attach to the railroad property. *Coleman v. Oregonian R. Co.*, 57 Am. & Eng. R. Cas. 436, 25 Oreg. 286, 35 Pac. Rep. 656.

Notice may be furnished the owner by a subcontractor at any time between doing the labor or furnishing the materials and twenty days after the building is completed or the work terminated; but the affidavit must be furnished within the twenty days. *Norfolk & W. R. Co. v. Howison*, 81 Va. 125.

34. Filing claim of lien for supplies.—Under Va. Code, § 2486, providing that no person shall be entitled to a railroad supply lien unless he shall file a memorandum of his claim within six months after it has fallen due, the time of furnishing supplies is immaterial so far as the claim is concerned; but where they are to be paid for in instalments, the claim must be filed and recorded

within six months of the time that the last instalment falls due. *Newgass v. Atlantic & D. R. Co.*, 56 Fed. Rep. 676.

But where a general creditor's bill is filed against a company, and the case is referred to a commissioner to take, state, and report the claims with their priorities, this suspends the running of the six months within which claims must be filed under the above section. *Newgass v. Atlantic & D. R. Co.*, 56 Fed. Rep. 676.—FOLLOWING Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. Rep. 436.

35. Material-man's notice of lien.

—A person entitled to a lien on a railway for materials furnished for its construction may in his notice of lien confine his claim to that portion or section of the road in the construction of which his material was used. *Giant-Powder Co. v. Oregon Pac. R. Co.*, 43 Am. & Eng. R. Cas. 622, 42 Fed. Rep. 470, 14 Sawy. (U. S.) 560, 8 L. R. A. 700.—DISTINGUISHING *Basshor v. Baltimore & O. R. Co.*, 65 Md. 99.

The claim of a material-man of a lien upon a railroad is not vitiated by the fact that his claim is in part for articles not the subject of a lien, where it is shown that his claim is not wilfully false; and the court will permit him to make the necessary segregation by throwing out the value of such articles, and declaring for the remainder. *Gordon Hardware Co. v. San Francisco & S. R. R. Co.*, 47 Am. & Eng. R. Cas. 293, 86 Cal. 620, 25 Pac. Rep. 125.—FOLLOWING *Malone v. Big Flat Gravel Min. Co.*, 76 Cal. 578.

Under Ga. Code, § 1979, before any lien can attach upon real estate for materials furnished a contractor for its improvement, written notice must be given to the true owner, no matter where he resides. Notice to an agent is not sufficient. *Pou v. Covington & M. R. Co.*, 40 Am. & Eng. R. Cas. 610, 84 Ga. 311, 10 S. E. Rep. 744.

36. Filing account of work done or materials furnished.—Where a company gives orders for different kinds of material a month apart, such orders are deemed separate contracts; and the party furnishing the materials cannot have a mechanic's lien under the Missouri statute, unless separate accounts be filed within ninety days of the last item of each. *Central Trust Co. v. Chicago, K. & T. R. Co.*, 54 Fed. Rep. 598.

Charges for work done for the railroad under two distinct contracts cannot be

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blended together in one lien. *O'Connor v. Current River R. Co.*, 111 Mo. 185, 20 S. W. Rep. 16.

A lien claim must be substantially correct and sufficiently definite; a claim filed for an amount greatly in excess of the amount due is not a compliance with the statute. *Kling v. Railway Constr. Co.*, 7 Mo. App. 410. *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 65 Iowa 513, 22 N. W. Rep. 654.

Furnishing materials creates an incipient lien, but to perfect it a general contractor must, in conformity with Va. Code 1873, ch. 115, §§ 3-11 inclusive, within the prescribed time, file in the county or corporation court of the county or corporation in which is situated the property on which the lien is sought to be secured, and in the clerk's office of the chancery court of Richmond city, where the property is in said city, a true account of the work done, or materials furnished, sworn to by the claimant or his agent, with a statement attached, signifying his intention to claim the benefit of the lien, and setting forth a description of the property on which he claims a lien, which is so to be recorded by the clerk. *Boston v. Chesapeake & O. R. Co.*, 12 Am. & Eng. R. Cas. 263, 76 Va. 180.

If such lien is given on the property of a railroad company in its entirety, it can only be secured by filing the account in the proper clerk's office of every county or corporation through which the road passes. *Boston v. Chesapeake & O. R. Co.*, 12 Am. & Eng. R. Cas. 263, 76 Va. 180.

37. Affidavit to claim for lien.—The statutory requirement that the affidavit for a mechanic's lien describe the property for the improvement of which labor or material may have been furnished is not complied with by stating generally that it was for a line of street railway owned by the defendant in a city named, it appearing that the defendant had several lines of railway, to either of which such designation would be equally applicable. *Fleming v. St. Paul City R. Co.*, 47 Am. & Eng. R. Cas. 290, 47 Minn. 124, 49 N. W. Rep. 661.

The requirement that the affidavit state "to and for" whom labor or material may have been supplied, and the contract relation of the lien claimant with such person, is not complied with by a statement that material was furnished "to and for the construction of the St. Paul City railway," at prices agreed upon between the plaintiff and

a designated contractor with the St. Paul City railway company, the lien claimant being a subcontractor. *Fleming v. St. Paul City R. Co.*, 47 Am. & Eng. R. Cas. 290, 47 Minn. 124, 49 N. W. Rep. 661.

6. Foreclosure.

38. Jurisdiction, and right to sue.—Suit must be brought on a contractor's lien within twelve months from the time it is recorded. The mere filing of a declaration in the office is not the commencement of a suit, unless it is followed by proper service upon the defendant. *Cherry v. North & S. R. Co.*, 11 Am. & Eng. R. Cas. 636, 65 Ga. 633.

Though a road may have been seized by the governor, under an act of the legislature, for failing to pay interest on bonds indorsed by the state, this does not abrogate its obligation to others, and a failure to sue within twelve months destroys the vitality of the lien. *Cherry v. North & S. R. Co.*, 11 Am. & Eng. R. Cas. 636, 65 Ga. 633.

When, by a statute, a lien in favor of a contractor is created upon that portion of the road constructed by him, but no provision is made for the enforcement of such lien, the lien affords the basis for the exercise by a court of chancery of its jurisdiction to coerce payment of the debt, and an order by the court in an action to establish a claim for the cost of construction against a consolidated company, directing the sale of the entire track and franchises, is unauthorized and void. *Louisville, N. A. & C. R. Co. v. Boney*, 39 Am. & Eng. R. Cas. 168, 117 Ind. 501, 20 N. E. Rep. 432, 3 L. R. A. 435.

The lien given by Ind. Act of 1883, as amended in 1885, is not confined to one county in cases where the work extends to two or more counties. The lien fastens upon an entire and continuous line of unfinished road, and may be enforced in any of the counties through which the road runs. *Midland R. Co. v. Wilcox*, 43 Am. & Eng. R. Cas. 629, 122 Ind. 84, 23 N. E. Rep. 506.

Where the subcontractor was entitled to a mechanic's lien for work done in the construction of a railway—held, that if the contractors had entered into an agreement by which they became personally liable to pay his claim, such contract was one in relation to the construction of a railway under Iowa Code, § 2583, and that the contractors were not entitled to a change of venue

to the county of their residence. *Vaughn v. Smith*, 7 Am. & Eng. R. Cas. 82, 58 Iowa 553, 12 N. W. Rep. 604.

The lien created by Mo. Rev. St. § 3200 is not restricted to persons who furnish materials or do labor within the state. Where part of a road lies without the state, the lien may be enforced against the part within the state, though the work was done or materials furnished out of the state. *St. Louis B. & C. Co. v. Memphis, C. & N. W. R. Co.*, 72 Mo. 664.—REVIEWED IN *Knapp v. St. Louis, K. C. & N. R. Co.*, 7 Am. & Eng. R. Cas. 394, 74 Mo. 374.

A lien arising under N. Y. Act of 1844, ch. 305, as amended in 1870, ch. 529, cannot be enforced in the superior court of the city of Buffalo, as the court has no jurisdiction. *Fowler v. Buffalo & J. R. Co.*, 1 *Sheld. (N. Y.)* 525.

Where the object of a suit is to enforce an alleged mechanic's lien, the suit is one of equitable jurisdiction. *Bailey Constr. Co. v. Purcell*, 88 Va. 300, 13 S. E. Rep. 456.

39. Parties.—The Texas Act of February 18, 1879, creates such privity between mechanics, laborers, and operatives and a railway company for whose benefit the labor contemplated by the act is performed as entitles the former to maintain an action directly against such company to enforce the lien which the statute gives for their benefit. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70.—FOLLOWING *Texas & St. L. R. Co. v. Allen*, 1 Tex. App. (Civ. Cas.) 291.

The lien given by the Missouri statute to mechanics and material-men is not so far assignable as to enable the assignee to fix a lien on the property subject to lien by compliance with the provisions of the statute. The lien is a "personal right given to the material-man or laborer for his own protection, and the right to create it cannot be assigned or transferred." *Grisvold v. Carthage, J. & S. C. R. Co.*, 18 Mo. App. 52.—FOLLOWED IN *Brown v. Chicago, S. F. & C. R. Co.*, 36 Mo. App. 458.

Where a railroad is in the hands of a receiver, and a suit is brought to foreclose a mechanic's lien on the road, under Mo. Rev. St. § 6747, the receiver is the only necessary defendant. *Central Trust Co. v. Chicago, K. & T. R. Co.*, 54 Fed. Rep. 598.

The lien may be enforced by suit against a purchaser of the railroad within one year after the lien accrued, although his title

was acquired without notice of the lien. *Brown v. Buck*, 54 Ark. 453, 16 S. W. Rep. 195.

One who has acquired an interest in the leasehold property sought to be charged with the lien, by virtue of the foreclosure of a deed of trust, executed before the lien attached, is properly allowed to become a co-defendant in the suit, and to have his rights adjudicated. *Kling v. Railway Constr. Co.*, 4 Mo. App. 574.

Where a subcontractor institutes a foreclosure proceeding against two parties, one as contractor and the other as owner, to support a special judgment against property, the plaintiff must show a contract between the owner and the contractor. *Kling v. Railway Constr. Co.*, 4 Mo. App. 574.

40. Pleading and evidence.—A complaint, to warrant a judgment *in rem* on a mechanic's lien, must show that the account was filed in the clerk's office within ninety days, and a full compliance with the statute in other respects. *Arkansas C. R. Co. v. McKee*, 30 Ark. 682.

Where a lien upon a railroad was claimed by plaintiffs, in the double character of contractors and material-men, for work done and materials furnished in constructing the railroad, and where the declaration against the company and the immediate contractor under the company, in a joint suit against them, brought to foreclose the lien, showed that the plaintiffs were only subcontractors, and both the claim of lien and the declaration were for a gross sum, without disclosing what part of it was for work and what part for materials, and there was no offer to amend the declaration so as to foreclose the lien for so much of the gross sum as represented the price of materials only, there was no error in denying a foreclosure, nor in dismissing the action as to the railroad company. *Carter v. Rome & C. Constr. Co.*, 89 Ga. 158, 15 S. E. Rep. 36.

A petition by a subcontractor to enforce a lien against a railroad is defective where it only shows the filing of notice with the circuit clerk, without averring that the president and secretary of the company did not reside, or could not be found, in the county, as required by Ill. Rev. St. 1874, p. 672, §§ 53, 54. *Cairo & St. L. R. Co. v. Cauble*, 85 Ill. 555.

A petition for the foreclosure of a mechanic's lien is fatally defective which fails to state that something was due for the

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services on which the lien was founded at the time the action was begun. A statement for a lien which is attached to the petition as an exhibit, but which was made out and filed some months before the beginning of the action, and in which it is alleged that something was due when the statement was made, cannot supply the place of an averment that something was due when the action was begun. *Stubbs v. Clarinda, C. S. & S. W. R. Co.*, 20 *Am. & Eng. R. Cas.* 492, 62 *Iowa* 280, 17 *N. W. Rep.* 530.

A petition seeking to enforce a mechanic's lien which shows that the road was incorporated under the laws of another state, and that the lien is for materials furnished in a certain county of the state, is not bad on demurrer as seeking to enforce a lien on a part of a road in the state, as the court will not assume that there is any part of the road in the state except in the county named. *Ireland v. Atchison, T. & S. F. R. Co.*, 20 *Am. & Eng. R. Cas.* 493, 79 *Mo.* 572.

The complaint alleged, in substance, that certain described land, against which the lien was invoked, was necessary to the convenient and ordinary use of the defendant's depot buildings. The answer alleged as a separate defense that the land in question was "incident to its franchise, and useful and indispensable and necessary, and facilitates the successful operation of said railroad." Held, that as the latter allegation was not admitted by the complaint, it was error to strike out a replication which denied it. *Helena Lumber Co. v. Montana C. R. Co.*, 10 *Mont.* 81, 24 *Pac. Rep.* 702.

A bill to enforce a mechanic's lien on railroad property referring to the notices filed, as prescribed by statute, and setting out in detail the work and labor performed and materials furnished, is sufficient, though it does not specifically set out the particular items stated in the notice. *Texas, S. F. & N. R. Co. v. Orman*, 3 *N. Mex.* 365, 9 *Pac. Rep.* 595.

In declarations by a subcontractor against the owner, under Va. Mechanics' Lien Law, it is unnecessary to aver that an account, alleged to have been furnished defendant, was approved by the general contractor; or that the latter, after ten days' notice thereof, had failed to object to it; or that the same had been ascertained to be due from the latter to the subcontractor, according to section 6.

These are matters of defense. *Norfolk & W. R. Co. v. Howison*, 81 *Va.* 125.

It was competent for the plaintiff to inquire into the disposition of the various lots of ties furnished the company, to establish the fact that the number for which judgment had been received, and which were included in the engineer's estimates, did not embrace the ties in controversy, *Smyth v. Ward*, 46 *Iowa* 339.

Where, in an action by the contractor to enforce a lien against the railroad, a count in the petition tenders the issue whether the engineer had made an estimate and certificate of the work, the plaintiff, before introducing evidence of the amount and value of the work, must first show that the engineer, after demand upon him, refused to make the estimate and certificate, as required by the contract. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

But, under a *quantum meruit* count for the value of work and materials furnished, the fact that the engineer has made the estimate and certificate is a matter of defense. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

Plaintiff had a right, under either count of the petition, to show the amount of his work and labor, and was not precluded from doing so merely because the defendant pleaded the estimate and certificate of the engineer. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

So plaintiff could show, under either count of the petition, that the engineer misconstrued the contract in his classification of the work, and had not measured the work according to the contract; and an allegation of fraud was not necessary to entitle him to introduce such evidence. *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463, 20 *S. W. Rep.* 631.

A copy of a notice of mechanics' lien in which the signatures are not proved or acknowledged is not, though certified by the county clerk, admissible as evidence of the due filing of the proper notice of lien. *Sampson v. Buffalo, N. Y. & P. R. Co.*, 2 *Hun (N. Y.)* 512, 4 *T. & C.* 600.

41. Defenses.—A bill filed to enforce a mechanic's lien is not barred by another suit pending, where it is only for the collection of the debt. *Parmelee v. Tennessee & S. V. R. Co.*, 13 *Lea (Tenn.)* 600.

The fact that only a part of the material

furnished a railroad is used will not prevent a lien attaching for the whole amount furnished. *Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184, 714.—REVIEWED IN *Hale v. Burlington, C. R. & N. R. Co.*, 2 *McCrary* (U. S.) 558, 13 *Fed. Rep.* 203.

A principal contractor cannot defeat the liens of those whose debtor he is for work and materials by asserting the lien of a mortgage executed by the owner by whom he was employed to build a house or a railroad. He cannot defeat their liens by asserting a lien superior to them, no matter how he may acquire such superior lien. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250, 26 *N. E. Rep.* 784.

Failure of the clerk of the circuit court to forward to the secretary of state a copy of an account filed for mechanics' lien against a railroad, as required by Mo. Rev. St. § 3203, will not defeat the lien. *St. Louis B. & C. Co. v. Memphis, C. & N. W. R. Co.*, 72 *Mo.* 664.

The facts of a general contractor's failure, and the owner's necessity to complete the work, does not affect the owner's liability for the amount due the subcontractor for labor or materials. *Shenandoah Valley R. Co. v. Miller*, 80 *Va.* 821.

Notice and affidavit having been furnished as required by law, by the subcontractor to the owner, it makes the latter liable for the amount named in the affidavit, without regard to the state of accounts between him and the general contractor. *Norfolk & W. R. Co. v. Howison*, 81 *Va.* 125.

A railroad contractor sublet a part of the road which he was to construct, and subsequently the subcontractor failed to pay laborers and material-men, and they filed notice, under the statute, of a lien. *Held*, that the company could not be made liable, unless it appeared that there was money due the contractor and the subcontractor at the time the notices were filed. *Sampson v. Buffalo, N. Y. & P. R. Co.*, 13 *Hun* (N. Y.) 280, 4 *T. & C.* 600.

42. Verdict, judgment, sale, etc.—

(1) *Verdict and judgment.*—As, under Ga. Code, § 1990, the verdict must set forth the lien allowed, and the judgment and execution must be awarded accordingly, a verdict and judgment which attempt to set up and enforce a lien upon a specified portion of a railroad are void upon their face, so far as the contractor's special lien is concerned.

Farmers' L. & T. Co. v. Candler, 47 *Am. & Eng. R. Cas.* 296, 87 *Ga.* 241, 13 *S. E. Rep.* 560.

A verdict describing the lien intended to be allowed thereby in these terms: "That the plaintiff have a lien as a contractor to build railroads upon that part of the Gainesville & Dahlonga railroad from its terminus in the city of Gainesville to the Chattahoochee river, in Hall county, including its right of way, roadbed, depot grounds, and all other property belonging to said railroad company, for the sum aforesaid," etc., does not set up a lien upon the whole railroad referred to, but only attempts to do so upon the part extending from Gainesville to the Chattahoochee river. *Farmers' L. & T. Co. v. Candler*, 47 *Am. & Eng. R. Cas.* 296, 87 *Ga.* 241, 13 *S. E. Rep.* 560.

Under the Illinois statute, where a subcontractor proceeds to enforce a lien against a railroad, the suit must be begun within the three months to which the lien is limited. In such cases it is not necessary that the notice required by the statute should be accompanied with a copy of the contract between the contractor and the company. The statute only refers to the contract between the contractor and the subcontractor. The decree should be against the company and the contractor, and the property of the company should only be sold upon a failure to pay the amount of the lien within the time fixed by the court. *Cairo & St. L. R. Co. v. Cauble*, 4 *Ill. App.* 133.

The statement filed with the clerk is the limit of recovery only with respect to purchasers and encumbrancers. *Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184, 714.

A railroad let a contract for the erection of a building, and a person who furnished materials filed a lien against the building, and commenced an action against the company. Before he obtained judgment the contractor filed a lien upon the same building for an amount including the former; and judgment was taken in both cases by default. *Held*, that the two judgments were not incompatible; but the court should provide for the proper distribution of the funds arising from a sale of the property. *Hill v. La Crosse & M. R. Co.*, 11 *Wis.* 214.

(2) *Sale.*—A mechanic's lien on a railroad, although notice is filed only in one county, must be foreclosed against the whole line of road situate within the state, and the whole of that part of the road sold;

a part of such part cannot be sold. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250, 26 *N. E. Rep.* 784.

It is otherwise, however, as to the rolling stock and other movable property. While all of these are subject to the lien, only so much of them need be sold as may be necessary to satisfy the judgment. *Knapp v. St. Louis, K. C. & N. R. Co.*, 7 *Am. & Eng. R. Cas.* 394, 74 *Mo.* 374.—REVIEWING *St. Louis B. & C. Co. v. Memphis, C. & N. W. R. Co.*, 72 *Mo.* 664.—FOLLOWED IN *Ireland v. Atchison, T. & S. F. R. Co.*, 20 *Am. & Eng. R. Cas.* 493, 79 *Mo.* 572. QUOTED IN *Farmers' L. & T. Co. v. Candler*, 87 *Ga.* 241.

A mechanic's lien for repairing an article extends to the entire article; and the whole of such article must be sold in order to enforce the lien. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250, 26 *N. E. Rep.* 784.

This court will not direct the sale of lands required for the use of a railway company to enforce the payment of a mechanic's lien for work done on the property; in such a case the decree will only be for payment of the amount found due, with costs. *Breeze v. Midland R. Co.*, 26 *Grant's Ch. (U. C.)* 225.

Where railroad property is about to be sold under a mechanic's lien, if the law only permits other lien holders to share in the proceeds who have reduced their claims to judgments, the court may stay the sale for a time to permit judgments to be taken on other claims. *Eaton v. Cleveland, St. L. & K. C. R. Co.*, 41 *Fed. Rep.* 421.

III. LABORERS' LIENS.

1. Who Entitled to a Lien.

43. Constitutionality and construction of statutes.—*Mo. Act of Feb. 24, 1853*, § 12, giving laborers a lien upon moneys due from the company to subcontractors, is constitutional, when applied to railroad companies previously chartered. *Peters v. St. Louis & I. M. R. Co.*, 23 *Mo.* 107.—QUOTED IN *Luther v. Saylor*, 8 *Mo. App.* 424; *Brannin v. Connecticut & P. R. R. Co.*, 31 *Vt.* 214.

It is not necessary that the thirty days' labor for which a railroad may be held liable under that act should be performed upon thirty consecutive days. *Peters v. St. Louis & I. M. R. Co.*, 24 *Mo.* 586.

New Jersey Corporation Act, § 63, provides that "in case of the insolvency of any corporation the laborers in the employ thereof shall have a lien upon the assets thereof for the amount of wages due to them respectively, which shall be paid prior to any other debt or debts of said company; and the word 'laborers' shall be construed to include all persons doing labor or service of whatever character, for, or as workmen or employes in the regular employ of, such corporation." *Held*: (1) that the lien so given comes into existence at the time that the court adjudges the insolvency of the company accrued; (2) that persons holding claims for wages who are not in the employ of the company when it becomes insolvent can have no lien; (3) that a lien for wages is not forfeited by embracing other items with it; (4) but laborers in the employ of a company when it becomes insolvent have a prior lien no difference how long since the wages were earned. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 1 *Am. & Eng. R. Cas.* 205, 33 *N. J. Eq.* 192.—FOLLOWING *Bedford v. Newark Machine Co.*, 16 *N. J. Eq.* 117.

Interest cannot be allowed on the claim for wages under the above statute, which has accrued before the lien attaches. *Delaware, L. & W. R. Co. v. Oxford Iron Co.*, 1 *Am. & Eng. R. Cas.* 205, 33 *N. J. Eq.* 192.

The privilege conferred by *N. Car. Code*, § 1342, is restricted to laborers, and for work done for thirty days or less in constructing a road, and the company can in no event be held liable for payment of accounts due by the contractors for materials. *Moore v. Cape Fear & Y. V. R. Co.*, 112 *N. Car.* 236, 17 *S. E. Rep.* 152.

Section 35 of article 16 of the Texas Constitution of 1876 did not give to laborers on railroads a lien on the property of the company on which they labored, as was provided by article 37 to mechanics, artisans, and material-men. *Central & M. R. Co. v. Henning*, 52 *Tex.* 466.

The lien given to mechanics and workmen by the act of February 18, 1879, was intended to apply only to labor done or materials furnished after the passage of that act. *Central & M. R. Co. v. Henning*, 52 *Tex.* 466.

44. Who is a "laborer," "workman," or "servant."*—The provision

* Who are "laborers, workmen, and servants"

of Ky. Act of 1888 that "all persons who perform labor or furnish labor" in the construction of a railroad shall have a lien, is not limited to persons who perform manual labor, but will include the services of a civil engineer. *Central Trust Co. v. Richmond, N. J. & B. R. Co.*, 54 Fed. Rep. 723.

A teamster employed by a contractor in the construction of a railroad is a laborer within the meaning in which that term is used in the statute. *Mann v. Burt*, 35 Kan. 10, 10 Pac. Rep. 95.

A foreman or superintendent of a company of laborers who remains with them directing their work, and sometimes working himself, is within the meaning and intent of the word "laborer" as used in the Tex. statute. *Texas & St. L. R. Co. v. Allen*, 1 Tex. App. (Civ. Cas.) 291.

45. Who is not.—A person who contracts to put up wires for a telegraph company is not an employé of the company within Indiana laws allowing a lien for employes' work and labor. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. Rep. 60.—REVIEWED IN *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.

Contractors who supply laborers and teams to work on a railroad by the day are not "laborers" or employes within the meaning of Kentucky Act of March 20, 1876, giving a lien for work done or materials furnished in keeping a railroad as a going concern; but such persons may have a lien under the act of March 27, 1888, giving a lien to persons who furnished labor or materials for the construction or improvement of any railroad or other public improvement. *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.—REVIEWING *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. Rep. 60; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. Rep. 405.

One who contracts to haul and deliver lumber on the cars at an agreed price, to be paid when it is sold in market and the avails received, has no lien thereon at common law for his labor. *Stillings v. Gibson*, 63 N. H. 1.

A person who takes a contract to do certain work on a railroad, and then employs

within meaning of Mechanics' Lien Laws, see notes, 32 AM. REP. 264; 18 L. R. A. 305. See also 57 AM. & ENG. R. CAS. 440, *abstr.*

others to do it or assist in doing it, is not a "laborer" within the meaning of New York Act of 1850, ch. 140, § 10. *People v. Remington*, 10 N. Y. S. R. 310, 45 Hun 329; affirmed in 109 N. Y. 631, *mem.*, 16 N. E. Rep. 680, *mem.*

One who performs a contract to deliver lumber by hiring teams and drivers, but who does no hauling himself, is not a "laborer" within the meaning of Pa. Act of April 9, 1872, and is not entitled to the preference provided by that act. In the contemplation of the act, "laborers" are those who perform with their own hands the contract they make with the employer. *Wentroth's Appeal*, 82 Pa. St. 469.

A civil engineer is not a "laborer" or "workman" within the meaning of the Pa. resolution of January 21, 1843, and its supplement, the act of April 4, 1862, and is not entitled to the lien provided thereby upon the property of a railroad for the value of his services rendered in its construction. *Pennsylvania & D. R. Co. v. Leuffer*, 84 Pa. St. 168.

Texas Const. art. 16, § 35, which requires the legislature to pass laws to protect laborers on railroads and other public works, and the act of Aug. 7, 1876, passed in pursuance of the constitutional provision, have no reference to contractors or builders. *Tyler Tap R. Co. v. Driscoll*, 52 Tex. 13.

Under a statute which gives a lien to "mechanics, laborers, and operators who have performed labor or work with tools, teams, or otherwise in the construction of a railroad," a "laborer" is one who performs manual services in the construction of the railroad, and not one who may work in preparing ties to be furnished to and used by the railroad at a price named. *St. Louis, A. & T. R. Co. v. Matthews*, 40 Am. & Eng. R. Cas. 523, 75 Tex. 92, 12 S. W. Rep. 976.

46. Work must be done under contract with owner or contractor.

—The remedy afforded is summary and should be strictly construed, and the act is not to be so extended or construed as to give to the laborer employed in ditching, building levees or railroad lines, a lien upon the real estate for his labor, where the labor was done under a contract with the state, but only when the contract was with the owner of the lands upon which the work was done. *Dano v. Mississippi, O. & R. R. Co.*, 27 Ark. 564.

No lien enures under chapter 3132, Fla. Laws, in favor of a laborer for a subcontractor against a railroad company, where the only privity of contract existing is between the company and the first contractor. *Howard v. Moore*, 20 Fla. 163.

Even though the contractor has fully paid the subcontractor the amount due under his contract, and though the railroad company is indebted to the contractor in a sum exceeding the amount of the claim of the laborer against the subcontractor. *Uiter v. Crane*, 37 Iowa 631.

Under the provisions of the Ga. Mechanics' Lien Act of 1869, a mechanic employed by the lessee of a railroad is entitled to a lien only upon and to the extent of the interest of such lessee in the road. *Breed v. Nagle*, 46 Ga. 112.

2. What is Subject to the Lien.

47. Bridges.—The Wisconsin legislature has, under Wis. Const. art. 11, § 1, the power to enact laws for the enforcement of liens for labor upon bridges or other structures of a railway company, although the same are part and parcel of its railway, and essential to the full and complete operation thereof. *Purtell v. Chicago F. & B. Co.*, 39 Am. & Eng. R. Cas. 242, 74 Wis. 132, 42 N. W. Rep. 265.

There is no rule of public policy in Wisconsin against enforcing a laborer's lien upon any bridge or other structure of a railroad company, when such structure is part and parcel of the railroad, even though the enforcement of the lien may interfere with the operation of the railroad. *Purtell v. Chicago F. & B. Co.*, 39 Am. & Eng. R. Cas. 242, 74 Wis. 132, 42 N. W. Rep. 265.

48. Street railway.—A laborer can have no lien upon a street railway, under Wash. Code 1881, ch. 138, unless the person causing the railway to be constructed has some estate in the land over which it is laid. (Scott, J., dissenting.) *Front St. Cable R. Co. v. Johnson*, 47 Am. & Eng. R. Cas. 287, 2 Wash. 112, 25 Pac. Rep. 1084.

3. Notice of Claim.

49. Filing statement of claim.—In order to obtain a lien upon a railroad, a laborer or material-man is only required to file notice in the recorder's office in the county where he furnished the material or did the work through which such road

runs, and then such lien extends to the entire line of the road in the state. In case of a sale of the road and a transfer of the lien to the fund derived from the sale, by order of the court ordering the sale, the lien is transferred to the whole fund and not to a part. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 Am. & Eng. R. Cas. 271, 127 Ind. 250, 26 N. E. Rep. 784.—DISAPPROVING *Boston v. Chesapeake & O. R. Co.*, 76 Va. 180. FOLLOWING *Louisville, N. A. & C. R. Co. v. Boney*, 117 Ind. 501.

The requirement of the statute that the written settlement with the subcontractor shall be given to the owner and contractor by the laborer claiming a lien is sufficiently complied with by filing the settlement with the clerk within the thirty days allowed for filing the lien. *Bundy v. Keokuk & D. M. R. Co.*, 49 Iowa 207.

The provision of Ky. Act. of 1888 relating to liens, and providing that a person performing labor must file a verified statement of the amount claimed in the clerk's office within sixty days "after the last day of the last month in which any labor was performed, or materials or teams furnished," is sufficiently complied with by laborers working by the month, where they file a claim for a previous month's wages, and after they ceased work filed another claim for such other work as has been done since; and the provision of the statute that the amount due must be set out does not require a detailed statement. *Central Trust Co. v. Richmond, N., I. & B. R. Co.*, 54 Fed. Rep. 723.

A railroad corporation made a contract with a person to do certain work on its railroad. He contracted with G. to furnish the gravel. G. contracted with D. to fill the cars at a gravel pit, and D. hired L. to assist in the work under his contract. After L. had done some work D. abandoned his contract with G., and G. a few days afterwards continued D.'s work and employed L. upon it. Held, that L. could not maintain an action against the corporation, under Mass. St. 1873, ch. 353, for the amount due him from D. without filing a statement of his claim within thirty days after he ceased to perform labor for D., and that it was not enough to file a certificate within thirty days after he ceased to perform labor for G., describing the labor as performed for D. and G. *Lyon v. New York & N. E. R. Co.*, 127 Mass. 101.

50. Necessity of notice to owner.

—A laborer who seeks to subject a railroad company to the payment of wages due him by a contractor in the construction of such company's road, as provided in section 1942 of the N. Car. Code, must show a substantial compliance with the requirements of such section as to notice, etc. *Moore v. Cape Fear & Y. V. R. Co.*, 112 N. Car. 236, 17 S. E. Rep. 152.

A laborer who does work in the construction of a railroad, and gives the notice required by the statute, is entitled to a lien. Where the notice is given in due time and manner, payment to the contractor will not defeat his rights. *Indiana, I. & I. R. Co. v. Larrew*, 130 Ind. 368, 30 N. E. Rep. 517.

Notices by railroad laborers that they intend to claim a lien under the statute, which are directed to the company by its corporate name, and to the officers, agents, and servants thereof, and state the amount and number of days' labor, and the time when it was performed, and name of the contractor from whom due, are sufficient. *Peters v. St. Louis & I. M. R. Co.*, 24 Mo. 586.

Mo. Rev. St. 1879, § 787, requiring subcontractors, laborers, or material-men to give notice within twenty days after work is performed or materials furnished of a lien, does not relate to an enforcement of the lien, but the establishment of a personal liability against the company. *Morgan v. Chicago & A. R. Co.*, 76 Mo. 161.

Unless a company is notified within twenty days of the claim of a laborer or furnisher of material, as provided by Mo. Rev. St. 1879, §§ 3200-3216, a personal judgment against it in a suit brought thereunder will be erroneous. *Morgan v. Chicago & A. R. Co.*, 76 Mo. 161.

Where the workman's contract is not with the owner, but with a subcontractor, the building cannot be bound by this contract for more than the reasonable value of the work done and materials furnished; and the lien claim filed must set out the items, though the contract is for a gross sum. *Kling v. Railway Constr. Co.*, 7 Mo. App. 410.

Under the Ohio Act of March 31, 1874, entitled "An act to secure pay to persons performing labor and furnishing materials in constructing railroads" (71 Ohio L. 51), a substantial and not a technical compliance

with the conditions of the statute providing for the service of written notice upon the owner of the road is essential to create any obligation on the part of such owner towards the person performing labor or furnishing materials under a contractor or subcontractor, or to give to such person any right of action against such owner. *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122.

The limitation of thirty days' time within which suits under the statute of 1874, to secure their pay to laborers on railroads must be brought, applies to controversies arising between the contractor or subcontractor and the person furnishing materials or work, and not to rights of action on the part of the latter against the owner of the road. *Scioto Valley R. Co. v. Cronin*, 38 Ohio St. 122.

51. Upon whom the notice may be served.—The station agents of a foreign railroad company operating a railroad in Missouri are the representatives of the company in such a sense that service of notice upon them of claims for work and labor done or materials furnished upon the road is service upon the company within the meaning of the statute providing the mode of obtaining and enforcing liens against railroads. (Mo. Rev. St. 1879, §§ 3200-3216.) *Morgan v. Chicago & A. R. Co.*, 76 Mo. 161.

A party who claimed a lien against a company, failing to find any of the officers of the company, served notice of his claim upon a person who had a desk in the office of the company, but had no connection with its business. *Held*, that the service was not a compliance with Mo. Rev. St. § 3202. *Heltzel v. Kansas City, St. L. & C. R. Co.*, 77 Mo. 482.

Under the provisions of "An act to secure pay to persons performing labor or furnishing materials in constructing railroads," passed March 31, 1874 (71 Ohio L. 51), which provides that "any person performing said labor or furnishing said materials who has not been paid therefor shall serve a notice in writing upon the secretary or other officer or agent of said railroad company, stating in said notice the kind and amount of materials furnished, etc.," the service of such notice upon a director of the railroad company to be affected by it is sufficient. *Scioto Valley R. Co. v. McCoy*, 42 Ohio St. 251.

4. Assignability; Subrogation.

52. Such liens are assignable.—A statutory right of action against a corporation for labor done and materials furnished follows the assignment of the claim; otherwise it would be determined by the claimant's death, and perhaps by his insolvency. *Chicago & N. E. R. Co. v. Sturgis*, 44 Mich. 538, 7 N. W. Rep. 213.

After complying with the requirements of section 1942 of the N. Car. Code a laborer can assign his claim as a debt either against his employer or the railroad company dealing with him under a direct agreement or as subcontractor, and the assignee can sue upon such claim and other similar ones in one action, and recover the sum total of all such claims due for labor. *Moore v. Cape Fear & Y. V. R. Co.*, 112 N. Car. 236, 17 S. E. Rep. 152. *Austin & N. W. R. Co. v. Rucker*, 12 Am. & Eng. R. Cas. 258, 59 Tex. 587.

Work done under an agreement with a subcontractor on a railroad to cut and manufacture a specified number of cross-ties at a designated price is not the work of a contractor, builder, or material-man in contemplation of the statute, but those performing it are laborers under a subcontractor, and, as such, entitled to the lien given by the statute. Such a lien is assignable, and passes with the assignment of the account. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70.

53. — not assignable.—Although a laborer upon a railroad has a lien by statute for the sum due him, it is not assignable at law, and, even if assignable, it would be in equity only, and thus would not entitle the holder of the same to assign the lien. *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116.

The lien given by the statute to laborers who have performed labor upon the road-bed of any railroad in this state is a personal right given the laborer for his own protection, and the right to create it cannot be assigned or transferred. *Brown v. Chicago, S. F. & C. R. Co.*, 36 Mo. App. 458.—FOLLOWING *Griswold v. Carthage, J. & S. C. R. Co.*, 18 Mo. App. 52.

Certain work was done by plaintiffs' assignors in July and August, 1881, for a railroad company; the notice required by section 2131 of the Code of Iowa of the filing of a claim for a lien was given October 31, 1881; but prior to the giving of the notice

the company had paid in full for the work after its completion in accordance with the contract. Plaintiff brought action to enforce the lien against the company and to obtain judgment against the assignors. *Held*, that the lien could not be enforced against the company, and that, as the evidence was not sufficient to show a valid assignment to plaintiffs, judgment could not be rendered against the contractor. *Nash v. Chicago, M. & St. P. R. Co.*, 12 Am. & Eng. R. Cas. 261, 62 Iowa 49, 17 N. W. Rep. 106.

54. Liability to assignee for failure to take bond from contractor.—Kan. Laws 1872, ch. 136, to protect laborers, mechanics, and others in the construction of railroads, applies not merely when a railroad company is engaged in the construction of its first and main track, but also wherever it is enlarging its road by the addition of side tracks. A railroad company failing to take the bond required by said statute is liable not merely to the laborers personally, but to any persons to whom they may transfer their claims. *Missouri, K. & T. R. Co. v. Brown*, 14 Kan. 557.—DISTINGUISHED IN *Martin v. Michigan & O. R. Co.*, 26 Am. & Eng. R. Cas. 351, 62 Mich. 458.

55. Subrogation.—If a party, at the request of a railway company, takes up certificates of indebtedness issued by it to its laborers for work and to procure board, and to enable boarding-house keepers to obtain groceries and provisions for hands engaged in the construction of the road, with an agreement to settle with him for the same, such party will be entitled to recover of the company the amount of such advances; but he is not entitled to any lien, under the Illinois statute, against the company or its property. *Cairo & V. R. Co. v. Fackney*, 78 Ill. 116.

Where the financial agents of a railroad company advanced money to the company without any special agreement as to the manner of its application, and received as security therefor mortgage bonds, they are not entitled, by reason of the fact that a part of the money advanced was paid out to laborers and supply-men, to be subrogated to the lien of such laborers and supply-men. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 559, 86 Va. 1, 13 Va. L. J. 309, 9 S. E. Rep. 759.

5. Enforcement.

56. Jurisdiction.*—County courts in Texas have jurisdiction to foreclose a laborer's lien upon the "equipments" of a railway in a suit to recover for cross-ties which have been furnished a contractor and used in the construction of the road. "Equipments," as used in the statute creating such lien, mean the rolling stock and other movable property used in operating a railway which is personal property, and the county court has jurisdiction to foreclose liens upon personal property. *St. Louis, A. & T. R. Co. v. Sandak*, 3 *Tex. App. (Civ. Cas.)* 453.

57. Right to sue, generally.—One cannot enforce a lien against a railroad for work and labor on an account assigned to him prior to the filing of a lien. *O'Connor v. Current River R. Co.*, 111 *Mo.* 185, 20 *S. W. Rep.* 16.

Such lien cannot be sustained in favor of the lienor as to work done by him, where such work is not distinguishable in the petition from that for which the account was assigned, and for which no lien could be enforced. *O'Connor v. Current River R. Co.*, 111 *Mo.* 185, 20 *S. W. Rep.* 16.—DISTINGUISHED IN *Williams v. Chicago, S. F. & C. R. Co.*, 112 *Mo.* 463.

58. Parties.—It is not essential that all the companies that may be interested in a railroad should be made parties to a proceeding to enforce a lien for work and labor or materials; but if any are omitted their interest will not be affected. *Morgan v. Chicago & A. R. Co.*, 76 *Mo.* 161.

Where there were intermediate contractors for the construction of a railroad, and the assignee of claims due by the last of such contractors to laborers brought his action against the railroad company and the first contractor, conceding that the plaintiff could in no event recover from any but the railroad company itself, under the statute, yet the addition of the first contractor as a party would not be a fatal misjoinder. *Moore v. Cape Fear & Y. V. R. Co.*, 112 *N. Car.* 236, 17 *S. E. Rep.* 152.

Under the provision of Texas Act of 1879, ch. 12, where a suit is brought against a railroad company to enforce a laborer's lien, other lien holders have a right to intervene

without leave of the court. *Snow v. Texas Trunk R. Co.*, 4 *Woods (U. S.)* 394, 16 *Fed. Rep.* 1.

And if leave to intervene has been refused by the court, and the parties go on and file their petitions asserting their liens, they thereby become parties. *Snow v. Texas Trunk R. Co.*, 4 *Woods (U. S.)* 394, 16 *Fed. Rep.* 1.

59. Pleading.—In an action to enforce a laborer's lien, the complaint should disclose the property, and the nature of the estate held by the defendant, and upon which the lien is claimed. *Dano v. Mississippi, O. & R. R. Co.*, 27 *Ark.* 564.

A declaration on the common counts in assumpsit, with mere allusions to the statute and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred. *Chicago & N. E. R. Co. v. Sturgis*, 44 *Mich.* 538, 7 *N. W. Rep.* 213.

Both the lien filed for work done in the construction of the road, and the petition in an action for the enforcement of it, should state the facts showing that the work was performed by the lienor under contract either with the railway company or its agent, or with one of the contractors or subcontractors therefor; and these statements should substantially agree. *But held*, that it was not a variance to state in the lien that the lienor contracted with the railway company, and in the petition that he contracted with a corporation acting in the premises as the agent or trustee of the railway company. *Mackler v. Mississippi River & B. T. R. Co.*, 52 *Mo. App.* 516.

Where, in an action by the assignee of a number of claims due laborers by contractors, the complaint and exhibits failed to show affirmatively that each of the laborers not only claimed a specific sum, but had substantially complied with the statute in respect to notice, etc., previous to the assignment of his account, a demurrer to the complaint will be sustained. *Moore v. Cape Fear & Y. V. R. Co.*, 112 *N. Car.* 236, 17 *S. E. Rep.* 152.

The laborer's lien being a creature of the statute, all allegations as to agreements made between a railway company and its contractors and subcontractors that the laborer's lien should exist in favor of the latter are irrelevant, and especially where it is not alleged that the laborers were parties to

* Jurisdiction of equity to enforce statutory liens against railroads, see 57 *AM. & ENG. R. CAS.* 425, *abstr.*

such an agreement. *Texas & St. L. R. Co. v. McCaughey*, 62 Tex. 271.

60. Evidence.—To enforce a lien for work done for a subcontractor proof must be made that the labor was performed at the instance of the subcontractor, and "that the wages are due." Such an account is not admissible in evidence under a sworn statement as to its correctness as an "open account," within the meaning of art. 2266, Tex. Rev. St. *Austin & N. W. R. Co. v. Daniels*, 62 Tex. 70.

61. Judgment.—A judgment foreclosing a laborer's lien upon the "equipments" of a railroad need not specify the particular articles upon which it is to operate. It is sufficient to declare the lien foreclosed upon the equipments of the railroad to an extent sufficient to satisfy the judgment. *St. Louis, A. & T. R. Co. v. Sandal*, 3 Tex. App. (Civ. Cas.) 453.

62. Amount recoverable.—Under a bill in equity to enforce a lien for work and labor performed on a railroad under the act, ch. 3132, Laws Fla. 1879, it is error to render a decree for a larger sum than is alleged in the bill to be due, and specially asked for in the prayer for relief. *St. Johns & H. R. Co. v. Bartola*, 28 Fla. 82, 9 So. Rep. 853.—FOLLOWING *Mills v. Heeney*, 35 Ill. 173.

The lien provided by ch. 3132 is for "labor performed," and independent of the statute such lien would not exist, and a court of chancery would have no jurisdiction to adjudicate it. The existence and extent of the lien here provided must depend upon the provisions of the statute, and it is error to award under it a sum for unliquidated damages arising from breach of contract. *St. Johns & H. R. Co. v. Bartola*, 28 Fla. 82, 9 So. Rep. 853.

63. Attorneys' fees.—An order of court directed payment of "wages of employes" out of a fund in court arising from the sale of a railroad. *Held*, not to include attorneys' fees. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. Rep. 405.—DISAPPROVING *Gurney v. Atlantic & G. W. R. Co.*, 58 N. Y. 358.—REVIEWED IN *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.

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LIFE TABLES.

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I. GENERAL PRINCIPLES.

1. Constitutionality of statutes of limitation.—Ala. Act of Feb. 3, 1877, § 2, providing that claims against railroads for killing live stock shall be barred, unless made within six months of the time of the killing, is valid, notwithstanding the fact that section 1 has been declared unconstitutional, as attempting to impose absolute liability upon such companies for killing stock. *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193.—FOLLOWING *Zeigler v. South & N. Ala. R. Co.*, 58 Ala. 594.—FOLLOWED IN *Smith v. Louisville & N. R. Co.*, 21 Am. & Eng. R. Cas. 157, 75 Ala. 449. QUOTED IN *Alabama G. S. R. Co. v. Killian*, 69 Ala. 277.

The constitutional provision forbidding the taking of private property for public use without just compensation does not exact that the compensation shall precede the taking; it suffices that the law authorizing the taking provides for the compensation and designates an impartial tribunal for its assessment; and it is competent to restrict the property owner to a given time for the enforcement of his rights. *Simms v. Memphis, C. & L. R. Co.*, 12 Heisk. (Tenn.) 621.—DISTINGUISHING *White v. Nashville & N. W. R. Co.*, 7 Heisk. 518.

2. — of provisions in charters limiting time to sue.—The clause in the charter of a railroad company fixing the limitation of actions for killing stock on its track at six months is not in violation of any constitutional provision. *Lucas v. Kentucky C. R. Co.*, (Ky.) 45 Am. & Eng. R. Cas. 520, 14 S. W. Rep. 965. *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.) 348.

3. Validity of conventional limitations.—Parties may expressly stipulate that an action on a shipping contract shall be brought within a certain period of time less than is provided in the local statutes of limitation, or the rights of the delinquent party will be extinguished; and such stipulation, if free from fraud, will bind the parties and be regarded as valid in courts of law. *Nonce v. Richmond & D. R. Co.*, 33 Fed. Rep. 429.

The only limitation on the validity of such a contract, when made on sufficient consideration, is that it be reasonable as to the period of time stipulated. *Gulf, C. & S. F. R. Co. v. Trawick*, 30 Am. & Eng. R. Cas. 49, 68 Tex. 314, 4 S. W. Rep. 567.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89.

4. Operation of the statutes, generally.—Statutes limiting the time in which personal actions shall be brought take away the remedy only, but do not extinguish the claim. *Morgan v. Camden & A. R. Co.*, 18 Phila. (Pa.) 384.

Where neither the general statutes of a state nor any special act contain any special limitation in regard to claims upon companies for the taking of land, the general statute of limitations applies to all actions of trespass brought against such companies. *Houston & T. C. R. Co. v. Chaffin*, 14 Am. & Eng. R. Cas. 437, 60 Tex. 553.

Where a contract sued on is a contract

with continuing covenants, and a suit is to enforce the covenants, or to dissolve the contract for breach thereof, the suit is not barred until after the expiration of the contract. *So held*, where a railroad was sued for failing to comply with a contract to maintain certain bridges, crossings, and drainage. *Roman Catholic Church v. Texas & P. R. Co.*, 41 Fed. Rep. 564.

The limitation of sixty days in which claims against railroads must be presented or sued on, under Ala. Code, § 1401, does not apply to injuries to a person. As to such claims, the limitation is provided by section 2905, and is one year. *Nicholson v. Mobile & M. R. Co.*, 49 Ala. 205.

The provision of N. Y. Code Civ. Pro. § 414, exempting from the operation of ch. 4, limiting the time for the commencement of actions, cases where a person was entitled to commence an action when the Code took effect, and declaring that "the provision of law applicable thereto immediately before this act takes effect continues to be applicable, notwithstanding the repeal thereof," does not refer simply to statutory provisions, but includes a rule or doctrine established by judicial decision. *Clark v. Lake Shore & M. S. R. Co.*, 94 N. Y. 217; *affirming* 26 Hun 475, *mem.*

5. What cases are within their operation.—The statute of limitations runs against a claim of a municipal corporation against a street-car company for paving. *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 10 Sup. Ct. Rep. 19.

The statute may be pleaded in bar of the special statutory remedy provided for the recovery of damages caused in the construction of a railroad. *Forster v. Cumberland Valley R. Co.*, 23 Pa. St. 371.—FOLLOWED IN *Houston & T. C. R. Co. v. Chaffin*, 14 Am. & Eng. R. Cas. 437, 60 Tex. 553. OVERRULED IN *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. St. 369.

6. What are not.—As respects public rights, municipal corporations are not within ordinary limitation statutes. *District of Columbia v. Washington & G. R. Co.*, 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.—REVIEWING *Baltimore & O. R. Co. v. District of Columbia*, 3 MacArth. (D. C.) 122.

Where a company is required by statute to keep its tracks laid on streets paved at its own expense, but fails to do so, and the district authorities lay the pavement, and

sue the company for the cost, the statute of limitations does not apply. *District of Columbia v. Washington & G. R. Co.*, 4 Am. & Eng. R. Cas. 161, 1 Mackey (D. C.) 361.

Where property owners institute proceedings to assess their damages caused by laying a railroad in the streets, the proceeding is not an action of trespass, so that the statute relating to the limitation of actions therefor would apply. *Dixon v. Baltimore & P. R. Co.*, 3 Am. & Eng. R. Cas. 201, 1 Mackey (D. C.) 78.—APPROVING *Baltimore & P. R. Co. v. Sixth Presbyterian Church*, 91 U. S. 127.

A company can acquire no prescriptive right to let the waste water from its tank onto a public street, as against the city, or one in its legitimate use as a street. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.

The grant of a joint and mutual use of a highway to a railroad with the public cannot be set up under the Ill. Limitation Law of 1839 as a bar, as the use by the corporation is not adverse. *Pittsburg, Ft. W. & C. R. Co. v. Reich*, 101 Ill. 157.—QUOTED IN *St. Louis, A. & T. H. R. Co. v. Belleville*, 20 Ill. App. 580.

A statute of limitation acts on the remedy merely, not on the debt, and therefore cannot be said to impair the obligation of a contract; neither does it raise a presumption of payment, and is ineffectual where a party seeks affirmative relief under allegations of payment. *Johnson v. Albany & S. R. Co.*, 54 N. Y. 416, 6 Am. Ry. Rep. 331; *affirming* 40 How. Pr. 193, 5 Lans. 222.

The Pa. Statute of March 27, 1713, applies only to actions at common law, and is not a bar to a statutory proceeding to recover damages for land taken by a railroad. *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. St. 369.—OVERRULING *Forster v. Cumberland Valley R. Co.*, 23 Pa. St. 371.

Certificates of stock under the seal of the company, containing the stipulation to pay interest, were issued to a county. In an action by the county to recover interest paid by it—*held*, that the statute of limitations did not operate. *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

The 16 Vict. c. 99, § 10, limiting the time within which suits can be brought against the Great Western R. Co., applies only to actions for damages occasioned in the exercise of the powers given to the company for enabling them to construct and maintain their road, not to claims for negli-

gence in conveying passengers. *Roberts v. Great Western R. Co.*, 13 U. C. Q. B. 615.—QUOTED IN *McArthur v. Northern & P. J. R. Co.*, 17 Ont. App. 86. REVIEWED IN *Anderson v. Canadian Pac. R. Co.*, 17 Ont. 747.

7. How far the government is bound.—The statute of limitations does not run against the United States. *United States v. Curtner*, 14 Sawy. (U. S.) 535.

The statute of limitations of a state does not run against the right of action of the United States upon negotiable bonds and coupons of a railroad corporation, purchased by the United States before maturity as an investment of money received from the sale of lands ceded by an Indian tribe, and held in trust for the tribe, under a treaty. *United States v. Nashville, C. & St. L. R. Co.*, 26 Am. & Eng. R. Cas. 110, 118 U. S. 120, 6 Sup. Ct. Rep. 1006.

Where the United States file a bill to cancel patents which had been erroneously issued to a railroad company, the statute of limitations is not a bar, neither is the laches of the government officers. *United States v. Southern Pac. R. Co.*, 39 Fed. Rep. 132.

So long as title to land remains in the United States the statute of limitations cannot be pleaded by one who has been in possession for the statutory time to perfect a claim of title; but the statute may be pleaded against a grantee of the United States. *Chicago, R. I. & P. R. Co. v. Allfree*, 64 Iowa 500, 20 N. W. Rep. 779.

Ordinarily a statute of limitation does not apply to a state, unless it is expressly named; nor can possession be held adverse to the state; but by express statute in Alabama twenty years is the limitation of an action against the state. *Swann v. Gaston*, 87 Ala. 569, 6 So. Rep. 386.

Where a city seeks to recover of a railroad company for the breach of a contract arising upon the acceptance of a grant under a city ordinance, the statute of limitations may be interposed as a bar, the same as in cases upon ordinary contracts between natural persons. *Muscantine v. Chicago, R. I. & P. R. Co.*, 79 Iowa 645, 44 N. W. Rep. 909.

The statute of limitations runs against a county suing a railroad company for illegally crossing a highway. The maxim, *nullum tempus occurrit regi*, has no application. *Houston & T. C. R. Co. v. Travis County*, 62 Tex. 16.—REVIEWING *Galveston v. Menard*, 23 Tex. 408.

8. When the lex fori governs.—Where an employé is injured in one state and sues in another, the action will be governed by the statute of limitations in force where the suit is brought, though it might be barred by the law of the state where the injury occurred. *Nonce v. Richmond & D. R. Co.*, 33 Fed. Rep. 429. *O'Shields v. Georgia Pac. R. Co.*, 83 Ga. 621, 10 S. E. Rep. 268.

Where an employé brings a common law action in one of the states against his company for injuries received in Canada, the statute of limitations where the suit is brought will govern, and not the one in force where the injury was received. *Johnston v. Canadian Pac. R. Co.*, 50 Fed. Rep. 886.

Plaintiff was injured in the state of Kansas, but immediately went to the state of Missouri, and lived there; but did not bring an action until after it would have been barred by the statute of Kansas. *Held*, that, as the action was one given by the common law, it would not be barred by the Kansas statute, unless both parties resided there for the full period of limitation after the injury. *Finnell v. Southern Kan. R. Co.*, 33 Fed. Rep. 427.—DISAPPROVING *Baker v. Stonebraker*, 36 Mo. 349.

A resident of Missouri was injured on a railroad in Tennessee, and sued for the injury in New York. *Held*, that the action was barred unless plaintiff had become a resident of New York within the one year limited by the laws of Tennessee for bringing the action, though the limit in New York was three years. *Penfield v. Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351, 10 Sup. Ct. Rep. 566.

9. How far equity will follow the statute.—The statute of limitations is a bar in equity as well as at law, and the silence of a subscriber to stock after six years have expired, and his standing by while large expenditures were being made, will not preclude him from pleading the statute. *Pittsburgh & C. R. Co. v. Graham*, 2 Grant's Cas. (Pa.) 259.

Where shippers of live stock file a bill charging fraud and concealment in monthly statements of freight charges and the settlements made thereunder, the federal court will follow the state statute of limitations, except that it will apply the equity rule that time will not run in favor of the defendant until the fraud was discovered,

or until, with reasonable diligence, it might have been discovered. *Kirby v. Lake Shore & M. S. R. Co.*, 120 U. S. 130, 7 Sup. Ct. Rep. 430.

After a county had subscribed to the stock of a railroad a compromise was effected with the company whereby the bonds of the county issued in payment of the stock were returned and the subscription canceled. Afterwards the company became insolvent, and a judgment creditor filed a bill to set aside the compromise as fraudulent, and to subject the amount of the subscription to payment of his judgment. *Held*, that equity would apply the statute of limitations of six years as in a suit at law, it being nine years after the compromise before the bill was filed. *New Albany v. Burke*, 11 Wall. (U. S.) 96.

10. Who may claim the protection of the statute, generally.—A corporation may plead prescription. *New Orleans & C. R. Co. v. Harper*, 11 La. Ann. 212.

The statute runs in favor of a railroad company which has entered on land for a right of way. *Welsh v. Chicago, B. & K. C. R. Co.*, 19 Mo. App. 127.

Where a township has subscribed to the stock of a railroad, and has issued its bonds in payment, and afterwards a dispute is settled by a compromise, and funding bonds are issued, under such circumstances as to estop the township, the taxpayers of a city therein are estopped also, and cannot plead the statute of limitation. *Brown v. Milliken*, 42 Kan. 769, 29 Am. & Eng. Corp. Cas. 151, 23 Pac. Rep. 167.—FOLLOWED IN *Oswego Tp. v. Anderson*, 44 Kan. 214.

While limitation will run in favor of a trustee after his repudiation of his trust, still such repudiation must be made known to the beneficiary or the beneficiary be charged with notice. A fraudulent concealment of an act subversive of his trust would prevent the running of limitations in his favor. *Becker v. Gulf City St. R. & R. E. Co.*, 80 Tex. 475, 15 S. W. Rep. 1094.

11. What will take a case out of the statute, or arrest its running, generally.—The promise of officers of a company to pay for land used for a right of way, within the period of limitation, is not an admission of title in the promisee, so as to prevent the running of the limitation. *James v. Indianapolis & St. L. R. Co.*, 91 Ill. 554.

Where a passenger fails to sue for a personal injury until the action is *prima facie* barred, averments that the defendant placed him in charge of a physician who misled him by falsely stating that the injuries did not result from the accident, but from causes for which defendant was not liable, and that plaintiff did not learn the facts until after the statute had run, are not sufficient to bring the case within the exception to the Missouri statute, providing that it shall not apply where the defendant "by any improper act prevents the commencement of an action." *Chamberlain v. Chicago, B. & Q. R. Co.*, 27 Fed. Rep. 181.

In ejectment against a company for real estate occupied by it as a part of its right of way, the company claimed title to the property by reason of the statute of limitations. Within the ten years last preceding the commencement of the action the railroad company sought to condemn the property to its use under the provisions of the statute for the condemnation of real estate. These proceedings were instituted against the real owner by name, and the condemnation money deposited with the county judge for him. *Held*, that these proceedings amounted to a recognition of the ownership of the person against whom they were instituted, and would arrest the running of the statute, even though the proceedings were void for want of jurisdiction by reason of a failure to comply with the law in the publication of the notice. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371, 32 N. W. Rep. 162.

12. What is the commencement of an action such as will stop the running of the statute.—An action is commenced, and the statute of limitations ceases to run, upon the filing of the petition and the issuing of a summons, although the summons be made returnable to a term of court commencing within ten days from its date, the provision of the code fixing the term to which a summons shall be made returnable being directory merely. *Louisville & N. R. Co. v. Smith*, 87 Ky. 501, 10 Ky. L. Rep. 514, 9 S. W. Rep. 493.

Where one company conveys its property to another, and the latter takes possession, after assuming the debts of the other, and a creditor takes judgment against the grantor, and has execution returned *nulla bona*, and promptly institutes proceedings in equity against both companies, but after

the statute would be a bar to the original claim, the claim is neither barred by laches, nor the statute of limitations. *Fogg v. St. Louis, H. & K. R. Co.*, 5 *McCrary* (U. S.) 449, 17 *Fed. Rep.* 871.—EXPLAINED IN *Glenn v. Dorsheimer*, 23 *Fed. Rep.* 695.

The limitation of an action against a company to recover damages for personal injuries is one year; and in determining when the action was commenced the date or form of the summons is not conclusive, it being amendable in these particulars on proper evidence. *Alabama G. S. R. Co. v. Hawk*, 18 *Am. & Eng. R. Cas.* 194, 72 *Ala.* 112, 47 *Am. Rep.* 403.—FOLLOWING *Mobile & M. R. Co. v. Crenshaw*, 65 *Ala.* 566.

The beginning of an action by a contractor against a company is not the beginning of an action against a county, or the county commissioners, so as to stop the running of the statute on the liability of the county to subscriptions made in aid of the road, which had been assigned to the contractor. *Smith v. Bourbon County*, 42 *Kan.* 264, 21 *Pac. Rep.* 1109.

The fact that proceedings were instituted to assess damages to land, and commissioners appointed who never reported, and no further proceedings were ever taken, would not prevent the statute from running against a subsequent action, unless it was shown that the former action had been continued. *Waring v. Cheraw & D. R. Co.*, 16 *So. Car.* 416.

The bringing of a suit by the trustees of the bondholders to foreclose the mortgage prevents the running of the statute as to all the bondholders; and whatever is done by the trustees, or by one or more of the bondholders, in behalf of all, for the enforcement of the common security, enures to the benefit of all. *In re Chickering*, 26 *Am. & Eng. R. Cas.* 646, 56 *Vt.* 82.

Under *Tex. Rev. St. art.* 3202, subd. 1, providing that actions for personal injuries shall be commenced in one year, an action will be barred where the petition is filed within a year, but no citation issued until nearly two years thereafter, because no bond for costs was given, and no affidavit made of inability to secure such costs. *Ricker v. Shoemaker*, 81 *Tex.* 22, 16 *S. W. Rep.* 645.

In an action commenced before a justice of the peace for \$125, the value of a horse killed by a train, the plaintiff recovered judgment against the defendant, both before the justice and in the circuit court, to which

the cause was taken by appeal. On appeal to the supreme court the judgment below was vacated, and the action dismissed, on the ground that the justice had no jurisdiction of an action for damages to personal property exceeding in amount the sum of \$100. Within a year after the judgment was vacated, but more than a year after the injury complained of, the plaintiff brought a new action for the same cause in the circuit court, and the defendant pleaded the statute of limitations of one year as a bar to the action, under section 5540, *Mansf. Digest*. *Held*, that the vacation of the judgment and dismissal of the action in the supreme court brought the plaintiff within the saving of section 4497, *Mansf. Dig.* *Little Rock, M. R. & T. R. Co. v. Manees*, 49 *Ark.* 248, 4 *S. W. Rep.* 778.

At the trial of an action for personal injuries plaintiff was permitted to withdraw a juror on condition that he would pay the costs within ten days, which he failed to do, and the action was subsequently dismissed. *Held*, that the case was not within *N. Y. Code Civ. Pro.* § 405, extending the time for bringing an action one year from the termination of a prior action, under certain circumstances; and the fact that plaintiff was unable financially to pay the costs did not alter the case. *Hayward v. Manhattan R. Co.*, 17 *Civ. Pro. (N. Y.)* 155.

A wife sued a company for damages to growing crops caused by flooding her lands, and joined her husband *pro forma*; afterwards an amendment was allowed by which he was made a real party as to damages to certain community property. The company insisted that joining him *pro forma* did not stop the statute of limitations from running as to the items in which he had an interest, and that the statute had fully run before he was made a real party. *Held*, that in contemplation of law the husband was a real party from the institution of the suit, and that the statute did not run thereafter. *Gulf, C. & S. F. R. Co. v. Jones*, 3 *Tex. App. (Civ. Cas.)* 39.

13. Effect of amendments of pleadings after statutory period has run.

—Where amended counts to the declaration are filed in a suit against a railroad, and the amended counts set up a new cause of action, the statute of limitation may be pleaded to the amended counts where the full time had run before leave was given to

amend. *Illinois C. R. Co. v. Cobb*, 64 Ill. 128.

So where an original complaint charges that plaintiff was forcibly ejected from a car, an amendment showing that he was induced to leave the car by mistake before he reached his destination, by the porter calling the wrong station, introduces a new cause of action, against which the statute may be pleaded. *Alabama G. S. R. Co. v. Smith*, 81 Ala. 229, 1 So. Rep. 723.

But where a complaint charges that plaintiff was wrongfully expelled from a car, an amendment charging that the expulsion was with unnecessary force does not state a new cause of action. *Chicago, St. L. & P. R. Co. v. Bills*, 37 Am. & Eng. R. Cas. 121, 118 Ind. 221, 20 N. E. Rep. 775.

Where no cause of action is stated in the original declaration, but is shown for the first time in an amendment thereof, a plea of the statute relates to the time of the filing of the amendment. *Lewis v. Washington & G. R. Co.*, 6 Mackey (D. C.) 556.—FOLLOWING *Johnston v. District of Columbia*, 1 Mackey 427.

Where, however, the original declaration states a cause of action, but does it imperfectly, and thereafter an amendment is filed, a plea of the statute will relate to the time of the filing of the original declaration. *Lewis v. Washington & G. R. Co.*, 6 Mackey (D. C.) 556.

When a declaration has been treated as a nullity by both parties, and been withdrawn, a subsequent declaration is not an amendment, but an original. Therefore the rule that the statute runs up to the date of an amendment (in certain kinds of actions), and not of the writ, is not applicable. *Reiff v. Pennsylvania R. Co.*, 18 Phila. (Pa.) 260.—REVIEWING *Smith v. Bellows*, 77 Pa. St. 441.

If an action upon the case, against a carrier for negligence, under his contract, be brought within four years, and, after four years have elapsed, the plaintiff amend his writ by adding a count in trover, and a count for trespass *vi et armis*: query, whether the new counts are barred? *Southern Exp. Co. v. Palmer*, 48 Ga. 85.

When the cause of action is an injury resulting from the alleged negligence of the defendant, the time, place, and circumstances of which are stated in the original petition, which is filed before limitation has barred the action, limitation cannot be pleaded to

an amendment which states more fully than the original petition the results of the injury, and which is filed at a time when the statute would bar a recovery on a suit then brought. *Texas Pac. R. Co. v. Davidson*, 68 Tex. 370, 4 S. W. Rep. 636.—QUOTING *International & G. N. R. Co. v. Irvine*, 64 Tex. 533.

A complaint in an action for flooding land alleged that it was due to defendant raising an embankment across a stream. By a subsequent amendment it was alleged that the embankment diverted the stream from its course, and that the overflow was caused by an imperfect bridge at another place. *Held*, that the amendment presented a new issue, and it would not relate back to the time of bringing the suit so as to prevent the running of the statute. *Buntin v. Chicago, R. I. & P. R. Co.*, 41 Fed. Rep. 744.

An original complaint charged that plaintiff's son was injured by defendant, whereby he was compelled to pay a certain sum for surgical and medical attention; but an amendment alleged that plaintiff had paid a part of the amount, and had incurred a liability for the balance. *Held*, that the statute of limitations, as to the amount contracted but not paid, would run to the time of the amendment. *Meeks v. Southern Pac. R. Co.*, 61 Cal. 149.

In 1874 the plaintiff sued a company to recover for a personal injury on the ground of negligence in the engineer in backing his locomotive and needlessly blowing the whistle, and thereby frightening plaintiff's horse and making it unmanageable. In 1877 the declaration was amended, adding as a ground of negligence the improper signaling of the flagman for the plaintiff to cross the tracks. It was contended that the last-named cause of action was within the statute of limitations of two years. The evidence tended to establish both grounds of negligence. *Held*, that in order to raise the question whether the amendment introduced a new cause of action, there being only one injury claimed, the defendant should have pleaded the statute separately to that part of the declaration having reference to the improper signaling by the flagman. *Pennsylvania Co. v. Sloan*, 35 Am. & Eng. R. Cas. 440, 125 Ill. 72, 17 N. E. Rep. 37; affirming 24 Ill. App. 48.

In an action upon a penal statute more than a year after the cause of action accrued, the plaintiff, on a demurrer to his

declaration being sustained, asked and obtained leave of the court to amend his declaration, against the objections of the defendant, and the declaration was amended in court, and thereupon the defendant tendered to the court a plea, in substance, that the plaintiff his action ought not to have and maintain, because the cause of action did not accrue within one year before he filed his amended declaration. *Held*, that under the law in force, March 9, 1869, the statute of limitations did not run in such case in favor of the defendant up to the time of the filing of the amended declaration, but only until the commencement of the suit; that is, the issuing of the original writ. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

14. How the defense may be interposed or avoided.—The statute of limitations may be set up by special exception, and where some of the items of an account against a railroad for overcharges are barred, and the exception is to the whole amount, the exception should be sustained as to the barred items and overruled as to the others. *International & G. N. R. Co. v. Donaldson*, 2 Tex. App. (Civ. Cas.) 183.

An allegation in a replication that the defendants were and are a corporation existing under the laws of another state, and that they were not and are not a corporation existing under any law of New York, is not a sufficient answer to a plea of the statute, because it fails to aver that the defendants were a foreign corporation before and at the time the cause of action accrued, and does not allege that they had never been a corporation under the laws of New York. *Blossburg & C. R. Co. v. Tioga R. Co.*, 5 Blatchf. (U. S.) 387.

15. Repeal or suspension of limitation laws.—A provision in a charter exempting a company from suit after the lapse of a year from the accrual of a cause of action is not repealed by a revision of the laws of the state in which the statute of limitations is re-enacted, by which it is provided that actions shall be commenced within six years, though the act adopting the revision repeals all acts or parts of acts inconsistent therewith. *Vail v. Easton & A. R. Co.*, 44 N. J. L. 237.

The Ky. Act of March 17, 1871, entitled "An act to further protect the owners of stock living along the line of railways," does not take from or suspend the right of

the owner of the stock injured by the railway company to institute his action for damages immediately after the injury is done, nor does it either expressly or by implication repeal the former statutes on the subject, or suspend or affect the limitation of such actions. If the owner pursues the mode provided by this statute to increase his recovery, he by his own act diminishes the time within which his action must be brought, and must abide the legal consequence. *Mortimer v. Louisville & N. R. Co.*, 10 Bush (Ky.) 485.

16. Statutory changes in periods of limitation.—It is within the constitutional power of the legislature to require, as to municipal bonds already issued, that suits for their enforcement shall be barred unless brought within a less period than that prescribed when they were made. The exertion of this power is, therefore, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law before the bar takes effect. *Koshkonong v. Burton*, 7 Am. & Eng. R. Cas. 203, 104 U. S. 668.

II. WHEN THE STATUTE BEGINS TO RUN.

17. In general.*—The statute of limitations does not begin to run in any case until there is a complete and present cause of action. The Ark. Act of March 25, 1871, limiting actions to avoid tax-sales to two years begins to run from the expiration of the time allowed for redemption, and not from the date of sale. *Cairo & F. R. Co. v. Parks*, 32 Ark. 131.

The statute begins to run, not necessarily from the doing of the act, but from the time substantial damages were thereby caused. *Mangold v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 52. *Holard v. Texas & P. R. Co.*, 36 La. Ann. 450. *Heath v. Texas & P. R. Co.*, 37 La. Ann. 728.

The right of action in a county that had subscribed for railway stock, and partially complied with such subscription, to recover bonds of the company, or their value to the amount of the certificates issued, accrued at the time of adjudication that counties had not power so to subscribe, and the statute of limitations would operate to bar the action at the end of five years thereafter.

* When cause of action accrues, see 39 AM. & ENG. R. CAS. 63, *abstr.*

Wapello County v. Burlington & M. R. Co., 44 Iowa 585.

18. Where demand or other act is a prerequisite to the right to sue.—

Where preliminary action is essential to the bringing of an action upon a claim, such as is required of the township trustee in Kan. Laws of 1876, ch. 105, and such precedent action rests with the claimant, he cannot prevent the operation of the statute by long and unnecessary delay in taking such action; but the statute will begin to run in a reasonable time after he could by his own act have perfected his right of action; and such reasonable time will not in any event extend beyond the statutory period fixed for the bringing of such an action. *Atchison, T. & S. F. R. Co. v. Burlingame Tp.*, 36 Kan. 628, 14 Pac. Rep. 271.

Where a county subscribes to railroad stock to be paid when the road is completed, a demand of the bonds when the road is completed, and a refusal to deliver, gives the company a cause of action, and a statute of limitations begins to run from that date. *Smith v. Bourbon County Com'rs*, 43 Kan. 619, 29 Am. & Eng. Corp. Cas. 180, 23 Pac. Rep. 642.—QUOTING *State Bank v. Magness*, 11 Ark. 343. REVIEWING *Tennent v. Battey*, 18 Kan. 324.

A demand for compensation for land taken by a railroad company for a roadbed, and on which the railroad has been constructed and put in operation, otherwise than by expropriation proceedings, is not prescribed in two years, under La. Rev. St. §§ 698, 1497, Rev. Civ. Code, art. 2630, and La. Act 125 of 1880, p. 169, § 5. *Mitchell v. New Orleans & N. E. R. Co.*, 41 La. Ann. 363, 6 So. Rep. 522.—DISTINGUISHING *Jefferson & L. P. R. Co. v. New Orleans*, 31 La. Ann. 479.

Dividends declared on stock in a corporation are payable on demand; and until demand and refusal prescription does not begin to run against the person entitled. *Armant v. New Orleans & C. R. Co.*, 41 La. Ann. 1020, 7 So. Rep. 35.

Where the right of action depends upon some act of plaintiff, such as the making of a demand, he cannot, by failing to do such act, prevent the statute of limitations from running. And in this case, where plaintiff seeks to recover of the defendant for the appropriation of land for right of way, and defendant sets up as an equitable defense a written agreement of plaintiff to convey the

land upon demand after the location of its road, and defendant neglected for more than ten years after the location of its road to demand a deed—*held*, that, in the absence of special circumstances excusing the delay, the cause of action pleaded as an equitable defense was fully barred, whether it be regarded as a cause of action based on a written contract, or an action brought for the recovery of real property. *Ball v. Keokuk & N. W. R. Co.*, 20 Am. & Eng. R. Cas. 375, 62 Iowa 751, 16 N. W. Rep. 592.—DISTINGUISHING *Barlow v. Chicago, R. I. & P. R. Co.*, 29 Iowa 276; *Noll v. Dubuque, B. & M. R. Co.*, 32 Iowa 66.

19. Actions upon coupons.—The statute of limitations begins to run against interest coupons, detached from municipal bonds, from the date of their maturity, independent of the time it will bar an action on the bonds themselves. *Clark v. Iowa City*, 20 Wall. (U. S.) 583.—DISTINGUISHED IN *Burton v. Koshkonong*, 4 Fed. Rep. 373. FOLLOWED IN *Walnut v. Wade*, 103 U. S. 683.—*Koshkonong v. Burton*, 7 Am. & Eng. R. Cas. 203, 104 U. S. 668.

20. Actions on subscriptions to stock.—Where stock is to be paid for in instalments, a right of action accrues each time an instalment falls due and a call is made, and the statute of limitations thereon begins to run from that time. *Western R. Co. v. Avery*, 64 N. Car. 491.

Where no call is made for more than six years from the date of subscription, the law will presume an abandonment of the enterprise, and, from analogy to the statute, bar the recovery. *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22.—FOLLOWED IN *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. St. 77, 2 Grant's Cas. (Pa.) 259.

When the liability of a stockholder in an incorporated company, on a mortgage given to secure his subscription to the capital stock, depends on a future contingency, prescription will not begin to run until the contingency has happened which was to make the payment of the subscription demandable. *Clinton & P. H. R. Co. v. Eason*, 14 La. Ann. 828.—DISTINGUISHING *Brown v. Union Ins. Co.*, 3 La. Ann. 181; *Stark v. Burke*, 9 La. Ann. 342; *New Orleans, J. & G. N. R. Co. v. Estlin*, 12 La. Ann. 184.

A subscriber to railroad stock had paid up in full, but the last instalment paid had been to an agent of the company, who had died without transmitting it, and

subsequently the company declared the stock forfeited for non-payment of the amount paid to the agent, whereupon the subscriber commenced mandamus proceedings to compel the company to issue him a certificate of stock. *Held*, that the statute did not begin to run until the stock was declared forfeited. *Rice v. Pacific R. Co.*, 55 Mo. 146.

21. Actions against stockholders by creditors.*—In a suit to collect a judgment against an insolvent corporation from a stockholder thereof, the statute does not commence to run against the judgment creditor, and in favor of the stockholder, until the entry of the judgment. *Powell v. Oregonian R. Co.*, 13 Sawy. (U. S.) 535, 36 Fed. Rep. 726; see 38 Fed. Rep. 187.

Subscribers cannot object when the proper officers fail to make calls, and creditors of the corporation are forced to a court of equity, that the calls should have been made sooner. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. Rep. 739.

22. Actions for real property.—Where a company mortgages land granted it to a state, the title to remain in the state until the road is completed, the ordinary statute of ten-years' limitation will not begin to run in favor of an adverse occupant until the state conveys title back to the company. *Swann v. Gaston*, 87 Ala. 569, 6 So. Rep. 386. *Ware v. Swann*, 79 Ala. 330.

23. Actions for damages to land by construction of railways.—Upon the construction and putting into operation of a railroad, all damages to contiguous property along the line of the road, present and prospective, from the location and operation of the road, are immediately recoverable and must all be recovered in one action; and if an action is not brought before the lapse of the statutory period, the statute will bar a recovery for any sum. *Chicago & E. I. R. Co. v. McAuley*, 121 Ill. 160, 11 N. E. Rep. 67.—QUOTING *Troy v. Cheshire R. Co.*, 23 N. H. 101; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush (Ky.) 393.—QUOTED IN *Louisville & N. R. Co. v. Orr*, 91 Ky. 109.—*Foryde v. Stone*, 50 Ark. 250, 7 S. W. Rep. 129.

So long as the owner of land over which a company is seeking to obtain the right of

way retains complete possession and control of the same, the statute does not begin to run against his right to recover damages. *Midland R. Co. v. Smith*, 44 Am. & Eng. R. Cas. 222, 125 Ind. 509, 25 N. E. Rep. 153.

A right of action to recover for permanent injuries to land resulting from the negligent construction of a railroad accrues at the time the first injury is sustained. *Van Orsdol v. Burlington, C. R. & N. R. Co.*, 56 Iowa 470, 9 N. W. Rep. 379. *Vanhorn v. Grand Trunk R. Co.*, 9 U. C. C. P. 264.

The period of three years "from the time of taking" land for a railroad, within which, by Mass. Rev. St. ch. 39, § 58, application must be made to county commissioners to estimate the damages for such taking, is to be computed from the filing of the location of the road, as required by section 75 of the same chapter. *Charlestown Branch R. Co. v. Middlesex County Com'rs*, 7 Metc. (Mass.) 78.—REVIEWED IN *Missouri Pac. R. Co. v. Hays*, 14 Am. & Eng. R. Cas. 177, 15 Neb. 224.

Where a company unlawfully diverts a stream of water from its course so as to do damage to an adjoining landowner, and the trespass is continued and is allowed to continue after the company promises to repair the damage done and to stop future damage, the statute does not run against the landowner from the time of the original trespass. *Valley R. Co. v. Franz*, 25 Am. & Eng. R. Cas. 275, 43 Ohio St. 623, 4 N. E. Rep. 88.—LIMITING *Kansas Pac. R. Co. v. Muhlman*, 17 Kan. 224; *Williams v. Pomeroy Coal Co.*, 37 Ohio St. 583.

Where a railway act provides for a six months' limitation of actions against the company, and that in case of a continuation of damages the action must be brought within six months next after committing such damages should have ceased, in case of a continuation of damages the limitation begins to run from the ceasing of the committing the damages, and not from a demand and non-payment. *Kennet & A. Canal Nav. Co. v. Great Western R. Co.*, 7 Q. B. 824, 4 Railw. Cas. 90, 9 Jur. 788, 14 L. J. Q. B. 325.

24. Actions by abutters for construction of railway in street.—A cause of action does not accrue to the owners of abutting property, against a company for damages on account of the build-

* When statute begins to run in actions to enforce stockholders' statutory liability, see notes, 3 AM. ST. REP. 827, 872.

ing of a railroad along a city street until the track is laid down, and until that time the statute of limitations does not begin to run against such action. *Mulholland v. Des Moines, A. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 99, 60 *Iowa* 740, 13 *N. W. Rep.* 726. *Lyles v. Texas & N. O. R. Co.*, 39 *Am. & Eng. R. Cas.* 59, 73 *Tex.* 95, 11 *S. W. Rep.* 782.

A railway company having the right to construct its road along a public street has a reasonable time given it for such construction and the consequent obstruction of the street. An owner of adjacent property has no right of action for such obstruction until after such reasonable time, and limitation does not run against him until the end of such time. *Missouri Pac. R. Co. v. Speed*, 3 *Tex. Civ. App.* 454, 22 *S. W. Rep.* 527.

Where a company unlawfully entered and took possession of a street, and constructed and completed its grade, the cause of action of the abutting owner thereupon accrued, and under *Ind. Rev. St.* 1881, § 292, which limits actions for injuries to real property to six years, the action must be brought within six years from the completion of the grade, or it is barred. *Strickler v. Midland R. Co.*, 125 *Ind.* 412, 25 *N. E. Rep.* 455.

Where a railway is constructed in a street by legislative authority, the cause of action for all damages that will naturally result to abutting property from the prudent operation of the road arises as soon as the cars begin to run, and an action by the owner of abutting property to recover such damages is barred after the lapse of five years from that date. But as to injuries resulting from an improper or careless operation of the road, a cause of action does not accrue until the wrong is done, and limitation runs only from that time. *Louisville & N. R. Co. v. Orr*, 91 *Ky.* 109, 15 *S. W. Rep.* 8. —QUOTING *Chicago & E. I. R. Co. v. McAuley*, 121 *Ill.* 160.

25. Actions for torts, personal injuries, etc.—A cause of action for a personal injury accrues at the time of the injury; and the fact that the injured person lingers for a considerable time before recovering does not extend the time in which an action must be brought. Under the California statute said action must be brought in two years. *Piller v. Southern Pac. R. Co.*, 52 *Cal.* 42.

Subsequent results, such as pain and suf-

fering, naturally following from personal injuries received do not extend the time for bringing an action. *Taylor v. Manhattan R. Co.*, 25 *N. Y. S. R.* 226, 53 *Hun* 305, 6 *N. Y. Supp.* 488.

In Texas, in applying the statute of limitations, whether the day on which the act was done or the event happened is to be included or excluded must depend upon the circumstances and reason of the thing, so that the intention of the parties may be effected. In construing the statute as a statute of repose, in actions for personal injuries, the day upon which the accident occurs should be included, and the statute begins to run from that day. *Texas & P. R. Co. v. Goodson*, 2 *Tex. App. (Civ. Cas.)* 31.

Plaintiff sued for damages to a carriage coming in collision with a post supporting a "sign-board" at a point where a railroad crossed a highway. Held, that the statute of limitations only began to run from the time of the collision, not from the time the post was erected. *Soule v. Grand Trunk R. Co.*, 21 *U. C. C. P.* 308.

26. Action for conversion of goods.—The statute will not run in the absence of knowledge on the part of the owner of the conversion of his goods until a reasonable time elapses for ascertaining the facts. *Houston & T. C. R. Co. v. Adams*, 49 *Tex.* 748.

27. Action for loss of goods.—The statute does not begin to run in favor of a carrier from the delivery of goods, but from the time when a cause of action accrues. So, although goods were shipped more than five years before suit brought, to recover for their loss by fire, but were destroyed within five years before suit, the cause of action is not barred. *Merchants' Despatch Co. v. Topping*, 89 *Ill.* 65.

28. Actions for killing stock.—Under *Iowa St.* 1862, ch. 169, § 6, making railroad corporations liable in double damages for stock killed unless paid within thirty days, a cause of action accrues as of the date of the injury, and may be brought at any time within five years thereafter. *Koons v. Chicago & N. W. R. Co.*, 23 *Iowa* 493.—DISTINGUISHED IN *Herriman v. Burlington, C. R. & N. R. Co.*, 9 *Am. & Eng. R. Cas.* 339, 57 *Iowa* 187. REVIEWED IN *Manwell v. Burlington, C. R. & N. R. Co.*, 45 *Am. & Eng. R. Cas.* 501, 80 *Iowa* 662.

29. Actions for fraud or concealment.*

—An action to recover excessive charges on the ground of unjust discrimination is an action of law, and is not within the provisions of sections 2529, 2530, Iowa Code, which provide that actions brought for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery must be brought within five years from the time when the cause of action accrued, and that in an action for relief on the ground of fraud the cause of action shall be deemed to have accrued only upon discovery of the fraud, although the plaintiff alleges that the discrimination was fraudulently concealed by the defendant. *Carrier v. Chicago, R. I. & P. R. Co.*, 42 Am. & Eng. R. Cas. 349, 79 Iowa 80, 44 N. W. Rep. 203, 6 L. R. A. 799.—FOLLOWED IN *Cook v. Chicago, R. I. & P. R. Co.*, 81 Iowa 551.

Such an action is governed by the rule that where the defendant fraudulently conceals the cause of action the statute of limitation commences to run only from the time of its discovery, the plaintiff's cause of action being based upon the unreasonable charges, and not upon the fraud. *Carrier v. Chicago, R. I. & P. R. Co.*, 42 Am. & Eng. R. Cas. 349, 79 Iowa 80, 44 N. W. Rep. 203, 6 L. R. A. 799.—FOLLOWING *Boomer Tp. v. French*, 40 Iowa 601.—*Cook v. Chicago, R. I. & P. R. Co.*, 45 Am. & Eng. R. Cas. 291, 81 Iowa 551, 46 N. W. Rep. 1080.—FOLLOWING *Carrier v. Chicago, R. I. & P. R. Co.*, 79 Iowa 80.

If the petition in an action against a company for the fraud of its agent properly states the cause of action, and avers that the fraud was not discovered until within four years before the suit was begun, an answer charging that the cause of action did not accrue within four years before suit because the fraud was not committed within said time is insufficient. *Maple v. Cincinnati, H. & D. R. Co.*, 15 Am. & Eng. R. Cas. 94, 40 Ohio St. 313, 48 Am. Rep. 685.

Where one land-grant railroad brings an action to recover certain lands which it is charged the state has fraudulently conveyed to another company, the time for bringing the action cannot be extended by a failure sooner to discover the fraud, as in such cases the proceedings are all of public

record, and it is inexcusable negligence not to take notice of the records. *St. Paul, S. & T. F. R. Co. v. Sage*, 49 Fed. Rep. 315, 4 U. S. App. 160, 1 C. C. A. 256.

But apart from the statute of limitations a delay of fourteen years to assert title during which time the other company has sold the lands to actual settlers, is such laches as to defeat a recovery. *St. Paul, S. & T. F. R. Co. v. Sage*, 49 Fed. Rep. 315, 4 U. S. App. 160, 1 C. C. A. 256.—QUOTING *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. Rep. 1009.

Plaintiff, a shipper, paid a freight rate according to the company's published schedule, supposing that a uniform rate was charged to all, but subsequently discovered that the company charged other shippers a lower rate. *Held*, in an action to recover the excess, that this was not such fraud or concealment on the part of the company as to allow him one year from the discovery of the discrimination in which to bring an action, as provided by Colo. Gen. St. § 2170; but the action must be brought within one year from the time of the shipment. *Goodridge v. Union Pac. R. Co.*, 35 Fed. Rep. 35.

30. Actions for nuisances, obstructions to bridges and waterways.*

—Where a nuisance is of a permanent nature, and its erection and continuance are necessarily an injury, the damage it causes may be fully compensated at once, and the statute runs against an action therefor from the time the nuisance is constructed. *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331.—DISTINGUISHING *St. Louis, I. M. & S. R. Co. v. Morris*, 35 Ark. 622; *Little Rock & Ft. S. R. Co. v. Chapman*, 39 Ark. 463.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Yarbrough*, 56 Ark. 612.

But where, although the structure constituting a nuisance is of a permanent character, its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations does not begin to run until the happening of

*Limitation of action where party is in ignorance of fraud, see note, 12 AM. & ENG. R. CAS. 359.

*When limitation runs against actions for maintaining nuisances, see note, 20 AM. ST. REP. 176.

the injury complained of. *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331.

In an action for damages caused by the erection of an embankment so as to obstruct a natural waterway, a right of action to the person injured accrues at the date of the first substantial injury caused thereby. *Bird v. Hannibal & St. J. R. Co.*, 30 Mo. App. 365.

Where a company destroys a bridge, making it necessary for the county to rebuild it, a right of action against the company for the cost of rebuilding accrues at the time that the bridge is completed. *Perry County v. Newark, S. & S. R. Co.*, 43 Ohio St. 451, 2 N. E. Rep. 854.

31. Actions for flowing lands.—The limitation of three years applies to actions against a railroad company for overflowing one's land by the building of a levee, and commences as soon as the levee is completed. *St. Louis, I. M. & S. R. Co. v. Morris*, 5 Am. & Eng. R. Cas. 48, 35 Ark. 622.—DISTINGUISHED IN *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240.

The statute of limitations does not begin to run against a landowner's right of action for the unlawful flowage of his land until he has been injured. *Culver v. Chicago, R. I. & P. R. Co.*, 38 Mo. App. 130. *Omaha & R. V. R. Co. v. Brown*, 44 Am. & Eng. R. Cas. 475, 29 Neb. 492, 46 N. W. Rep. 39.—FOLLOWING *Omaha & R. V. R. Co. v. Standen*, 22 Neb. 343.—*Miller v. Keokuk & D. M. R. Co.*, 14 Am. & Eng. R. Cas. 293, 63 Iowa 680, 16 N. W. Rep. 567.—DISTINGUISHING *Powers v. Council Bluffs*, 45 Iowa 652.—*Moison v. Great Western R. Co.*, 14 U. C. Q. B. 109. *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. Rep. 331.

Where at the time a railway embankment is erected it is uncertain whether it will cause adjoining land to overflow or not, and growing crops are consequently overflowed by reason of such embankment, the statute begins to run, not from the time the embankment was erected, but from the time the injury occurred. *St. Louis, I. M. & S. R. Co. v. Yarborough*, 52 Am. & Eng. R. Cas. 682, 56 Ark. 612, 20 S. W. Rep. 515.—FOLLOWING *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240.

Where a company constructs a passage through its embankment to allow the escape of surface water, which proves insufficient, a right of action will not be barred in five

years from the discovery of the insufficiency; but where the opening is designed for a cattleway, and is not practicable for a waterway, the injury is permanent, and the damages entire, and the right of action accrues as soon as the embankment is made or discovered, and is barred in five years. *Huisch v. Keokuk & D. M. R. Co.*, 71 Iowa 606, 33 N. W. Rep. 126.—DISTINGUISHING *Drake v. Chicago, R. I. & P. R. Co.*, 63 Iowa 302.

Defendant built its roadbed so as to obstruct the flow of water from an upper proprietor, but abandoned it, and it was cut through, and the water passed off. Afterwards it built another bed obstructing the flow, for which suit was brought. Held, that the statute of limitations commenced to run at the completion of the last and not the first obstruction. *Little Rock & Ft. S. R. Co. v. Chapman*, 17 Am. & Eng. R. Cas. 51, 39 Ark. 463, 43 Am. Rep. 280.—DISTINGUISHED IN *St. Louis, I. M. & S. R. Co. v. Biggs*, 52 Ark. 240.

32. Actions by or against personal representatives.—Where a cause of action accrues to the estate of a decedent instead of to the deceased while living, the statute of limitations will not commence to run until the appointment of an administrator. But if the statute has once begun to run in the lifetime of the party entitled, it is not interrupted by his subsequent death, but continues, and the cause of action survives, not accrues, to the personal representative. *Sherman v. Western Stage Co.*, 24 Iowa 515.—DISTINGUISHING *Blake v. Midland R. Co.*, 18 Q. B. (83 E. C. L.) 110. EXPLAINING *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280.

33. — or trustees.—Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred more than

six years before the action was brought. *Held*, that the cause of action was the refusal by the company, when the forgeries were made known to it, to treat the plaintiffs as owners of the stock, and that, therefore, the statute would not begin to run against the plaintiffs until such refusal. *Barton v. North Staffordshire R. Co.*, *L. R.* 38 *Ch. D.* 458.

The plaintiffs were entitled to treat the transfers as nullities, and the company was ordered to register the plaintiffs as owners of the stock. *Barton v. North Staffordshire R. Co.*, *L. R.* 38 *Ch. D.* 458.

34. Actions against foreign corporations.—The statute does not commence running against a foreign corporation until it has attachable property in the state, although, previous to that time, there may be directors and stockholders of such corporation residing in the state. *Hall v. Vermont & M. R. Co.*, 28 *Vt.* 401.

Under a statute providing that "when the defendant is a foreign corporation, having a managing agent in the state, the service [of summons] may be made upon such agent," the statute of limitations as against a nonresident express company begins to run from the time the company has such agent, and if it has such agent when the cause of action accrues, it will be barred in five years, according to the Nebraska statute. *United States Exp. Co. v. Ware*, 20 *Wall. (U. S.)* 543.—REVIEWED IN *McCabe v. Illinois C. R. Co.*, 4 *McCrary (U. S.)* 492, 13 *Fed. Rep.* 827.

III. WHAT LAPSE OF TIME WILL CREATE A BAR.

35. In general.—Where a company binds itself to grade a certain street in a reasonable time, an action by the city for a breach of the contract is barred in Iowa in ten years after the right of action accrues. *Muscantine v. Chicago, R. I. & P. R. Co.*, 79 *Iowa* 645, 44 *N. W. Rep.* 909.

Where a construction contract is reduced to writing, an action to recover a balance due the contractor is "founded upon a contract in writing," within the meaning of *Tex. Rev. St. art.* 3205, and is barred in four years. *Galveston, H. & S. A. R. Co. v. Johnson*, 74 *Tex.* 256, 11 *S. W. Rep.* 1113.

In Louisiana a claim for damages, *ex delicto*, is prescribed by one year. *Harris v. New Orleans, O. & G. W. R. Co.*, 16 *La. Ann.* 140.

A street-car company accepted its charter with the condition therein that it should purchase the property of an omnibus line, at a price to be assessed by disinterested persons. *Held*, that the valuation thus ascertained was not an award, but an appraisal, and within the *Pa. Act* of March 27, 1713, limiting the bringing of "all actions of debt grounded upon any lending or contract without specialty" to six years. *Green & C. St. Pass. R. Co. v. Moore*, 64 *Pa. St.* 79.

A., the president of a railroad company, died April 14, 1874. The company, as a creditor, brought assumpsit against his administrator December 20, 1875, and recovered judgment January 8, 1883. On January 10, 1883, the company issued a *scire facias* against A.'s heirs on said judgment. The heirs contended that because the judgment against the administrator was not obtained until seven years after the suit was brought it was not duly prosecuted within the meaning of the act of February 24, 1834, and that the question of due prosecution must be left to the jury. The court, however, directed the jury that the suit had been duly prosecuted under the act, and a verdict was rendered in favor of the company, upon which judgment against the heirs was entered March 28, 1884. *Held*, that the judgment was binding upon the heirs. *Phillips v. Allegheny Valley R. Co.*, 107 *Pa. St.* 472.

In an action for purchase price of certain property it appeared that defendant by resolution of its board of directors accepted a conveyance of such property from plaintiff's intestate; that the acceptance was entered on the corporate minutes and signed by president and secretary. *Held*, that such minutes constituted a contract in writing, and that the action could be brought thereon within four years under the *Rev. St. Tex. art.* 3205, enacting that an action for a debt where the indebtedness is evidenced or founded on any contract in writing shall be commenced and prosecuted within four years from the accrual of said cause of action. *Texas Western R. Co. v. Gentry*, 33 *Am. & Eng. R. Cas.* 46, 69 *Tex.* 625, 8 *S. W. Rep.* 98.

36. Actions against carriers of goods for breach of contract.—An action based upon a written contract to transport goods is not barred for sixteen years under the Illinois statute. *Illinois C. R. Co. v. Johnson*, 34 *Ill.* 389.

An action against a carrier for an alleged neglect of duty properly to bill, direct and transport goods delivered to the carrier is barred in five years from the date of the alleged tort or breach of duty, and not from the time when the damages actually ensue. This is when the action is not brought upon any written contract. *Pennsylvania Co. v. Chicago, M. & St. P. R. Co.*, 144 Ill. 197, 33 N. E. Rep. 415.

In Iowa an action against a company for damages for a breach of a contract to transport freight is barred in five years from the time of the inception of the cause of action. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.—REVIEWED IN *McCabe v. Illinois C. R. Co.*, 4 McCrary (U. S.) 492, 13 Fed. Rep. 827.

A receipt given by a company for goods to be transported to another point on the line of the road is not a bill of exchange, and is not, therefore, prescribed by five years according to art. 3505 of the La. Civ. Code. *Flash v. New Orleans, J. & G. N. R. Co.*, 23 La. Ann. 353.

Where a land carrier gives what is called a bill of lading in form like a steamboat bill of lading, as a matter of convenience, or through the scarcity of stationery, but which is shown to be only a mere receipt, and was so used, it is not prescribed by five years' limitation as provided by La. Civ. Code art. 3505. *Flash v. New Orleans, J. & G. N. R. Co.*, 23 La. Ann. 353.

An action of contract against a carrier for the value of goods delivered for transportation, but negligently held until destroyed, is not barred by the Mass. statute until six years after their destruction. *Finn v. Western R. Corp.*, 102 Mass. 283.

An action against a company for damages for failure to deliver cotton to commission merchants, as per contract, is not barred within six years, under the Tennessee statute. *Louisville & N. R. Co. v. Neal*, 11 Lea (Tenn.) 270.

An action based upon a bill of lading, for a failure properly to carry goods is an action *ex contractu*, and as to the statute of limitations is governed by Tex. Rev. St. art. 3207, providing that every action * * * for which no limitation is prescribed shall be brought within four years next after the right to bring the same shall have accrued. *Millington v. Texas & P. R. Co.*, 2 Tex. App. (Civ. Cas.) 148.

In an action for unreasonable delay in the transportation of merchandise, where a

portion of such unreasonable delay occurred more than six years prior to the date of the writ and continued so that a portion of the delay was within the six years—*held*, that as to whatever damage occasioned by such delay which occurred more than six years before the commencement of the suit it was barred, but such damage as was occasioned by inexcusable delay within that time was recoverable. *Jones v. Grand Trunk R. Co.*, 16 Am. & Eng. R. Cas. 265, 74 Me. 356.

The General Railway Act of Canada, 51 Vict. c. 29, § 487, providing the time in which "all actions or suits for indemnity for any damages or injury sustained by reason of the railway" shall be brought, has no application to an action for damages for non-delivery of goods delivered to a railway for carriage, whether the action be on contract or in tort. *White v. Canadian Pac. R. Co.*, 6 Man. 169.—EXPLAINING *Palmer v. Grand Junction R. Co.*, 4 M. & W. 749; *Carpue v. London & B. R. Co.*, 5 Q. B. 747.

37. Actions for overcharges or discrimination.*—An action under Colo. St. of 1885 to recover treble damages for an overcharge of freight is an action to recover a penalty, and is barred in one year. *Goodridge v. Union Pac. R. Co.*, 35 Fed. Rep. 35.—APPLYING *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. Rep. 110.

An action to recover back the amount of freight paid above the rate prescribed by the railroad commission of the state must be brought, under Ga. Code, within twelve months. *Parmelee v. Savannah, F. & W. R. Co.*, 78 Ga. 239, 2 S. E. Rep. 686.

An action under chapter 68, Acts Fifteenth General Assembly of Iowa, for five times the amount paid as freight, in case of an overcharge, is an action for a statutory penalty, and, under section 2529, Code, is barred in two years. *Herriman v. Burlington, C. R. & N. R. Co.*, 9 Am. & Eng. R. Cas. 339, 57 Iowa 187, 9 N. W. Rep. 378, 10 N. W. Rep. 340.—DISTINGUISHING *Koons v. Chicago & N. W. R. Co.*, 23 Iowa 493.

The state statute of limitations applies to actions in the federal courts, under the Interstate Commerce Act, on account of discrimination in rates. The right of action

*Limitation of action to recover excessive charges, see note, 45 AM. & ENG. R. CAS. 299.

in such case comes within Rev. Civ. Code La. art. 3536, providing a limitation of one year to actions for damages resulting from quasi offenses. *Copp v. Louisville & N. R. Co.*, 53 Am. & Eng. R. Cas. 25, 30 Fed. Rep. 164.

In an action based on the Mo. statute to recover back an excess above the statutory limit fixed as compensation for carrying live stock, the statutory bar of three years will apply. *Young v. Kansas City, St. J. & C. B. R. Co.*, 33 Mo. App. 509.—FOLLOWED IN *Winsor Coal Co. v. Chicago & A. R. Co.*, 52 Fed. Rep. 716.

38. Action for carrying passenger beyond destination.—An action for damages by a passenger for carrying him beyond his destination, and putting him off the train at a distance from the station at which he should have been allowed to leave, is barred by limitation of one year in Texas. *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. Rep. 843.

39. Actions for loss of baggage.—The six-months' limitation clause, R. S. C. c. 109, § 27, does not apply to an action by a passenger for loss of baggage, such action arising out of contract, but to actions for damages occasioned by the company in the execution of the powers given or assumed by it to be given for enabling it to maintain its railway. *Anderson v. Canadian Pac. R. Co.*, 40 Am. & Eng. R. Cas. 624, 17 Ont. 747.—QUOTING *Auger v. Ontario, S. & H. R. Co.*, 9 U. C. C. P. 164. REVIEWING *Roberts v. Great Western R. Co.*, 13 U. C. Q. B. 615; *Browne v. Brockville & O. R. Co.*, 20 U. C. Q. B. 202; *May v. Ontario & Q. R. Co.*, 10 Ont. 70; *McCallum v. Grand Trunk R. Co.*, 30 U. C. Q. B. 122, 31 U. C. Q. B. 527.

40. Actions on contracts to keep cars in repair.—A contract between a sleeping-car company and a railroad company for the letting and hiring of sleeping cars, provided that "the railway company shall repair all damages to said cars of every kind occasioned by accident or casualty." Held, that a suit brought to recover the value of a car destroyed was not a suit to recover rent, within the meaning of La. Code, providing that such actions should be barred in three years. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 56 Fed. Rep. 705.

41. Actions on coupons.—Ordinary

municipal bonds issued for railroad stock are specialties, and are not governed by a statute of limitations relating to simple contracts. And a suit on coupons is not barred unless the lapse of time is sufficient to bar a suit on the bonds. *Lexington v. Butler*, 14 Wall. (U. S.) 282. *Kenosha v. Lamson*, 9 Wall. (U. S.) 477.—REVIEWED IN *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469.—*Burton v. Koshkonong*, 4 Fed. Rep. 373.—DISTINGUISHING *Amy v. Du-buque*, 98 U. S. 470; *Clark v. Iowa City*, 20 Wall. 583.—*Coler v. Santa Fe County Com'rs*, (N. Mex.) 27 Pac. Rep. 619.

Where town bonds are issued in aid of a railroad, which are soon after repudiated and the payment of interest refused, and a suit is brought to recover upon past-due coupons, and the law is declared unconstitutional, and judgment is entered for the town, a subsequent action for money had and received will be barred, under the Missouri statute, in five years from the time the bonds were repudiated. *Morton v. Nevada*, 52 Fed. Rep. 350, 10 U. S. App. 333, 3 C. C. A. 109; affirming 41 Fed. Rep. 582.

42. Actions on subscriptions to stock.—The La. Statute of 1852, which declares that "the prescription of all other open accounts the prescription of which is ten years under existing laws shall be prescribed by three years" is not applicable to the case of a demand for a balance of a subscription to the capital stock of a corporation. *New Orleans, J. & G. N. R. Co. v. Estlin*, 12 La. Ann. 184.—DISTINGUISHED IN *Clinton & P. H. R. Co. v. Eason*, 14 La. Ann. 828.

By the Ohio Code of Civ. Pro. actions to recover the amount of subscriptions for stock are limited to fifteen years, dating from the times fixed in the calls for payment; and where no circumstances interpose to render it inequitable, a creditor's bill may be maintained to subject the amount due to the payment of his claim any time within that period. *Warner v. Callender*, 20 Ohio St. 190.

A subscription conditioned for the prosecution of the construction of the road will be barred, in Pennsylvania, unless the condition be performed and a call made within six years. *Pittsburgh & C. R. Co. v. Graham*, 2 Grant's Cas. (Pa.) 259. *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. St. 77.—FOLLOWING *Pittsburgh & C. R. Co. v. Byers*, 32 Pa. St. 22; *McCully v. Pittsburgh*

& C. R. Co., 32 Pa. St. 25.—*Whetham v. Pennsylvania & N. Y. C. & R. Co.*, 9 Phila. (Pa.) 284.

The silence of the subscriber after the six years have expired, and his standing by while large expenditures are being made, will not estop him from pleading the statute; it is a bar in equity, as at law. *Pittsburgh & C. R. Co. v. Graham*, 36 Pa. St. 77.

The proper limitation to an action by a company against its members for calls, under 8 and 9 Vict. c. 16, is twenty years. *Cork & B. R. Co. v. Goode*, 13 C. B. 827, 17 Jur. 555, 22 L. J. C. P. 198.

43. Actions by creditors against stockholders.—A suit brought against a stockholder of the Lexington Railroad & Coal Mining Co. (Wagn. Mo. St. 291, § 13) more than a year after the debt was contracted was barred by the statutory limitation of the act touching manufacturing and business companies (Wagn. St. 336, § 13). The one-year limitation of time for commencing suit was not so short as to justify the supreme court in declaring it unreasonable, and the law for that reason invalid. The act was wholly prospective, and therefore constitutional. *Adamson v. Davis*, 47 Mo. 268.

44. Suit to compel application of railway tax to payment of aid bonds.—The statute does not bar an action of mandamus to compel trustees of a township to certify the fact to the county treasurer, under Iowa Laws of 1872, chs. 2 and 50, requiring such trustees, where aid has been voted for a road, to certify when the company has expended the amount of the taxes in the township. *Harwood v. Quinby*, 44 Iowa 385.

Where town bonds have been issued in aid of a railroad, and an action is commenced to compel a county treasurer to invest the taxes paid by the railroad so as to pay off the bonds, he cannot claim the protection of the statute of limitations so as to limit a recovery to such as were collected within six years of the commencement of the action. *Wood v. Monroe County Sup'rs*, 50 Hun 1, 18 N. Y. S. R. 671, 2 N. Y. Supp. 369.

Where a county treasurer, instead of applying taxes assessed on a railroad in a town, to the redemption of bonds of the town issued in aid of a railroad, as required by N. Y. Act of 1869, ch. 907, as amended in 1871, ch. 283, applies them to the pay-

ment of county and state taxes, a cause of action accrues when the misappropriation is made, and an action brought more than six years thereafter is barred. *Strough v. Jefferson County Sup'rs*, 119 N. Y. 212, 23 N. E. Rep. 552, 28 N. Y. S. R. 967; *affirming* 50 Hun 54, 3 N. Y. Supp. 110, 23 N. Y. S. R. 940.—DISTINGUISHED IN *Spaulding v. Arnold*, 125 N. Y. 194. FOLLOWED IN *Wood v. Monroe County Sup'rs*, 9 N. Y. Supp. 699.

45. Suits against assignees and liquidators.—The provision in U. S. Rev. St. § 5047, limiting the time in which suits can be brought by or against an assignee in bankruptcy to two years, does not apply to suits pending at the time of the bankruptcy, and wherein the assignee is substituted as plaintiff. *Jenkins v. Chicago & N. W. R. Co.*, 6 Ill. App. 192.

A decree ordering the liquidator of an insolvent Louisiana corporation to collect the assets as speedily as possible is not prescribed by ten years. The judgment directs the liquidator to discharge a duty attached to his office, and it is not a moneyed judgment. *Clinton & P. H. R. Co. v. Whitaker*, 22 La. Ann. 209. *Clinton & P. H. R. Co. v. Lee*, 22 La. Ann. 287.

46. Actions founded on fraud.—The holder of bonds of a railroad in Florida exchanged coupons attached thereto for preferred stock. The road and franchises were subsequently sold to pay the bonds of the road, including the above. Eight years after the sale he brought suit to set aside the exchange on the ground of fraud. No claim of after-discovered facts was made. *Held*, that the suit was barred by the statute of limitations of that state. *Coddington v. Pensacola & G. R. Co.*, 103 U. S. 409.

A railroad company filed a bill to enjoin the collection of county taxes in Nebraska, and by consent of the county authorities took a decree. More than four years thereafter, the personnel of the county authorities having changed, they filed a bill in the U. S. circuit court to set aside the decree, on the ground of fraud and collusion. *Held*, that the state statute, limiting the right of action for relief on the ground of fraud to four years, would apply. *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 Sup. Ct. Rep. 687.

The doctrine that laches will not be imputed to a government for a failure on the part of its officers to perform their duty—

held, not to apply to such a case. *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684, 11 Sup. Ct. Rep. 687.

Where a contractor sues for a breach of contract, and alleges fraud in a transfer of the company's property, but afterwards abandons the charge of fraud, the statute begins to run from the time it is abandoned, and will constitute a bar, under the Texas statute, in four years, so that the charge cannot be revived. *Shirley v. Waco Tap R. Co.*, 78 Tex. 131, 10 S. W. Rep. 543.—QUOTING *Cassaday v. Anderson*, 53 Tex. 535.

47. Condemnation proceedings.—The three-years' statute of limitations (N. Car. Code, § 155, subd. 2 and 3) is no bar to condemnation proceedings, and it seems that there is no statute of limitations provided for such proceedings. *Land v. Wilmington & W. R. Co.*, 47 Am. & Eng. R. Cas. 161, 107 N. Car. 72, 12 S. E. Rep. 125.

48. Proceedings to obtain damages for land condemned.*—An action by a landowner to enforce his claim to compensation against the land taken, or to enjoin the company from using it until compensation is made, is barred in seven years under the Arkansas statute applicable to actions to recover lands. *Organ v. Memphis & L. R. R. Co.*, 29 Am. & Eng. R. Cas. 75, 51 Ark. 235, 11 S. W. Rep. 96.

A petition for a writ to assess the damages occasioned by the construction of a railroad over the petitioner's lands, under the provisions of sections 905-912, Ind. Rev. St. 1881, is barred by the fifteen-years' statute of limitations. *Shurtle v. Terre Haute & I. R. Co.*, 51 Am. & Eng. R. Cas. 576, 131 Ind. 338, 30 N. E. Rep. 1084. *Shurtle v. Louisville, N. A. & C. R. Co.*, 130 Ind. 505, 30 N. E. Rep. 639.

The length of time prior to bringing suit for which the owner can recover damages against a railroad company for an unauthorized use of his land discussed, but not decided. *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178, 8 Am. Ry. Rep. 296.—DISTINGUISHED IN *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171.

To a judgment of county commissioners, fixing the damages for real estate taken for the location of a railroad, the Maine statute

is a bar after six years. *Mooers v. Kennebec & P. R. Co.*, 58 Me. 279.

Where property has been taken for a railroad, and the damages assessed, but not paid, a subsequent proceeding to enforce payment of the damages is barred, under the Missouri statute, in ten years. The provision of the statute providing for the enforcement of judgments in twenty years does not apply. *Duncan v. Missouri Pac. R. Co.*, 22 Mo. App. 614.

Where a landowner institutes a proceeding, under provisions of an act incorporating a railroad company, to recover the value of land taken for the road, a provision in the charter requiring such actions to be brought within two years from the completion of the road applies, and the action is barred if not brought within that time. *Vinson v. North Carolina R. Co.*, 74 N. Car. 510, 13 Am. Ry. Rep. 396.—REFERRED TO IN *Carolina C. R. Co. v. McCaskill*, 25 Am. & Eng. R. Cas. 83, 94 N. Car. 746.—*Carolina C. R. Co. v. McCaskill*, 25 Am. & Eng. R. Cas. 83, 94 N. Car. 746.

A presumption of a conveyance arises from the act of taking possession and building the road, and the owner's failure within the two years to take steps to have his damages ascertained. *Carolina C. R. Co. v. McCaskill*, 25 Am. & Eng. R. Cas. 83, 94 N. Car. 746.—DISTINGUISHED IN *Beattie v. Carolina C. R. Co.*, 108 N. Car. 425.—*Gudger v. Richmond & D. R. Co.*, 43 Am. & Eng. R. Cas. 606, 106 N. Car. 481, 11 S. E. Rep. 515.

The limitation for filing petitions in error prescribed in § 12 of the Ohio Act of April 23, 1872 (69 Ohio L. 88), applies as well to proceedings instituted by the landowner under section 21 of the act as to proceedings instituted by the railroad to appropriate land. *Cleveland & M. V. R. Co. v. Wick*, 35 Ohio St. 247.—DISTINGUISHING *Robinson v. Orr*, 16 Ohio St. 285; *Cleveland, C. & C. R. Co. v. Mara*, 26 Ohio St. 185. REVIEWING *Little Miami R. Co. v. Hopkins*, 19 Ohio St. 279.

Damages for land taken by a railroad are not a "penalty," and therefore not within a law limiting the right to sue to recover penalties to two years. *Delaware, L. & W. R. Co. v. Burson*, 61 Pa. St. 369.—DISTINGUISHING *Forster v. Cumberland Valley R. Co.*, 23 Pa. St. 37.

Where a company locates its road on private land without paying the damages, the statute of limitations does not bar an action

* Limitation of proceedings to recover compensation, see note, 39 AM. & ENG. R. CAS. 60.

for the subsequent use of the land. *McClinton v. Pittsburg, Ft. W. & C. R. Co.*, 66 Pa. St. 404.

The right of action against a company for damages for injuries to land taken, injured, or destroyed in the construction of its corporate works is not affected by the six-years' statute of limitations of March 27, 1713, 1 Sm. L. 76. *Seipel v. Baltimore & C. V. R. Extension Co.*, 129 Pa. St. 425, 18 Atl. Rep. 568.

Where land is held by a trustee for the use of another for life, and large powers of control are vested in the *cestui que trust*, who is in possession, and grants a right of way for a road over the land, the trustee, after the death of the *cestui que trust*, and after the full statutory period (sixteen years) has run, cannot recover the land. *Tutt v. Port Royal & A. R. Co.*, 28 So. Car. 388, 5 S. E. Rep. 831.

One who voluntarily consents to the occupation of his land by a railway roadbed for seventeen years, with no other compensation therefor than such as would result to him in common with others from the construction of the road, cannot recover damages for the use of his land. *Texas & N. O. R. Co. v. Sutor*, 59 Tex. 29.

The lien which an owner has for land damages on land taken by a railroad for its use is not barred by the Vt. statute, if at all, until fifteen years have elapsed, if such owner has clearly evinced an intention to hold the title until the damages are paid. *Robinson v. Missisquoi R. Co.*, 30 Am. & Eng. R. Cas. 299, 59 Vt. 426, 4 N. Eng. Rep. 891, 10 Atl. Rep. 522.

The right of compensation for land taken by a railway company is not barred in Ontario short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. *Ross v. Grand Trunk R. Co.*, 25 Am. & Eng. R. Cas. 209, 10 Ont. 447. *Essery v. Grand Trunk R. Co.*, 21 Ont. 224.—FOLLOWING *Ross v. Grand Trunk R. Co.*, 10 Ont. 447.

49. Actions for damages to land in the construction of railways.—Limitation is available as a defense against a statutory remedy for the recovery of damages resulting from the construction of a railroad, and in Texas the statute of two years applies. *Houston & T. C. R. Co. v. Chaffin*, 14 Am. & Eng. R. Cas. 437, 60 Tex.

553.—FOLLOWING *Forster v. Cumberland Valley R. Co.*, 23 Pa. St. 371.

The limitation of two years within which an action must be commenced, as prescribed in section 12 of the General Corporation Act, as amended April 15, 1857 (54 Ohio L. 133), applies only in cases where a railroad is constructed in a highway, or on other public ground, under an agreement with the public authorities, or after condemnation, as provided in said section. *Lawrence R. Co. v. Cobb*, 35 Ohio St. 94.—DISTINGUISHED IN *Columbus, S. & C. R. Co. v. Mowatt*, 35 Ohio St. 284.

To maintain trespass against a railway company in Canada for damages done in the construction of its line, the action must be commenced within six months from the time of the committing of the trespass. *Follis v. Port Hope & L. R. Co.*, 9 U. C. C. P. 50.

Section 34 of R. S. O. c. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, does not apply to an action brought against a railway company for damages for wrongfully taking earth from plaintiff's land. *Beard v. Credit Valley R. Co.*, 23 Am. & Eng. R. Cas. 142, 9 Ont. 616.—FOLLOWING *Brock Tp. v. Toronto & N. R. Co.*, 37 U. C. Q. B. 372.—*Brock Tp. v. Toronto & N. R. Co.*, 37 U. C. Q. B. 372.—DISTINGUISHING *Follis v. Port Hope & L. R. Co.*, 9 U. C. C. P. 50.—FOLLOWED IN *Beard v. Credit Valley R. Co.*, 9 Ont. 616.

The prescription of six months enacted in § 27 of the Railway Act R. S. Can. c. 109 is applicable to cases where damage is caused to land through a preliminary survey made with the object of locating the railway line over the land, where the line so surveyed was subsequently abandoned and a new location adopted. *Ravary v. Ontario & Q. R. Co.*, 5 Montr. Super. 54.

The Dominion Government Railways Act (Acts of 1881, c. 25, § 109) provides that "no action shall be brought against any officer, employé, or servant of the department of railways and canals for anything done by virtue of his office, service, or employment, except within three months after the act committed, and upon one month's previous notice in writing." Defendants entered into a contract with the crown, represented by the minister of railways and canals, for the construction of a branch of the Inter-

colonial railway at Dartmouth, N. S., and in the prosecution of their work under the contract entered upon plaintiff's land. An action having been brought against defendants for breaking and entering—*held*, that defendants were "employés" within the meaning of the act, and entitled to the protection given therein. *Kearney v. Oakes*, 20 Nov. Sc. 30.

50. Suits by abutters for damages from occupation of streets.—In Iowa an action against a railroad company for damages to the owner of a city lot, on account of the construction of the railroad upon the street on which the lot abuts, does not involve title to real estate by adverse possession, but is simply an action for damages provided by statute in such cases; and such action is barred in five years after it accrues. *Pratt v. Des Moines N. W. R. Co.*, 32 Am. & Eng. R. Cas. 236, 72 Iowa 249, 33 N. W. Rep. 666.—**DISTINGUISHING** Merchants' Union Barb Wire Co. v. Chicago, B. & Q. R. Co., 70 Iowa 105.—**DISTINGUISHED IN** Harbach v. Des Moines & K. C. R. Co., 43 Am. & Eng. R. Cas. 115, 80 Iowa 593, 44 N. W. Rep. 348.

The time within which damages arising from proceedings to raise a street by a railroad company, under Mass. Rev. St. ch. 39, § 67, must be claimed is limited to three years by Rev. St. ch. 39, § 58. *Gardiner v. Boston & W. R. Corp.*, 9 Cush. (Mass.) 1.

In Michigan an action by a private person, as for a continuing injury in keeping a railway track in the street near his premises, is subject to the six-year limitation, if defendant relies on permission given longer ago, and plaintiff seeks to show, by such evidence as remains, that his permission was obtained by fraud. *Krueger v. Grand Rapids & I. R. Co.*, 14 Am. & Eng. R. Cas. 98, 51 Mich. 142, 16 N. W. Rep. 313.

In Nebraska an action for damages to plaintiff's real estate, caused by the company's building its tracks and operating its road across the street and on a lot lying next to plaintiff's property, must be brought within four years of the date of the construction of such railroad. *Omaha & R. V. R. Co. v. Moschel*, 56 Am. & Eng. R. Cas. 74, 38 Neb. 281, 56 N. W. Rep. 875.

In Ohio the right of an abutting owner to recover for temporary injury resulting from a change of grade, or for an additional track of a railroad, is limited to four years prior to the commencement of an action

for the same. *Little Miami R. Co. v. Hambleton*, 14 Am. & Eng. R. Cas. 126, 40 Ohio St. 496.

The right to lay a track in a village street does not give the company the right to raise the grade of the street, and if it does so, an abutting owner may maintain an action for damages any time within twenty-one years. *Little Miami R. Co. v. Hambleton*, 14 Am. & Eng. R. Cas. 126, 40 Ohio St. 496.—**APPLIED IN** Grafton v. Baltimore & O. R. Co., 17 Am. & Eng. R. Cas. 200, 21 Fed. Rep. 309. **APPROVED IN** Stickley v. Chesapeake & O. R. Co., 52 Am. & Eng. R. Cas. 56, 93 Ky. 323, 20 S. W. Rep. 261.

The owner of the soil of a highway, taken by a company for its roadway, under an agreement between the company and the commissioners of the county as to the terms and manner of its use, as provided by Rev. St. § 3283, is entitled to compensation for its appropriation, and may compel the company, under the provisions of Rev. St. § 6448, to condemn and pay for the same; and such right is not barred by the lapse of less than twenty-one years from the time of such occupation by the company. The limitation of two years contained in section 3283 applies only to incidental injuries to property on and adjacent to the roadway, occasioned by the location and construction of the railroad, and does not include the remedy for injuries to, or the taking of, the land itself. *Lawrence R. Co. v. O'Harra*, 48 Ohio St. 343, 28 N. E. Rep. 175.

A company wrongfully laid its track in a public highway, and after it had continued the obstruction more than six years an action was brought against it under 70 Ohio L. 53. *Held*, that neither the limitation of four years, nor that of six years, was a bar to the action. *Lawrence R. Co. v. Mahoning County Com'rs*, 35 Ohio St. 1.

A company in laying its track in a public street, in pursuance of authority from the proper officers of the municipal corporation, necessarily lengthened a bridge across such street, and extended the approaches to the bridge along the street in which it was situated, by which means the grade was raised in front of A.'s residence, to her injury. A.'s premises did not abut on the street in which the track was laid, but were near thereto. *Held*, that the case was governed by section 12 of the general act of 1852, relating to corporations, as amended in 1857 (54 Ohio L. 133), and hence the ac-

tion was barred in two years from the completion of the work. *Columbus, S. & C. R. Co. v. Mowatt*, 35 *Ohio St.* 284.—DISTINGUISHING *Lawrence R. Co. v. Cobb*, 35 *Ohio St.* 94; *Lawrence R. Co. v. Williams*, 35 *Ohio St.* 168.—APPLIED IN *Grafton v. Baltimore & O. R. Co.*, 17 *Am. & Eng. R. Cas.* 200, 21 *Fed. Rep.* 309.

51. Actions for damages sustained by general operation of railroad.—

When a town has been compelled to pay damages on account of a defect in a highway, caused by a construction of a railroad thereon, it may maintain an action therefor commenced within a year from the time when its liability is ascertained and fixed. *Veazie v. Penobscot R. Co.*, 49 *Me.* 119.—QUOTED IN *Pittsburg, C. & Y. R. Co. v. Moses*, 24 *Am. & Eng. R. Cas.* 295, 2 *Atl. Rep.* 188.

The provisions of the 8 Vict. c. 25, § 49, and 14 and 15 Vict. c. 51, § 20, as to the institution of actions against railroad companies and others within the period of six months, do not apply to actions for damages arising from neglect and carelessness of the company's servants in the ordinary management of the railroad. *Marshall v. Grand Trunk R. Co.*, 5 *Low. Can.* 339.

So of the prescription or limitation of six months established by the 16 Vict. c. 46, § 19. *Germain v. Montreal & N. Y. R. Co.*, 6 *Low. Can.* 172.

The prescription of one year under 43-44 Vict. (Q.) c. 24, § 6, applicable to claims for damages against provincial railways, applies where the damage was caused by a train of a company under provincial control, though the train was running at the time on a portion of the line of a federal railway company over which the former had running rights. *North Shore R. Co. v. McWillie*, 5 *Montr. L. R.* 122.

The same prescription applies though the provincial railway before the accident occurred had been transferred by 46 Vict. (D.) c. 9, § 27, to Dominion control. *North Shore R. Co. v. McWillie*, 5 *Montr. L. R.* 122.

Section 287 of 51 Vict. c. 29 (D.), "The Railway Act," by which the time for bringing an action for indemnity for any damages or injury sustained by reason of the railway is extended to one year, applies to the Grand Trunk Ry. Co. of Canada. *Zimmer v. Grand Trunk R. Co.*, 21 *Ont.* 628.

The defendants set up that the injuries
6 D. R. D.—21.

complained of happened more than six months before action brought, and that the action was barred by the twenty-seventh section of the Consolidated Railway Act, to which the plaintiff demurred. *Held*, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway." *May v. Ontario & Q. R. Co.*, 26 *Am. & Eng. R. Cas.* 337, 10 *Ont.* 70.—FOLLOWING *Browne v. Brockville & O. R. Co.*, 20 *U. C. Q. B.* 202; *McCallum v. Grand Trunk R. Co.*, 30 *U. C. Q. B.* 122; *Kelly v. Ottawa St. R. Co.*, 3 *Ont. App.* 616. REVIEWING *Prendergast v. Grand Trunk R. Co.*, 25 *U. C. Q. B.* 193; *Hammersmith & C. R. Co. v. Brand*, *L. R.* 4 *H. L. Cas.* 220.

52. Ejectment.—Seven years' adverse possession of land, wrongfully taken by a railroad company in the construction of its road, will bar an action to enforce the claim of the owner against the land, or to enjoin the company from using it until compensation is made. *Organ v. Memphis & L. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 75, 51 *Ark.* 235, 11 *S. W. Rep.* 96.

If a company in possession of a railroad and its appendages, under a deed which is color of title, acquired in good faith, pays all taxes legally assessed thereon for seven successive years preceding the commencement of a suit in equity to divest its title to land occupied by it as a right of way, this will be a complete defense. *Lake Shore & M. S. R. Co. v. Pittsburg, Ft. W. & C. R. Co.*, 71 *Ill.* 38.

The continued occupation of land by a railway for a right of way for over twenty years, with acts of ownership, will constitute a bar to a recovery by the former owner. But where such possession is not held under color of title, it will extend only to the portion actually occupied. *James v. Indianapolis & St. L. R. Co.*, 91 *Ill.* 554.

Where the party under whom a plaintiff in ejectment claimed land occupied by a railway company made a conveyance of the same to a railway company, moved his fence, and gave it possession of the land more than twenty years before suit brought, and such company, together with the defendant corporation, as its successor, had occupied the same ever since under such release—*held*, that the plaintiff could not recover. *Carmody v. Chicago & A. R. Co.*, 111 *Ill.* 69.

The fact that the company took possession of the land as a trespasser did not prevent the running of the statute of limitations, and open and adverse use for twenty years was sufficient to establish a right of way. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171.—APPROVING *Sibley v. Ellis*, 11 Gray (Mass.) 417.

No presumption of abandonment or of a grant, and no statute of limitation, runs against a company by the adverse occupation of any of the land condemned or otherwise obtained by them for the purposes of the road. *Carolina C. R. Co. v. McCaskill*, 25 Am. & Eng. R. Cas. 83, 94 N. Car. 746.

Under the Pa. law a recovery of land in ejectment is only barred by twenty-one years' adverse holding by a railroad, where it has been appropriated without a grant, release, or legal condemnation. *McClinton v. Pittsburg, Ft. W. & C. R. Co.*, 66 Pa. St. 404.—FOLLOWED IN *McFadden v. Johnson*, 72 Pa. St. 335; *Colgan v. Allegheny Valley R. Co.*, 3 Pittsb. (Pa.) 394. REVIEWED IN *Philadelphia & R. R. Co. v. Lawrence*, 10 Phila. (Pa.) 604.

Where land is subject to the lien of two judgments, but is sold first under the junior judgment, seven years' continuous adverse possession by the purchaser perfects the title, and bars a claim by a purchaser under the senior judgment, though seven years may not have elapsed since the latter purchase. *Tennessee & P. R. Co. v. Mabry*, 85 Tenn. 47, 1 S. W. Rep. 511.

In such case, seven years' continuous adverse possession, by the first purchaser, and his vendee, under an assurance of title, purporting to convey an estate in fee, invests the vendee with an indefeasible title in fee simple, and bars the claim of the second purchaser; although seven years may not have elapsed from the date of the second purchase. *Tennessee & P. R. Co. v. Mabry*, 85 Tenn. 47, 1 S. W. Rep. 511.

Where a railway company erects a rail fence on the boundary of its line, and afterwards plants a hedge, and when the hedge grows up, removes the fence, if the owner of the adjoining field occupies the strip between the hedge and the line of the fence, and cultivates it without interference from the company, he acquires title in the statutory period by adverse possession. *Norton v. London & N. W. R. Co.*, L. R. 13 Ch.

D. 268, 41 L. T. 429, 28 W. R. 173; affirming L. R. 9 Ch. D. 623, 47 L. J. Ch. 859, 39 L. T. 25, 27 W. R. 352.—CONSIDERED IN *Bonner v. Great Western R. Co.*, L. R. 24 Ch. D. 1, 48 L. T. 619, 32 W. R. 190, 47 J. P. 580.

53. Foreclosure suits.—In the case of a claim secured by a mortgage, although the remedy by an action at law for the claim under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Smith v. Washington City, V. M. & G. S. R. Co.*, 1 Am. & Eng. R. Cas. 493, 33 Gratt. (Va.) 617.—QUOTING *Elkins v. Edwards*, 8 Ga. 325.

54. Injunction to restrain unauthorized use of land.—The right of a landowner to maintain an injunction proceeding to restrain a railroad company which has entered upon his land without making payment therefor is "founded upon the title to real property," within the meaning of Wis. Rev. St. ch. 138, § 3, and is limited to twenty years. *Gilman v. Sheboygan & F. du L. R. Co.*, 40 Wis. 653, 13 Am. Ky. Rep. 468.—QUOTED IN *INTERNATIONAL & G. N. R. Co. v. Benitos*, 59 Tex. 326.

To a bill in equity brought under Me. Rev. St. ch. 51, § 10, "praying for an injunction against the use and occupation of" the complainant's land taken for the location of a railroad, the objection that the damages were fixed by the county commissioners more than six years before the filing of the bill may be taken as a defense by demurrer. *Mooers v. Kennebec & P. R. Co.*, 58 Me. 279.

55. Trespass on lands.—An action in Florida for trespass upon real property must be commenced within three years; otherwise it is barred by the statute. *Savannah, F. & W. R. Co. v. Davis*, 43 Am. & Eng. R. Cas. 542, 25 Fla. 917, 7 So. Rep. 29.

The limitation of two years prescribed by Kan. Civ. Code § 18, subd. 3, for an action for trespass on real property limits the damages recoverable to those caused within two years next preceding the action, though the trespass was continued for more than two years, and the action was coupled with an action of ejectment, the limitation of which is three years. *Missouri Pac. R. Co. v. Houseman*, 41 Kan. 300, 304, 21 Pac. Rep. 284.

Under the charter of the Western North Carolina R. Co., the company has no right to enter upon any yard, garden, or dwelling house without the consent of the owner; and where such entry is made, the provision that landowners shall apply for assessment of damages within two years after the road has been located does not apply. *Fore v. Western N. C. R. Co.*, 101 N. Car. 526, 8 S. E. Rep. 335.

56. Actions for flowing lands.*—

The statute does not bar a claim against a company for diverting surface water from its natural course so as to injure lands of another, within five years from the time the obstruction is erected, as the injury is continuing. *Chicago & A. R. Co. v. Riley*, 25 Ill. App. 569.—FOLLOWING *Chicago & A. R. Co. v. Connors*, 25 Ill. App. 561.—*Drake v. Chicago, R. I. & P. R. Co.*, 17 Am. & Eng. R. Cas. 45, 63 Iowa 302, 50 Am. Rep. 746, 19 N. W. Rep. 215.—FOLLOWING *McConnel v. Kibbe*, 29 Ill. 483; *Bowyer v. Cook*, 4 M., G. & S. 236.—DISTINGUISHED IN *Haisch v. Keokuk & D. M. R. Co.*, 71 Iowa 606, 33 N. W. Rep. 126.—*Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659, 7 Am. St. Rep. 501, 38 N. W. Rep. 545. *Wells v. New Haven & N. Co.*, 44 Am. & Eng. R. Cas. 491, 151 Mass. 46, 23 N. E. Rep. 724.—REVIEWING *Fowle v. New Haven & N. Co.*, 107 Mass. 352, 112 Mass. 334.—*Spilman v. Roanoke Nav. Co.*, 74 N. Car. 675.

Where the cause of action as stated in a petition is for an improper construction of an embankment, and the answer and reply show that the real issue upon which the case was to be tried was the failure to maintain a ditch under the embankment to carry off surface water, the cause of action is not a single one, and the plaintiff can recover for the damages sustained during the five years preceding the action. *Willitts v. Chicago, B. & K. C. R. Co.*, 88 Iowa 281, 55 N. W. Rep. 313.

An action for the flowing of canals, caused by the construction of a railroad, must be brought within six months from the accrual of the right. *Carron v. Great Western R. Co.*, 14 U. C. Q. B. 192.

Defendants in the construction of their railway crossed a stream of water which emptied on plaintiff's land, and to allow a

passage they built a culvert, and caused the water to flow as before. The culvert being filled, defendants caused a drain to be dug, which, with continuations made by the adjoining owners of property, caused the water to be diverted from its natural course and to overflow a portion of plaintiff's land. Plaintiff waited for six years and then brought an action, claiming damages for a crop injured at the time of the diversion, and as a continuing injury to the land since. *Held*, that the damage was not continuing, and that the action should have been brought within six months. *Patterson v. Great Western R. Co.*, 8 U. C. C. P. 89.

In 1872 defendant's predecessor constructed its roadbed, diverting the channel of a watercourse and turning it across and under its embankment through a bridge. Thereafter the channel began to fill up, and from time to time to overflow plaintiff's land, until in June, 1883, it became a fixed and permanent embankment and necessarily injurious. In December, 1887, suit was brought for the destruction of the crops of 1883, 1884, 1885, and in September, 1889, the petition was amended by averring permanent injury to the land. *Held*: (1) the action for the destruction of the crops was not barred; (2) the action for permanent injury alleged by the amendment in September, 1889, was barred. *Bunten v. Chicago, R. I. & P. R. Co.*, 50 Mo. App. 414.

57. Actions for spread of fires.*

—The Connecticut statute of 1881, p. 48, which makes companies responsible for fires communicated by their locomotives, is not penal, and an action brought under it is not barred by the statute of limitations applicable to penal actions. Case, and not trespass, is the proper remedy at common law for damages caused by sparks escaping from a locomotive, and is not barred within six years. *Newton v. New York & N. E. R. Co.*, 32 Am. & Eng. R. Cas. 347, 56 Conn. 21, 5 N. Eng. Rep. 614, 12 Atl. Rep. 644.

In Texas an action for damages for fire set out by a locomotive is barred in two years; and so, where suit is brought, items of damage added by an amended complaint more than two years after the fire are barred. *Gulf, C. & S. F. R. Co. v. Thompson*, 4 Tex. App. (Civ. Cas.) 219, 16 S. W. Rep. 174.

In an action against a company for so

* Flooding lands; limitation of actions for, see 44 AM. & ENG. R. CAS. 493, *abstr.*; 48 *Id.* 72, *abstr.*

* See also FIRES, 139.

negligently managing a fire which had begun upon their track that it extended to the plaintiff's land adjoining—*held*, that the "Railway Act," § 83, limiting suits to six months after the damage sustained, did not apply, the injury charged being at common law, by one proprietor of land against another, independent of any user of the railway. *Prendergast v. Grand Trunk R. Co.*, 25 U. C. Q. B. 193.—DISTINGUISHED IN *McCallum v. Grand Trunk R. Co.*, 31 U. C. Q. B. 527.—REVIEWED IN *King v. Ontario & Q. R. Co.*, 10 Ont. 70.

An action for damages caused by fire from a locomotive engine within the Consolidated St. C. ch. 66, § 83, must be instituted within six months. *McCallum v. Grand Trunk R. Co.*, 31 U. C. Q. B. 527.

58. Actions for continuing nuisances.—Trespasses upon real property effected by an unlawful structure or nuisance are continuous in their nature, and give separate successive causes of action from time to time as the injuries are perpetrated, barred only by the running of the statute against the successive trespasses. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, 40 N. Y. S. R. 145; *affirming* 58 Hun 610, 35 N. Y. S. R. 628, 13 N. Y. Supp. 47. *McGowan v. Missouri Pac. R. Co.*, 23 Mo. App. 203. *Wright v. Syracuse, B. & N. Y. R. Co.*, 49 Hun 445, 3 N. Y. Supp. 480; *affirmed* in 124 N. Y. 668, *mem.*, 37 N. Y. S. R. 964.

No lapse of time or inaction merely on the part of an owner after the erection and during the maintenance of the unlawful structure, unless it has continued for such a period of time as will effect a change of title in the property or authorize the presumption of a grant, is sufficient to defeat the right of the owner to his action at law or in equity. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, 40 N. Y. S. R. 145; *affirming* 58 Hun 610, 35 N. Y. S. R. 628, 13 N. Y. Supp. 47.

So also the right of an abutting owner to maintain an action at law or in equity because of an invasion of his rights in a public street by the erection thereon of a structure which impairs his easement therein continues so long as he continues to be the owner of the property, without regard to the lapse of time, provided the remedy is claimed within the statutory period of limitation applicable to the legal right, and before adverse possession has barred his title.

Galway v. Metropolitan El. R. Co., 128 N. Y. 132, 28 N. E. Rep. 479, 40 N. Y. S. R. 145; *affirming* 58 Hun 610, 35 N. Y. S. R. 628, 13 N. Y. Supp. 47.—APPLIED IN *Syracuse Solar Salt Co. v. Rome, W. & O. R. Co.*, 51 N. Y. S. R. 520.

It is immaterial, either in equity or at law, whether the injuries done were originally intended by the wrong-doer to be perpetual and permanent, or were of a temporary nature only and occasional in their operation. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. Rep. 479, 40 N. Y. S. R. 145; *affirming* 58 Hun 610, 35 N. Y. S. R. 628, 13 N. Y. Supp. 47.

Though a railroad embankment has been treated by the parties as a permanent obstruction, the five-years' statute of limitations does not bar an action, where it appears that it has been increased in height during the time. *Ohio & M. R. Co. v. Nuetzel*, 43 Ill. App. 108.—FOLLOWING *Ohio & M. R. Co. v. Wachter*, 123 Ill. 440; *Ohio & M. R. Co. v. Elliott*, 34 Ill. App. 589.

An action to abate a nuisance, such as erecting cattle pens near plaintiff's hotel, or to recover damages therefor, must have accrued within six years, under the Indiana statute. *Ohio & M. R. Co. v. Simon*, 40 Ind. 278.

Where a company is authorized to construct its road across a public highway on condition that it will restore the same, the obligation to restore the highway is a condition inseparable from the right to construct the road across the highway, and the statute of limitations is not a defense to an action brought to secure the performance of such duty. *Little Miami R. Co. v. Greene County Com'rs*, 31 Ohio St. 338, 16 Am. Ry. Rep. 278.—QUOTING *Hamden v. New Haven & N. R. Co.*, 27 Conn. 158. REVIEWING *People ex rel. v. Chicago & A. R. Co.*, 67 Ill. 118.

The obstruction was in existence for eighteen years before the presentment was made. *Held*, not barred by the statute of limitations, as the general rule is that the very continuance of a nuisance is a new offense. *Nashville & D. R. Co. v. State*, 1 Baxt. (Tenn.) 55.

Plaintiff, by written agreement, allowed the defendants to carry their road through his land, and in constructing it they made an embankment which rendered his access to the highway inconvenient, and prevented the water near and around his house from

running off as before. *Held*, that this was a continuing injury, for which an action, if maintainable, was not limited to six months. *Cameron v. Ontario, S. & H. R. U. Co.*, 14 U. C. Q. B. 612.

59. Other suits relating to realty.

—Where a company conveys its lands to a trustee, with a provision that any of its bondholders may, within five years from the date of the bonds, surrender them and receive a deed for a part of the land at a certain proportion of its value, and take the same discharged from the deed of trust, the five-years' limitation does not apply, and a purchaser six years thereafter is entitled to land free from the deed of trust. *Frash v. Glendy*, 68 Ind. 364.

Where the petition alleges breaches of trust, whereby the trust property, a railroad, was sold, and one of the directors of the corporation owning the road became the purchaser, and the prayer is that such purchase be held for the benefit of the corporation, and the property so purchased be declared to be held in trust for the corporation, etc., such a suit is not for the recovery of real estate, or for relief on the ground of fraud, but is a suit to declare and enforce an implied or constructive trust. Such an action will be barred in five years. In this case the purchaser died within five years from the time of his purchase. This suit, brought within one year after letters of administration were taken out on his estate, is not barred by the statute. *Covington & L. R. Co. v. Bowler*, 9 Bush (Ky.) 468.

60. Actions for personal injuries.

—(1) *Alabama*.—A claim for damages on account of personal injuries is not within the statute requiring claims for damages to be presented or sued on within sixty days after they accrue (Code, § 1701), but is governed by the general statute of limitations of one year (section 3231). *Mobile & M. R. Co. v. Crenshaw*, 8 Am. & Eng. R. Cas. 340, 65 Ala. 566. — FOLLOWING DOUBT-INGLY *Nicholson v. Mobile & M. R. Co.*, 49 Ala. 205. — FOLLOWED IN *Alabama G. S. R. Co. v. Hawk*, 18 Am. & Eng. R. Cas. 194, 72 Ala. 112, 47 Am. Rep. 403.

(2) *Iowa*.—Where plaintiff began an action for personal injury in the state court, which defendant had removed to the federal court, and plaintiff then had it dismissed without prejudice, on the ground that he believed that he could not obtain a fair trial in the federal court—*held*, that a new action

for the same cause, begun more than two years after the cause of action accrued, but less than six months after the first action was dismissed, was barred by section 2529 of the Code, and that section 2537 did not save it. *Archer v. Chicago, B. & Q. R. Co.*, 65 Iowa 611, 22 N. W. Rep. 894.

(3) *Mississippi*.—Code 1880, § 2673, requiring actions for "assault, battery, maiming, false imprisonment, malicious arrest," etc., to be brought within one year, does not apply to actions against railroad companies for personal injuries. *Bell v. Kansas City, M. & B. R. Co.*, 68 Miss. 19, 8 So. Rep. 508.

(4) *New York*.—The liability of a carrier of passengers to a passenger injured in consequence of some defect in the vehicle is based solely upon negligence, and the three-years' limitation fixed by Code of Civ. Pro. (subd. 5, § 383) for the bringing of "an action to recover damages for a personal injury resulting from negligence," applies. *Webber v. Herkimer & M. St. R. Co.*, 34 Am. & Eng. R. Cas. 580, 109 N. Y. 311, 16 N. E. Rep. 358, 15 N. Y. S. R. 262; *affirming* 35 Hun 44. — APPLIED IN *Diabola v. Manhattan R. Co.*, 8 N. Y. Supp. 334, 29 N. Y. S. R. 149.

It is immaterial whether the action is in form *ex contractu* for a breach of the carrier's contract or *ex delicto*. Where the source of the injury complained of is negligence, the action is barred if not commenced in three years. *Webber v. Herkimer & M. St. R. Co.*, 34 Am. & Eng. R. Cas. 580, 109 N. Y. 311, 16 N. E. Rep. 358, 15 N. Y. S. R. 262; *affirming* 35 Hun 44. — FOLLOWING *Carroll v. Staten Island R. Co.*, 58 N. Y. 126. — FOLLOWED IN *Maxson v. Delaware, L. & W. R. Co.*, 112 N. Y. 559, 20 N. E. Rep. 544, 21 N. Y. S. R. 767.

An action by a husband to recover damages for the loss of his wife's services by reason of the latter having received bodily injuries through the defendant's negligence is an action for personal injuries within the meaning of the N. Y. Code Civ. Pro. § 383, subd. 5, and is subject to the limitation of three years prescribed thereby, and not to the limitation of six years applicable to actions for damages for injuries to property. *Maxson v. Delaware, L. & W. R. Co.*, 37 Am. & Eng. R. Cas. 162, 112 N. Y. 559, 20 N. E. Rep. 544, 21 N. Y. S. R. 767; *reversing* 48 Hun 172, 15 N. Y. S. R. 650, 14 Civ. P. 248. — DISTINGUISHING *Cregin v. Brooklyn*

Crosstown R. Co., 83 N. Y. 595. FOLLOWING *Webber v. Herkimer & M. St. R. Co.*, 109 N. Y. 311. NOT FOLLOWING *Groth v. Washburn*, 34 Hun 509.

Plaintiff was injured by reason of defendant's negligence in April, 1877, and commenced this action to recover damages in January, 1880. *Held*, that the statute of limitations was not a bar, as the case was governed by the three-year limitation prescribed by Code of Civ. Pro. § 383, subd. 5. *Watson v. Forty-second St. & G. S. F. R. Co.*, 15 Am. & Eng. R. Cas. 486, 93 N. Y. 522; *affirming* 16 J. & S. 44.

(5) *Tennessee*.—Where an action for personal injuries was commenced within a year after the injury was received, and the plaintiff took a nonsuit and subsequently substituted a new suit within a year from the dismissal of the first, but more than one year after injuries received—*held*, under section 2755 of the Code, that the statute of limitations was no bar to the action. *Memphis & C. R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248.

(6) *Texas*.—The limitation of one year placed by statute upon actions for injuries to the person of another, as assaults, battery, wounding, or imprisonment, applies to actions for injuries from accidents on railroads also, the classes above named being examples merely, and not intended to restrict the operation of the statute. *Tobin v. Houston & T. C. R. Co.*, 8 Am. & Eng. R. Cas. 477, 56 Tex. 641. *Texas & P. R. Co. v. Goodson*, 2 Tex. App. (Civ. Cas.) 31.

Where a petition contained no express allegation as to damages caused to clothing of plaintiff (who was put off one of defendant company's trains), but the claim for damages was based upon mental and bodily injuries received by the plaintiff, and the action appears to have been brought eighteen months after the injury, exceptions that the cause of action is barred by limitation of one year should have been sustained. General allegations as to injury to the clothing would not save the action from the effect of the statute of limitations of one year. *Galveston, H. & S. A. R. Co. v. Roemer*, 1 Tex. Civ. App. 191, 20 S. W. Rep. 843.

(7) *Utah*.—An action by a passenger against a carrier to recover damages for injuries received through the negligence of such carrier, not having been specially provided for in the limitation act, is embraced under the general provision of section 20, and must be commenced within four

years after the cause of action shall have accrued. *Thomas v. Union Pac. R. Co.*, 1 Utah 235.

(8) *Ontario*.—The plaintiff sued the defendants for an injury sustained by him while engaged in his lawful occupation on the street, by the defendants' car being so carelessly and rapidly driven that he was obliged to jump into a drain to save himself, and was hurt. *Held*, that the eighty-third section of C. S. C. c. 66 applied to a suit of this nature, and that the action should have been brought within six months. *Kelly v. Ottawa St. R. Co.*, 3 Ont. App. 616.—FOLLOWING *Auger v. Ontario, S. & H. R. Co.*, 9 U. C. C. P. 164; *Browne v. Brockville & O. R. Co.*, 20 U. C. Q. B. 202.

61. Actions for killing or injuring live stock.—An action for damages against a railroad corporation for an injury to stock or cattle caused by negligence, there being no contract between the parties, must be commenced within one year from the time of the injury (Code, § 3231, subd. 6), the claim having been presented within sixty days. *Huss v. Central R. & B. Co.*, 66 Ala. 472.

A claim for damages for stock killed or injured is "barred, unless complaint is made within six months after such killing or injury"; but a presentment of the claim in writing, within the six months, to the president, treasurer, superintendent, depot agent, or agent specially appointed to look after such claims is sufficient to avoid the bar, although suit is not commenced until after the lapse of six months. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150. *Alabama G. S. R. Co. v. Killian*, 69 Ala. 277.—QUOTING *South & N. Ala. R. Co. v. Morris*, 65 Ala. 193.

The Illinois statute making railroad companies liable for killing live stock by reason of a failure properly to fence is not penal; and an action thereunder is not barred in two years. *Ohio & M. K. Co. v. Erwin*, 45 Ill. App. 558.

The recovery, without proof of negligence, allowed by the Ind. statute for injuries done to animals by railroads, when the roads are not fenced, is not a penalty given by statute within the meaning of Code, § 211, subd. 1. The action is for an injury done to property, and the limitation of the action is regulated by the third clause of section 210. *Jeffersonville R. Co. v. Gabert*, 25 Ind. 431.

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An action brought in 1886, for damages against a railway company on account of its removal of a fence, in the year 1880, from premises adjoining its right of way, is barred. *Hunter v. Burlington, C. R. & N. R. Co.*, 84 Iowa 605, 51 N. W. Rep. 64.

Actions for injuries must be brought within six months after such injury. *O'Bannon v. Louisville, C. & L. R. Co.*, 8 Bush (Ky.) 348. *Mortimer v. Louisville & N. R. Co.*, 10 Bush (Ky.) 485. But see *Kentucky C. R. Co. v. Kinney, (Ky.)* 35 Am. & Eng. R. Cas. 199, 8 S. W. Rep. 201.

Under section 5 of the damage act (Wagn. Mo. St. 520), the new suit brought against a railroad, after nonsuit, must be commenced within one year after the date of the injury. Section 19 of the chapter concerning limitations (Wagn. St. 919), authorizing the commencement of a new action within a year from date of nonsuit, has no application to causes the time for bringing which is not "prescribed" by that chapter, but is otherwise limited. [*Id.* § 26.] *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405, 9 Am. Ry. Rep. 247.—FOLLOWED IN *Revelle v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 438.

The statute, Mo. R. S. 1879, § 809, allowing double damages to the owner for stock killed on a railroad is penal; and three years is the time limited for the commencement of actions thereunder. This limitation is absolute, and is not extended by improper acts of the defendant preventing the commencement of the action. *Revelle v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 438.—FOLLOWED *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405.

An action to recover damages for killing or injuring a domestic animal which had strayed upon the track, and was killed or injured without fault or negligence of the company in operating its train, but solely by the neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred in Ohio in six years. *Seymour v. Pittsburg, C. & St. L. R. Co.*, 44 Ohio St. 12, 4 N. E. Rep. 236.

62. Action for injuries through neglect of co-servant.—An action to recover for injuries sustained by the negligence of co-employees is, though founded on a contract between the plaintiff and the company, deemed an action for injuries to the person within the meaning of section 2740 of the Iowa Revision, and barred in

two years from the time the cause of action accrued. *Nord v. Burlington & M. R. R. Co.*, 37 Iowa 498.—FOLLOWING *Sherman v. Western Stage Co.*, 22 Iowa 556, 24 Iowa 515.

The words, "an action for injury to the rights of another, not arising on contract," in subdivision 3 of section 18 of the Kan. Code of Civ. Pro., limit and qualify the provision in subdivision 2 of said section 18 giving three years in which to commence an action "upon a liability created by statute," and therefore the two-years' limitation for commencing an action, found in said subdivision 3 of said section 18, applies to all actions brought by an employé to recover damages from a railroad company on account of the negligence of a co-employé, whether the personal injury resulted from the negligence of the master, under the rule of the common law, or from the negligence of the co-employé, without the fault of the master. *Atchison, T. & S. F. R. Co. v. King*, 15 Am. & Eng. R. Cas. 330, 31 Kan. 708, 3 Pac. Rep. 565.

63. Actions for penalties.—Mo. Rev. St. § 3231, providing a limit of three years in which actions may be brought to recover penalties or forfeitures, where the action is by the party injured, or such party and the state, does not apply where a railroad company incurs a penalty for failing to erect a passenger station at a crossing, but the penalty prescribed goes to the school fund. *Missouri v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep. 722.

64. Criminal prosecutions.—La. Code, arts. 3501, 3502, fix the prescription resulting from offenses and *quasi* offenses at one year from the time when the damage is sustained. The plaintiff can only be entitled to the damages actually proven. *Mestier v. New Orleans, O. & G. W. R. Co.*, 16 La. Ann. 354.

An indictment under N. H. Gen. St. ch. 264, § 14, for the benefit of the prosecutor, is barred in one year. *State v. Nashua & L. R. Co.*, 58 N. H. 182.

65. How the time is to be computed.—The usual rule for the computation of time under a statute, that the first day from which a specified number of days is to be counted is to be excluded, and the last day which completes the time is to be included, applies where a statute declares certain penalties against railroad companies. So where the statute provides that suit must

be brought "within ten days," and a penalty is incurred on the 20th of a month, suit may be brought on the 30th of that month. *People v. New York C. R. Co.*, 28 Barb. (N. Y.) 284.

Under the statutory rule for the computation of time (Ala. Code, § 11), an action for personal injuries received on April 13th, commenced on April 13th of the next year, is not barred by the limitation of one year. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. Rep. 249.

IV. DISABILITIES AND EXCEPTIONS.

66. Coverture.—Where a company wrongfully enters upon land, the general rule is that the owner may maintain ejectment; but where there is acquiescence on the part of the owner until public rights have intervened, such action will not lie; and it is no excuse for the acquiescence that the landowner is under the disability of coverture. Coverture cannot prevail against a rule of public policy. *Indiana, B. & W. R. Co. v. Allen*, 113 Ind. 581, 12 West. Rep. 887, 15 N. E. Rep. 446.

A provision in a railroad charter providing that application for compensation for land taken must be made within ten years, excepted *femes covert* and infants, who might apply within two years after their disability might be removed. Held, that the statute applied where a married woman held the fee of land in trust for another married woman, and the statute would constitute a bar where the trustee's husband died after the ten years had run, and an additional two years after such death. *Waring v. Cheraw & D. R. Co.*, 16 So. Car. 416.

The above provision of the statute is not rendered inoperative by requiring the application for damages to be made "as hereinafter directed," when all the directions given are in a previous part of the statute. The manifest intention of the statute must prevail, and it will be read as "hereinbefore directed." *Waring v. Cheraw & D. R. Co.*, 16 So. Car. 416.

Tex. Rev. St. art. 3202, excepting married women from the operation of the statute of limitations, applies to a suit to recover damages from a railroad company for injuries to her while a passenger. *Texas & P. R. Co. v. Gwaltney*, 2 Tex. App. (Civ. Cas.) 602.

67. Infancy.—A provision in a charter fixing a time in which property owners must apply for damages for property taken in the construction of the road does not apply to infants; and as to them the time will not begin to run until they have attained their majority. *Indiana C. R. Co. v. Oakes*, 20 Ind. 9.

How. St. § 8713, which bars an action on the case unless commenced within six years after the cause of action accrues, does not commence to run as against an infant until he attains his majority. *Keating v. Michigan C. R. Co.*, 94 Mich. 219, 53 N. W. Rep. 1053.

The commencement of suit by an infant, by his next friend, will not set the statute of limitations in motion, so as to deprive him of its full benefit after he becomes of age. *Keating v. Michigan C. R. Co.*, 94 Mich. 219, 53 N. W. Rep. 1053.

Where a statute gives minor children a right to sue for wrongfully causing the death of a parent, and another provision requires actions for causing death to be brought within a year, suit may be begun within one year after a child attains his majority. *Rutter v. Missouri Pac. R. Co.*, 21 Am. & Eng. R. Cas. 212, 81 Mo. 169.

68. Exception in cases of trusts.—It is a general principle that the property of a corporation is a trust fund for the benefit of the stockholders in the hands of the corporation, which is the trustee; but capital stock in the corporation, the certificate of which is in the hands of the owner, who has paid for it, is neither a trust fund, nor is its owner a trustee for other stockholders, so as to prevent the running of the statute of limitations in his favor. *Taylor v. South & N. Ala. R. Co.*, 4 Woods (U. S.) 575, 13 Fed. Rep. 152.

The rule that the statute of limitations does not bar a trust estate holds only between *cestui que trust* and trustee not as between *cestui que trust* and trustee on one side, and strangers, as in this case a railroad company, on the other. *Patchett v. Pacific Coast R. Co.*, 100 Cal. 505, 35 Pac. Rep. 73.

69. Bills and notes.—During the civil war a railroad company was authorized to issue promissory notes to circulate as money, which were made payable on demand at a fixed place, and could not be re-issued as currency after one year from the close of the war. Held, that the statute began to run against such notes at the date

when they ceased to be reissuable, without any demand for payment; and a statute providing that the statute of limitations should not apply to notes or bills issued by a bank did not apply. *Butts v. Vicksburg & M. R. Co.*, 63 Miss. 462.

70. Fraud or concealment.—The rule in equity that the statute of limitations will not run against a defrauded party until he discovers the fraud requires that he shall use diligence in attempting to discover it; and where suit is brought after the ordinary limitation has run, it must be made to appear that by the exercise of reasonable diligence the fraud could not sooner be discovered. *Taylor v. South & N. Ala. R. Co.*, 4 Woods (U. S.) 575, 13 Fed. Rep. 152.

A railroad company which has voluntarily placed itself and its property and franchise in the hands of trustees to secure its debt to bondholders cannot lie by when sued for a tort which it claims to have been committed by such trustees, and shield both itself and the trustees from liability by concealing the fact that the trustees are operating the road until an action is barred by the statute. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; *affirming* 43 Ill. App. 454.

The Kansas statute does not run against innocent parties who have been defrauded until they discover the fraud. So where officers of a corporation combine to misapply the funds, the statute does not run until the stockholders discover the misapplication; and knowledge on the part of the officers is not knowledge of the stockholders. *Ryan v. Leavenworth, A. & N. W. R. Co.*, 21 Kan. 365.

71. Injunction restraining suit.—When an injunction does not stay an action, but only prescribes where and how it shall be instituted, the time of the continuance of the injunction is not to be excluded in determining whether the right to sue is barred. *Biggs v. Lexington & B. S. R. Co.*, 79 Ky. 470.

72. Suspension of business by corporate defendant.—The Pa. statute of limitations, providing that its provisions shall not extend to any corporation that may have suspended business, or made any transfer or assignment for the benefit of creditors, or for any cause may have ceased from or suspended the ordinary business for which it was created—*held*, to apply to a

sheriff's sale of a railroad, its property and franchises. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

73. Right of foreign corporation to plead the statute.*—A foreign corporation cannot avail itself of the statutes of limitation of the state in which it is sued. *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. Rep. 261.—FOLLOWING *Olcott v. Tioga R. Co.*, 20 N. Y. 210; *Boardman v. Lake Shore & M. S. R. Co.*, 84 N. Y. 157.—*Olcott v. Tioga R. Co.*, 20 N. Y. 210; *reversing* 26 Barb. 147.—NOT FOLLOWING *Faulkner v. Delaware & R. Canal Co.*, 1 Den. (N. Y.) 441.—APPLIED IN *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265, 84 N. Y. 157. DISAPPROVED IN *Wall v. Chicago & N. W. R. Co.*, 69 Iowa 498. FOLLOWED IN *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137; *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. Rep. 261; *Thompson v. Tioga R. Co.*, 36 Barb. 79.—*Mallory v. Tioga R. Co.*, 3 Abb. App. Dec. (N. Y.) 139, 36 How. Pr. 202, 3 Keyes 354, 5 Abb. Pr. N. S. 420; *affirming* 39 Barb. 488.

And this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in the state, and has property and officers therein. *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265, 84 N. Y. 157.—APPLYING *Olcott v. Tioga R. Co.*, 20 N. Y. 210; *Thompson v. Tioga R. Co.*, 36 Barb. 79; *Rathbun v. Northern C. R. Co.*, 50 N. Y. 656, mem.—FOLLOWED IN *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. Rep. 261.—*Rathbun v. Northern C. R. Co.*, 50 N. Y. 656, mem.—APPLIED IN *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265, 84 N. Y. 157. FOLLOWED IN *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137.—*Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137, 10 Am. Ry. Rep. 81; *affirming* 5 Blatchf. (U. S.) 387.—FOLLOWING *Thompson v. Tioga R. Co.*, 36 Barb. 79; *Olcott v. Tioga R. Co.*, 20 N. Y. 210; *Rathbun v. Northern C. R. Co.*, 50 N. Y. 656.—DISAPPROVED IN *Wall v. Chicago & N. W. R. Co.*, 69 Iowa 498. EXPLAINED IN *McCabe v. Illinois C. R. Co.*, 4 McCrary (U. S.) 492, 13 Fed. Rep. 827.

Such a corporation is within the excep-

* Right of foreign corporation to plead limitation, see note, 18 L. R. A. 524.

tion to the operation of the statute, by which the time of absence from the state is not to be taken as any part of the time limited for the commencement of an action. *Thompson v. Tioga R. Co.*, 36 Barb. (N. Y.) 79.—FOLLOWING *Olcott v. Tioga R. Co.*, 20 N. Y. 210.—APPLIED IN *Boardman v. Lake Shore & M. S. R. Co.*, 4 Am. & Eng. R. Cas. 265; 84 N. Y. 157. FOLLOWED IN *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 137.

The general rule seems to be that a foreign corporation cannot plead the statute of limitations; but when sued in the state for wrongfully causing death, under a statute which prescribes a special limitation, the general rule does not apply, and the special limitation may be pleaded. *Londrigan v. New York & N. H. R. Co.*, 12 Abb. N. Cas. (N. Y.) 273.

It is no answer to a plea of the statute of limitations that the defendants are a corporation created by and under the laws of another state. *Faulkner v. Delaware & R. Canal Co.*, 1 Den. (N. Y.) 441.—NOT FOLLOWED IN *Olcott v. Tioga R. Co.*, 20 N. Y. 210.

The exceptions to the operation of the statute of limitations, in cases where the debtor or party liable was out of the state when the cause of action accrued, or subsequently departed from the state (2 Rev. St. 297, § 27), apply to natural persons only, and not to corporations. *Faulkner v. Delaware & R. Canal Co.*, 1 Den. (N. Y.) 441.—QUOTED IN *McCormick v. Pennsylvania C. R. Co.*, 49 N. Y. 303.

A foreign corporation that, by the laws of a state within which it carries on business, can sue and be sued is not a non-resident in the sense that prevents it from setting up the statute of limitations as a defense in an action against it; and Iowa Code, § 2533, that provides that "the time during which a defendant is a non-resident of the state shall not be included in computing the period of limitation," has no reference to such a case. *McCabe v. Illinois C. R. Co.*, 4 McCrary (U. S.) 492, 13 Fed. Rep. 827.—EXPLAINING *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. 137. QUOTING *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65; *Baldwin v. Mississippi & M. R. Co.*, 5 Iowa 519; *Bristol v. Chicago & A. R. Co.*, 15 Ill. 436; *Richardson v. Burlington & M. R. Co.*, 8 Iowa 263. REVIEWING *United States Exp. Co. v. Ware*, 20 Wall. 543; *Cobb v.*

Illinois C. R. Co., 38 Iowa 608.—FOLLOWED IN *Guinn v. Iowa C. R. Co.*, 4 McCrary (U. S.) 566, 14 Fed. Rep. 323.

A railroad company doing business in the state, though incorporated elsewhere, is always subject to notice and personal judgment in the courts of the state, and hence is a resident of the state, within the meaning of the statute of limitations, and it may rely upon the statute in bar of an action not begun within the time limited therefor. *Wall v. Chicago & N. W. R. Co.*, 69 Iowa 498, 29 N. W. Rep. 427.—DISAPPROVING *Olcott v. Tioga R. Co.*, 20 N. Y. 210; *Tioga R. Co. v. Blossburg & C. R. Co.*, 20 Wall. (U. S.) 143.

The absence of the officers of a corporation, created in Texas and carrying on its business there, beyond the state, is not the absence of the corporation itself, so as to bring such corporation within the exception contained in section 22 of the statute of limitations. *Sherman v. Buffalo Bayou, B. & C. R. Co.*, 21 Tex. 349.

While the office of a corporation is kept, as required by law, at some place on the line of the road, and a party has full opportunity to obtain service on the company, as provided by statute, it cannot be truly averred that the corporation is beyond the limits of the state. *Sherman v. Buffalo Bayou, B. & C. R. Co.*, 21 Tex. 349.

V. NEW PROMISE; ACQUIESCENCE.

74. New promise.—The six-year statute of limitations of Colorado applies to specialties when sued on, as well as to simple contracts; and where a municipal bond issued in aid of a railroad, under seal, and for the direct and unconditional payment of money, is the basis of the action, the recovery must be had on the bond, and not on a subsequent promise or contract of less solemnity, so as to make a different limitation apply. *Toothaker v. Boulder*, 13 Colo. 219, 22 Pac. Rep. 468.

A cause of action originating in a breach of a transportation contract is complete when, within a reasonable time, the carrier has failed to perform it; and from that time the statute of limitations begins to run. Subsequent demands for fulfilment by the consignor, and promises by the carrier, do not take the case out of the statute, because: (1) Of the uncertainty as to the time when the liability accrued. (2) The

uncertainty would have continued as long as the carrier had the property and failed to transport it. (3) This theory assumes a waiver of the carrier's existing obligations at each demand. (4) Subsequent promises to transport were not based upon any consideration. They were simply promises to do what the carrier was already under obligations to do. *Cobb v. Illinois C. R. Co.*, 38 Iowa 601.

75. Acquiescence—Laches.—Nineteen years' acquiescence in a lease bars a suit to declare it void. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. Rep. 440.

Where the right is claimed by a company to flow water upon the lot of another by user for twenty years, the owner's complaint of the act within that period to the station agent of the company, and demand that it be stopped, will defeat the right claimed, as rebutting the presumption of acquiescence. *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339.—*DISAPPROVING Kimball v. Ladd*, 22 Vt. 747; *School District v. Lynch*, 33 Conn. 334.

The delay of the plaintiff for a period less than twenty years to notify the company of his injuries could not estop him or give the company a prescriptive right to maintain the embankment without liability for damages. *Knight v. Albemarle & R. R. Co.*, 111 N. Car. 80, 15 S. E. Rep. 929.

A failure to bring suit for eighteen years after a railroad has been so constructed as to divert a stream of water from its course is not such acquiescence as to prevent an injured party from maintaining an action, where the evidence shows that at the time the road was built he insisted that a culvert should be built, and from time to time thereafter objected to the diversion of the water. *Young v. Chicago & N. W. R. Co.*, 28 Wis. 171, 5 Am. Ry. Rep. 159.—*DISTINGUISHED IN O'Connor v. Fond du Lac, A. & P. R. Co.*, 5 Am. & Eng. R. Cas. 82, 52 Wis. 526, 38 Am. Rep. 753. *REVIEWED IN Chicago & A. R. Co. v. Kansas City, I. & P. R. Co.*, 110 Mo. 510.

LIMITATIONS OF LIABILITY.

As between connecting lines, see CARRIAGE OF MERCHANDISE, 665-690.

— to persons riding on free passes, see PASSES, 20-30.

For articles left in cloak room, see BAGGAGE, 130, 131.

For loss by fire, see BILLS OF LADING, 73-80; FIRES, 200.

— or injury to dogs carried, see CARRIAGE OF LIVE STOCK, 117.

— misdelivery, to wilful misconduct, see CARRIAGE OF MERCHANDISE, 285.

— negligence, whereby employes are injured, see EMPLOYEES, INJURIES TO, 170-181.

In bills of lading, see BILLS OF LADING, 62-72.

— passenger tickets, see TICKETS AND FARES, 14-21, 106.

Of carrier of baggage, see BAGGAGE, 95-103.

— — cattle, see CARRIAGE OF LIVE STOCK, 62-100.

— — goods, see CARRIAGE OF MERCHANDISE, 430-490.

— — passengers, see CARRIAGE OF PASSENGERS, 330-341.

— express companies, see EXPRESS' COMPANIES, 60-74.

— initial carrier, to its own line, see BAGGAGE, 21; CARRIAGE OF LIVE STOCK, 104; CARRIAGE OF MERCHANDISE, 674-681; CARRIAGE OF PASSENGERS, 503, 511.

— transfer company, for baggage, see BAGGAGE, 78.

Waiver of, by agents, see AGENCY, 58.

I. POWER TO LIMIT COMMON LAW

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I. POWER TO LIMIT COMMON LAW LIABILITY.

1. In general.*—A railway company, by accepting and acting under its charter, becomes a carrier of persons and property, and the law imposes all the duties and lia-

* Power of common carriers to limit their common law liability. Authorities arranged by states, see notes, 35 AM. & ENG. R. CAS. 672, 82 AM. DEC. 379.

Right to limit common law liability in the absence of negligence, see note, 18 L. R. A. 527.

Carrier may restrict its common law liability, see note, 3 L. R. A. 425.

Construction of statutes restraining carriers in the limitation of their common law liability, see note, 30 AM. & ENG. R. CAS. 55.

Connecting lines. When contracts limiting liability enure to benefit of connecting carriers, see notes, 32 AM. & ENG. R. CAS. 474; 18 Id. 506; 16 Id. 241.

Power of carrier to stipulate for exemption from liability, see notes, 3 AM. & ENG. R. CAS. 272; 9 Id. 110.

bilities of a common carrier upon it, and such company cannot exonerate itself from such duty and responsibility by contract with others, nor in any wise escape or free itself from liability unless released by the general assembly. *Wabash, St. L. & P. R. Co. v. Peyton*, 18 Am. & Eng. R. Cas. 1, 106 Ill. 534, 46 Am. Rep. 705.

It is not error to refuse instructions to the jury as to the power of a common carrier to limit his liability if there is nothing in the evidence to warrant them. *Central R. & B. Co. v. Hines*, 19 Ga. 203.

Under section 7 of the Railway and Canal Traffic Act, the declaration of the value of an article shipped must be made by the sender, with the intention that it shall be so understood, and for the purpose of insurance. *Robinson v. London & S. W. R. Co.*, 19 C. B. N. S. 51, 11 Jur. N. S. 390, 34 L. J. C. P. 234, 13 W. R. 660.

2. Limitation by express contract.*

—It is now the admitted doctrine in America (as it has been settled beyond a reasonable doubt in England) that it is competent for a common carrier to limit his common law liability by express contract. *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725. *Tardos v. Chicago, St. L. & N. O. R. Co.*, 35 La. Ann. 15. *Bankard v. Baltimore & O. R. Co.*, 34 Md. 197.—NOT FOLLOWED IN *Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.—*McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79. *Hutchinson v. Chicago, St. P., M. & O. R. Co.*, 37 Minn. 524, 35 N. W. Rep. 433. *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. (N. Y.) 136.—NOT FOLLOWING *Gould v. Hill*, 2 Hill (N. Y.) 623. QUOTING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.—*Dana v. New York C. & H. R. R. Co.*, 50 How. Pr. (N. Y.) 428.—FOLLOWING *Long v. New York C. R. Co.*, 50 N. Y. 76; *Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1; *Hinckley v. New York C. & H. R. R. Co.*, 56 N. Y. 429.—*Steiger v. Erie R. Co.*, 5 Hun (N. Y.) 345.—APPLYING *Cragin v. New York C. R. Co.*, 51 N. Y. 61; *Penn. v. Buffalo & E. R. Co.*, 49 N. Y. 204; *Dorr v.*

New Jersey Steam Nav. Co., 11 N. Y. 485.—*Lucesco Oil Co. v. Pennsylvania R. Co.*, 2 Pittsb. (Pa.) 477. *Swindler v. Hilliard*, 2 Rich. (So. Car.) 286.—FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506.—*McCarthy v. Gulf, C. & S. F. R. Co.*, 79 Tex. 33, 15 S. W. Rep. 164.

At least against all risks but his own negligence or misconduct. *Squire v. New York C. R. Co.*, 98 Mass. 239.—FOLLOWED IN *Pemberton Co. v. New York C. R. Co.*, 104 Mass. 144.—*Merrill v. American Exp. Co.*, 62 N. H. 514. *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556.

But the contract ought to be in clear and distinct terms. *McCoy v. Erie & W. Transp. Co.*, 42 Md. 498, 14 Am. Ry. Rep. 317.

And it must be fairly obtained, and just, and reasonable. *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 7 L. R. A. 162, 12 S. W. Rep. 1018.

And, notwithstanding the special contract, he remains a common carrier, with his common law liability restricted in so far as it may be lawfully restricted by the contract. *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369.—QUOTING *Southern Exp. Co. v. Moon*, 39 Miss. 831.—FOLLOWED IN *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

The rigorous accountability to which common carriers of goods and baggage have been held as against all losses has been relaxed so far as to allow that liability to be qualified to some extent by contract between the carrier and the employer. *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424.

Act 124, Laws of 1867 (How. Mich. St. § 3418), in so far as it requires any change in or limitation of the common law liability of a railroad company as a common carrier to be evidenced by a contract wholly in writing, is repealed by How. St. § 3328, which permits such agreement to be either written or printed. *Feige v. Michigan C. R. Co.*, 62 Mich. 1, 28 N. W. Rep. 685.

Where a shipper signs an agreement that he will not hold the company liable for loss of market, or other claims, arising from delay or detention on the journey, under any circumstances, the same is binding. *Hartness v. Great Western R. Co.*, 2 Mich. N. P. 80.

Under section 7 of the Railway and Canal Traffic Act, a special contract in

* Right of carrier to limit or restrict liability by contract, see notes, 1 L. R. A. 500; 3 Id. 343; 6 Id. 849; 7 Id. 214; 10 Id. 419; 12 Id. 799; 13 Id. 362.

Carriers' liability may be limited by express contract, see notes, 5 AM. ST. REP. 725; 13 L. R. A. 518.

writing must itself set out or embody the condition limiting the carrier's liability. *Peek v. North Staffordshire R. Co.*, 10 *H. L. Cas.* 473, 9 *Jur. N. S.* 914, 32 *L. J. Q. B.* 241, 11 *W. R.* 1023, 8 *L. T.* 768.—CONSIDERED IN *Manchester, S. & L. E. Co. v. Brown*, *L. R.* 8 App. Cas. 703, 53 *L. J. Q. B.* 124, 50 *L. T.* 281, 32 *W. R.* 207. FOLLOWED IN *Ashenden v. London, B. & S. C. R. Co.*, *L. R.* 5 Ex. D. 190, 42 *L. T.* 586, 28 *W. R.* 511, 44 *J. P.* 205.

3. Contracts limiting amount recoverable.*—It is now well settled that a common carrier may, by special contract, limit or qualify the liability resting upon him as an insurer; and this limitation may extend, not only to the risks or accidents for which the carrier will be answerable, but to the amount of damages for which he is to be liable in the event of loss or injury. *Alabama G. S. R. Co. v. Little*, 12 *Am. & Eng. R. Cas.* 37, 71 *Ala.* 611.—REVIEWED IN *Louisville & N. R. Co. v. Sherrod*, 84 *Ala.* 178, 4 *So. Rep.* 29.—*Brown v. Wabash, St. L. & P. R. Co.*, 18 *Mo. App.* 568.—FOLLOWING *Harvey v. Terre Haute & I. R. Co.*, 74 *Mo.* 538. QUOTING *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331.—*Fibel v. Livingston*, 64 *Barb. (N. Y.)* 179.

Where a shipper of property enters into a contract with a common carrier, whereby, in consideration of an agreement of the latter to transport the property at reduced rates, it is stipulated that in the event of loss or injury resulting from causes which would make the carrier liable the liability shall be limited to an amount not exceeding a valuation specified, the shipper, in case of loss or injury, is not entitled to recover more than the sum specified. *Zimmer v. New York C. & H. R. R. Co.*, 137 *N. Y.* 460, 33 *N. E. Rep.* 642, 51 *N. Y. S. R.* 269; reversing in part 63 *Hun* 631, 44 *N. Y. S. R.* 937, 18 *N. Y. Supp.* 945.—FOLLOWING *Fifield v. New York, L. & W. R. Co.*, 125 *N. Y.* 704.—*Conover v. Pacific Exp. Co.*, 40 *Mo. App.* 31.—REVIEWING *Harvey v. Terre Haute & I. R. Co.*, 74 *Mo.* 538; *McFadden v. Missouri Pac. R. Co.*, 92 *Mo.* 343.—*Rogan v. Wabash R. Co.*, 51 *Mo. App.* 665.

A stipulation in a written contract of shipment placing a limited valuation on

*Validity of stipulations limiting carriers' liability to a particular amount. Agreed valuations, see notes, 45 *AM. & ENG. R. CAS.* 319; 21 *Id.* 91; 18 *Id.* 613; 23 *AM. ST. REP.* 593.

the property shipped in case of its loss by the default of the carrier, when not made in consideration of special or reduced rates of shipment, is not binding on the shipper. *McFadden v. Missouri Pac. R. Co.*, 30 *Am. & Eng. R. Cas.* 17, 92 *Mo.* 343, 10 *West. Rep.* 372, 4 *S. W. Rep.* 689.—DISTINGUISHING *Hart v. Pennsylvania R. Co.*, 112 *U. S.* 331; *Harvey v. Terre Haute & I. R. Co.*, 74 *Mo.* 538.

Ordinarily the value agreed upon fixes the liability of the carrier, but on the one hand the carrier cannot limit his liability by an undervaluation, nor on the other can the shipper increase the liability by an overvaluation of the property shipped, so as to estop the carrier from showing its true value. *Chicago & N. W. R. Co. v. Chapman*, 42 *Am. & Eng. R. Cas.* 392, 133 *Ill.* 96, 24 *N. E. Rep.* 417; affirming 30 *Ill. App.* 504.

A provision in a contract of carriage that the carrier shall pay five cents per 100 pounds for every day that freights are delayed beyond a fixed time does not limit the liability of the carrier thereto. In addition thereto the carrier is liable for any actual damage occasioned by the delay. *Place v. Union Exp. Co.*, 2 *Hill. (N. Y.)* 19.

4. Contract must be just and reasonable.*—A contract restricting the responsibility of the carrier must be reasonable, and not calculated to ensnare or defraud the other party. *Capelhart v. Seaboard & R. R. Co.*, 81 *N. Car.* 438.

The stipulation for exemption from responsibility must be just and reasonable in the eye of the law, and hence it is not lawful so to stipulate as respects the negligence of the carrier or its agents. *Phifer v. Carolina C. R. Co.*, 89 *N. Car.* 311, 45 *Am. Rep.* 687. *M'Nally v. Lancashire & Y. R. Co.*, 8 *Ir. L. R.* 81, 4 *Ry. & C. T. Cas.* xix.

A provision in a shipping contract that in the event of loss or damage the carrier will be liable only for the value of the goods at the place and at the time of shipment is just and reasonable, and will be enforced. *Louisville & N. R. Co. v. Oden*, 80 *Ala.* 38.—FOLLOWING *South & N. Ala. R. Co. v. Henlein*, 52 *Ala.* 606.

*Limitation of carriers' liability must be reasonable, see notes, 5 *AM. ST. REP.* 725; 13 *Id.* 784.

English Railway and Canal Traffic Act. Just and reasonable conditions, see note, 16 *AM. & ENG. R. CAS.* 187.

A set of conditions limiting a carrier's liability is unreasonable and void if any part of it is unreasonable. *Kirby v. Great Western R. Co.*, 18 L. T. 658.

Under section 7 of the Railway and Canal Traffic Act, a condition limiting the carrier's liability must be just and reasonable in the judgment of the court, and must be set out in a written contract, signed by or on behalf of the consignor. *Aldridge v. Great Western R. Co.*, 15 C. B. N. S. 582, 33 L. J. C. P. 161. *Simons v. Great Western R. Co.*, 18 C. B. 805, 26 L. J. C. P. 25.—QUESTIONED IN *Garton v. Bristol & E. R. Co.*, 1 B. & S. 112, 30 L. J. Q. B. 273, 7 Jur. N. S. 1234, 9 W. R. 734.—*Peek v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768.

In considering whether conditions annexed to carriers' special contracts are just and reasonable, such conditions must be construed according to the ordinary meaning of their language, without implying any limitation or exception not expressed. *M'Nally v. Lancashire & Y. R. Co.*, 8 Ir. L. R. 81, 4 Ky. & C. T. Cas. xix.

5. As to whether the higher rate of freight is a reasonable alternative.—A contract limiting the carrier's liability *prima facie* unjust and unreasonable becomes just and reasonable if the shipper is given an alternative to enter into a contract which is just and reasonable. *Gallagher v. Great Western R. Co.*, 8 Ir. R., C. L. 326.

Where a railway company charges alternative rates, the lower being at the owner's risk, the higher rate, if within the maximum allowed, is not necessarily unreasonable. *Foreman v. Great Western R. Co.*, 38 L. T. 851.

The question whether the higher rate is a reasonable alternative should be left to the jury. *Ruddy v. Midland G. W. R. Co.*, 8 Ir. L. R. 224.

The mere fact that shippers invariably avail themselves of such lower rate is not evidence that the higher rate is unreasonable or prohibitory; that question is for the jury. *Foreman v. Great Western R. Co.*, 38 L. T. 851.

6. Must be a consideration for the contract.—A common carrier has no power to restrict, in any manner, his common law liability, but is bound to transport the property intrusted to him under this

liability, if it be not waived, or changed by contract. But he may make any contract with an individual relative to the transportation of his property which the latter may deem conducive to his interest, and enter into upon a consideration satisfactory to himself, though a diminution of the carrier's common law liability results therefrom. *Michigan C. R. Co. v. Hale*, 6 Mich. 243.—NOT FOLLOWING *Rome R. Co. v. Sullivan*, 14 Ga. 277. *OVERRULING Michigan C. R. Co. v. Ward*, 2 Mich. 538.

A common carrier may stipulate for limitation of or exemption from his common law responsibility for loss of freight occurring through other cause than his negligence (e. g., accidental fire), provided the contract is supported by a *bona fide*, and not merely colorable, consideration, and is fair and reasonable in itself in view of all the surrounding circumstances, and the assent of the shipper thereto is fairly obtained. *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162.—QUOTING *Dillard v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288; *Bissell v. New York C. R. Co.*, 25 N. Y. 442. *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314.

As the law compels the carrier to take goods for transportation, it may be difficult to see what consideration there is to support a contract for a release of the carrier from responsibility, yet it is a matter with which the courts can no longer deal. *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369.

Semble, that a common carrier for hire can protect himself by an express contract, to such extent only as will render his liability no greater than that of a special carrier for hire; also, that to render a parol contract to that effect binding upon the other party there should be a consideration therefor, and that otherwise it would be *nudum pactum*. *Glenn v. Charlotte & S. C. R. Co.*, 63 N. Car. 510.—FOLLOWED IN *Capehart v. Seaboard & R. R. Co.*, 81 N. Car. 438.

7. Reduction of freight as a consideration.—A reduction in freight charges is a sufficient consideration to support such a contract. So likewise is the increased responsibility assumed by the carrier in giving through bills of lading for shipment of goods over other lines beyond its

* Carrying at reduced rate in consideration that carriers' liability be limited, see 35 AM. & ENG. R. CAS. 614, *abstr.*

own terminus. *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314. *Dillard v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288.—APPROVING *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. (U. S.) 113. FOLLOWING *Olwell v. Adams Exp. Co.*, 1 Cent. L. J. 186. QUOTING *New York C. R. Co. v. Lockwood*, 17 Wall. 360.—DISTINGUISHED IN *Merchants' Dispatch Transp. Co. v. Bloch*, 86 Tenn. 393, 6 Am. St. Rep. 847, 6 S. W. Rep. 881. QUOTED IN *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162.

When a company charges alternative rates for conveyance of cattle or goods, the lower rate being at owner's risk, *a priori* the higher rate, if within the parliamentary limit, is not necessarily unreasonable or prohibitory. *Foreman v. Great Western R. Co.*, 38 L. T. 851, 3 Ry. & C. T. Cas. xxviii. *Harris v. Midland R. Co.*, 25 W. R. 63, 3 Ry. & C. T. Cas. xxvii. *Gallagher v. Great Western R. Co.*, 8 Ir. R., C. L. 326, 3 Ry. & C. T. Cas. xxviii.

Under the Railway and Canal Traffic Act, 1854, there is sufficient offer of an option of a lower rate at the owner's risk, or a higher rate at the company's risk, if there is a notice to this effect in the consignment note, and the higher rate is posted up in the company's office, and the consignment note signed on behalf of the shipper has been in general use for some time and has been adopted by him. *Foreman v. Great Western R. Co.*, 38 L. T. 851.

The plaintiff, under a contract in writing signed by his agent, delivered to the defendants certain cheeses to be carried from L. to S. "at owner's risk." As the plaintiff knew, the defendants had two rates of carriage: a higher rate when they took the ordinary liability of carriers, and a lower when they were relieved of all liability except that arising from the wilful misconduct of their servants. In using the words "owner's risk" the plaintiff intended that the cheeses should be carried at the lower rate, and subject to the conditions restricting the defendants' liability. The defendants' servants packed the cheeses in such a manner that during their transit upon the defendants' railway they were damaged, but the defendants' servants did not know that damage would result from the mode in which the cheeses were packed. Held, that, as the defendants carried at alternative rates, the

condition excepting them from liability when carrying at the lower rate was just and reasonable within the meaning of section 7 of the Ry. & C. Tr. Act 1854, and that the injury to the cheeses had not arisen from the wilful misconduct of their servants. *Lewis v. Great Western R. Co.*, 3 Q. B. D. 195, 47 L. J. Q. B. 131, 3 Ry. & C. T. Cas. xxviii.

8. Effect of shipper's failure to read contract.—Persons entering into a written or printed contract are bound to examine and ascertain its contents, and if they accept it without objection they are bound by its terms, in the absence of fraud or imposition. *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—FOLLOWING *St. Louis, K. C. & N. R. Co. v. Cleary*, 77 Mo. 634. *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.—DISAPPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. QUOTED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129.—*Zimmer v. New York C. & H. R. Co.*, 137 N. Y. 460, 33 N. E. Rep. 642, 51 N. Y. S. R. 269; reversing in part 63 Hun 631, 44 N. Y. S. R. 937, 18 N. Y. Supp. 945.—FOLLOWING *Fifield v. New York, L. & W. R. Co.*, 125 N. Y. 704.—*Lewis v. Great Western R. Co.*, 5 H. & N. 867, 29 L. J. Ex. 425.

It is not correct in all cases to charge a jury that unless a shipper knowingly assents to a restriction of the carrier's liability it will not relieve the company of its common law liability; and whether he did assent is a question for the jury. This rule might apply where the shipper does not sign the contract, but only takes a receipt; but where he signs the contract, and there is no other reason why it should not be valid, it is not a question for the jury whether he understood the contract. *Chicago, B. & Q. R. Co. v. Hale*, 2 Ill. App. 150.

9. Contract must be signed by shipper.—The fact that a shipper sent a note to a station agent requesting that goods be shipped "not insured" did not constitute a special contract signed by the parties so as to relieve the company from liability within the meaning of section 7 of the Railway and Canal Traffic Act. *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768.—CONSIDERED IN *Man-*

chester, S. & L. R. Co. v. Brown, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124, 50 L. T. 281, 32 W. R. 207. FOLLOWED IN Ashenden v. London, B. & S. C. R. Co., L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

It is only where the company seeks to exempt itself from liability by reason of there being a special contract that the proviso in section 7 of the Railway and Canal Traffic Act to the effect that no special contract shall be binding upon or affect any party unless the same be signed by him, etc., applies. *Baxendale v. Great Western R. Co.*, 38 L. J. Q. B. 137, L. R. 4 Q. B. 244, 17 W. R. 412.

10. Contract made after injury occurred.—Where a horse is injured while attempting to load him on the cars, a shipping contract thereafter entered into which contains no release of past liabilities does not relieve the carrier of the injury already caused. *McCullough v. Wabash Western R. Co.*, 34 Mo. App. 23.

11. By printed notice to the public.*—A railway company may limit its common law liability as carrier by notice. *Peck v. North Staffordshire R. Co.*, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768, 10 H. L. Cas. 473.—CONSIDERED IN *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124, 50 L. T. 281, 32 W. R. 207. FOLLOWED IN *Ashenden v. London, B. & S. C. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

Where there is no special contract as to the liability of a common carrier of property, he is responsible for all loss or damage except that which is caused by the act of God or the public enemy. He cannot limit this liability by notice, even if it be brought to the knowledge of the owner. But common carriers may limit their liability by an

* As to right of carriers to limit liability by notice or special contract, see notes, 32 AM. DEC. 468; 42 *Id.* 498. See also, CARRIAGE OF MERCHANDISE, 420-426.

Common law liability of carriers of goods may be limited by general notice, see note, 5 AM. ST. REP. 720.

Right of common carriers to limit liability by printed words or notices on tickets, checks, etc., see note, 5 AM. ST. REP. 719.

Notice, etc., restricting liability of carriers of passengers for torts or negligence, see note, 5 AM. ST. REP. 728. See also, CARRIAGE OF PASSENGERS, 330-341; TICKETS AND FARES, 14-21.

express agreement with the owner. *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485.

—FOLLOWING *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Barb. 524. OVERRULING *Gould v. Hill*, 2 Hill 623.—APPLIED IN *Steiger v. Erie R. Co.*, 5 Hun 345. FOLLOWED IN *Blossom v. Dodd*, 43 N. Y. 264. REVIEWED IN *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103; *London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. Supp. 231, 68 Hun 598, 52 N. Y. S. R. 581.

A common carrier may, by his express contract, limit his common law responsibility; but a mere general notice, when brought to the knowledge of the owner of the goods carried, will not have that effect unless there is very clear proof that the owner expressly assented to that, as forming the basis of the contract. But a carrier may, by general notice brought to the knowledge of the owner of the goods, limit his responsibility for carrying certain commodities beyond the line of his general business, or he may make his responsibility depend upon certain reasonable conditions. *Farmers' & M. Bank v. Champlain Transp. Co.*, 23 Vt. 186.

But such notice is not effectual to limit the time, after the arrival of the goods at their place of destination, in which the carrier would continue in the relation of common carrier. *Blumenthal v. Brainerd*, 38 Vt. 402.

A railway company cannot, by their printed notices, receipts, and regulations, even when brought to the notice of the shipper, so limit their responsibility that they can carry freights for a reward, and, at the same time, not be liable for a failure to exercise ordinary care in the business. *Mann v. Birchard*, 40 Vt. 326.

12. A general notice not sufficient.

—The rule is now well settled that a common carrier may limit his common law liability, in certain particulars, and to a certain extent, by express contract with the owner or shipper of goods. But carriers cannot limit their liability by a mere notice, even though the notice is brought to the knowledge of the person whose property they carry. It must be by express contract. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. *Western Transp. Co. v. Newhall*, 24 Ill. 466.—APPROVED IN *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

DISTINGUISHED IN *Illinois C. R. Co. v. Read*, 37 Ill. 484.—*Mobile & O. R. Co. v. Weiner*, 49 Miss. 725. *Moses v. Boston & M. R. Co.*, 24 N. H. 71.—FOLLOWING *Bennet v. Dutton*, 10 N. H. 487. NOT FOLLOWING *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228.—FOLLOWED IN *Moses v. Boston & M. R. Co.*, 32 N. H. 523.—*Moses v. Boston & M. R. Co.*, 32 N. H. 523.—FOLLOWING *Moses v. Boston & M. R. Co.*, 24 N. H. 71.—*Slocum v. Fairchild*, 7 Hill (N. Y.) 292.—REVIEWING *Hollister v. Nowlen*, 19 Wend. 247; *Cole v. Goodwin*, 19 Wend. 251.—*Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. (N. Y.) 136. *Brown v. Adams Exp. Co.*, 15 W. Va. 812.—APPROVING *Western Transp. Co. v. Newhall*, 24 Ill. 466; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 136. DISAPPROVING *Walker v. York & N. M. R. Co.*, 2 El. & Bl. (75 E. C. L.) 750; *Leeson v. Holt*, 1 Stark. 186 (2 E. C. L. 77); *Walker v. Jackson*, 10 M. & W. 173. REVIEWING *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

Limitations of a carrier's liability can only be made by express contract before a shipment is made; and where no written agreement is entered into, such limitations cannot be established by proving that the shipment was under such conditions, and previous knowledge on the part of the shipper, as to relieving the carrier. The liability of a carrier cannot be restricted by any vague or inconclusive evidence. *Reed v. Fargo*, 4 Silv. Sup. Ct. 143, 7 N. Y. Supp. 185.

13. Notice not brought to shipper's knowledge.—The common law liability of a carrier may be limited by express notice, except as to such losses as result from misconduct or negligence; but it must appear that the shipper had knowledge of the notice. *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228.—APPROVED IN *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 Ohio St. 65. NOT FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506; *Moses v. Boston & M. R. Co.*, 24 N. H. 71.

A carrier's liability cannot be limited by contract, unless it appears that the shipper assented thereto; but it need not be shown by evidence of express consent. It might be established by proof of previous dealings between the parties. *Lake Shore & M. S. R. Co. v. Davis*, 16 Ill. App. 425.

An advertisement in a newspaper is not
6 D. R. D.—22

admissible in evidence as a limitation of a carrier's common law liability, unless it is first shown that the plaintiff was in the habit of reading that paper. *Leeson v. Holt*, 1 Stark. 186.

The *prima facie* common law liability of a carrier is not conclusively rebutted by showing that a notice limiting liability was painted on a board and hung up at a station, where it is shown that the party sought to be bound thereby did not know of such notice. *Great Western R. Co. v. Goodman*, 12 C. B. 313, 16 Jur. 862, 21 L. J. C. P. 197.

14. Notice indorsed on receipt or bill of lading.—No excuse will avail a common carrier for loss of goods delivered to it for transportation, except the act of God or the public enemy, and he cannot limit his liability by any notice or entry upon receipts for goods or tickets sold, but may by an independent express contract. *Southern Exp. Co. v. Purcell*, 37 Ga. 103. *Purcell v. Southern Exp. Co.*, 34 Ga. 315. *Chicago & N. W. R. Co. v. Chapman*, 42 Am. & Eng. R. Cas. 392, 133 Ill. 96, 24 N. E. Rep. 417; *affirming* 30 Ill. App. 504. *Michigan C. R. Co. v. Hale*, 6 Mich. 243.—QUOTED IN *Adams Exp. Co. v. Haynes*, 42 Ill. 89.—*Blossom v. Dodd*, 43 N. Y. 264.—DISAPPROVING *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64. FOLLOWING *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; *Bissell v. New York C. R. Co.*, 25 N. Y. 442; *French v. Buffalo, N. Y. & E. R. Co.*, 4 Keyes (N. Y.) 108.—DISTINGUISHED IN *Belger v. Dinsmore*, 51 N. Y. 166; *Elmore v. Sands*, 54 N. Y. 512; *Kirkland v. Dinsmore*, 62 N. Y. 171. FOLLOWED IN *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212; *Madan v. Sherard*, 73 N. Y. 329; *Madan v. Sherrard*, 10 J. & S. (N. Y.) 353. RECONCILED IN *Steers v. Liverpool, N. Y. & P. Steamship Co.*, 57 N. Y. 1. REVIEWED IN *London & L. Fire Ins. Co. v. Rome, W. & O. R. Co.*, 23 N. Y. Supp. 231.—*Sunderland v. Westcott*, 2 Sweeney (N. Y.) 260, 40 How. Pr. 468.

Conditions printed on the back of a freight receipt, touching the carrier's liability, are but a notice and not a part of the contract; and where the contract is sued on, such conditions need not be set out in the declaration. *Western Transp. Co. v. Newhall*, 24 Ill. 466.—DISTINGUISHING *Barnard v. Cushing*, 4 Metc. (Mass.) 233.

If a shipper takes a receipt for his goods from a common carrier which contains con-

ditions limiting the liability of the carrier, with a full understanding of such conditions, and assents to them, it becomes his contract as fully as if he had signed it, and he will be bound by the conditions; but whether the shipper has consented to such conditions is a question of fact for the jury. *Anchor Line v. Dater*, 68 Ill. 369.—FOLLOWING *Adams Exp. Co. v. Haynes*, 42 Ill. 89; *Illinois C. R. Co. v. Frankenberg*, 54 Ill. 88.

Where a receipt is given by a carrier for goods, containing a clause limiting his liability, whether such receipt is to be regarded as a contract depends upon the question whether the owner of the goods, in taking the receipt, knew its contents, or is to be presumed to have known them. If he knew, or is presumed to have known from the nature of the transaction, the law infers his assent and makes it the contract between the parties. Otherwise there is no meeting of minds and no express contract. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349. *Sunderland v. Westcott*, 2 Sweeny (N. Y.) 260, 40 How. Pr. 468.

Conditions indorsed on a way bill by a railroad, limiting its liability, which are known to the consignor, who is agent of the consignee, the real owner, are binding on the consignee. *Armstrong v. Grand Trunk R. Co.*, 18 New Brun. 445.

15. Cannot voluntarily assume position of ordinary bailee.—A common carrier may, by contract, restrict his liability as an insurer, but he will not be permitted to assume the position of an ordinary bailee; the law still holds him to a higher degree of care than that required of a private carrier, and the rule as to the burden of proof still prevails; and if the goods are lost, whatever may have been the agreement with the shipper, the law will presume that they were lost through the fault of the carrier, unless the carrier show the contrary. *Kirby v. Adams Exp. Co.*, 2 Mo. App. 369. *Drew v. Red Line Transit Co.*, 3 Mo. App. 495.

16. Effect of usage and custom.—Neither usage nor custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common law liability. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448.

A carrier may limit his liability for loss or injury by special contract, except for gross

negligence or wilful misfeasance; but such liability cannot be limited by merely proving a usage in giving bills of lading containing limitations. *Illinois C. R. Co. v. Smyser*, 38 Ill. 354.

Where a company has for ten years posted notices, and inserted them in its bills of lading, containing certain regulations, and plaintiff has been a common shipper and fully aware of such regulations, the company cannot establish a usage conflicting therewith, where the statute of the state prevents carriers from limiting their liability. *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79.

The duty and liability of a common carrier in regard to the delivery of goods intrusted to him may be modified by the particular usage of the carrier; and if he rely upon and prove such usage as a defense in an action brought against him by the consignor of goods, it is not necessary that he should prove that the consignor had knowledge of such usage. *Farmers' & M. Bank v. Champlain Transp. Co.*, 18 Vt. 131. —APPROVING *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157.—APPROVED IN *Coates v. United States Exp. Co.*, 45 Mo. 238; *Kyle v. Laurens R. Co.*, 10 Rich. (So. Car.) 382.

17. Compelling a waiver of company's liability as a condition precedent to receiving freight.*—A common carrier has no right to demand of a shipper a waiver of his right as a condition precedent to receiving freight. *Missouri Pac. R. Co. v. Fagan*, 35 Am. & Eng. R. Cas. 666, 72 Tex. 127, 9 S. W. Rep. 749, 2 L. R. A. 75.

The carrier must hold himself in readiness to ship with common law responsibility, and must offer to shippers a reasonable and bona fide alternative between that mode of shipment and the one with limited responsibility. *Louisville & N. R. Co. v. Gilbert*, 42 Am. & Eng. R. Cas. 372, 88 Tenn. 430, 12 S. W. Rep. 1018, 7 L. R. A. 162.

A carrier cannot by special contract limit its common law liability for losses not occasioned by its negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction; and it is immaterial that the shipper knowingly accepted a bill of lad-

* Stipulation which companies may not extort from shippers, and effect of, if extorted, see note, 13 AM. ST. REP. 782.

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ing containing such restriction, without demanding a different contract, if he knew that the carrier's agents had no authority to make any other contract with him. *Little Rock & Ft. S. R. Co. v. Cravens*, 57 Ark. 112.—FOLLOWED IN *St. Louis, I. M. & S. R. Co. v. Spann*, 57 Ark. 127.

18. For destruction by fire.—A common carrier may by special contract avoid or limit his liability at common law as an insurer of property intrusted to him against loss or damage by fire occurring without his own fault. *Hoadley v. Northern Transp. Co.*, 115 Mass. 304. *Rand v. Merchants' Dispatch Transp. Co.*, 59 N. H. 363.

The carrier may by special contract limit his liability for loss to his own line; for loss by fire without his fault; and for other loss not attributable to negligence; and may require the value of the goods to be fixed by the shipper. He cannot, even by express contract, exempt himself from liability for gross negligence, or wilful misconduct of himself or his servants, nor can he limit his liability in amount in such cases. *Chicago & N. W. R. Co. v. Chapman*, 42 Am. & Eng. R. Cas. 392, 133 Ill. 96, 24 N. E. Rep. 417; *affirming* 30 Ill. App. 504.

19. For losses occasioned by delay.—A contract by which a company undertakes to relieve itself of all liability for damages occasioned by any delay in transportation, and to impose them upon the shipper, will be effectual to protect the company only against the consequences of delays not caused by its own negligence. *Dawson v. Chicago & A. R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296.

To relieve the carrier from the consequences of delay occasioned by negligence, such an exception must be expressly stated in the contract. *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; *affirming* 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140.

Where a shipper agrees to assume all risks of loss or injury from delays in transportation, this relieves the company of liability for a loss caused by a delay occasioned by an obstruction on another road, which suddenly diverts business to defendant's road. *Dawson v. Chicago & A. R. Co.*, 18 Am. & Eng. R. Cas. 521, 79 Mo. 296.

A condition that the carrier shall not be liable for loss of market, or other delay

arising from detention, is reasonable. *White v. Great Western R. Co.*, 2 C. B. N. S. 7, 26 L. J. C. P. 158.

A condition that the company shall not be liable for delay, however caused, is unreasonable. *Kirby v. Great Western R. Co.*, 18 L. T. 658.

Where a contract of carriage stipulates that the company shall only be liable for wilful misconduct, such misconduct is not shown by the fact that the van to be carried was loaded on a truck too high to allow of its passing under the gauge of a connecting line, whereby a delay was occasioned. *Webb v. Great Western R. Co.*, 26 W. R. 111.

A fish merchant delivered fish to a railway company to carry upon a signed contract, relieving the company as to all fish delivered by him "from all liability for loss or damage by delay in transit or from whatever other cause arising," in consideration of the rates being one fifth lower than where no such undertaking was granted; the contract to endure for five years. The servants of the company accepted the fish, although from pressure of business they could not carry it in time for the intended market, and the fish lost the market. *Held*, that upon the facts the merchant had a *bona fide* option to send fish at a reasonable rate with liability on the company as common carriers, or at the lower rate upon the terms of the contract; that the contract was in point of fact just and reasonable within section 7 of the Ry. & C. Tr. Act 1854, and covered the delay; and that the company were not liable for the loss. *Manchester, S. & L. R. Co. v. Brown*, 8 App. Cas. 703, 53 L. J. Q. B. D. 124, 4 Ry. & C. T. Cas. xviii.

20. Property of unusual value.—

A condition in a shipping bill that the carrier will not be responsible for loss of property of the kind receipted for, unless with the property when delivered for transportation was also delivered a memorandum in writing, stating the character and kind of articles and their value, or that such property will only be taken at the owner's risk, does not relieve the carrier from liability for his own negligent acts. *Rathbone v. New York C. & H. R. R. Co.*, 140 N. Y. 48, 55 N. Y. S. R. 306, 35 N. E. Rep. 418; *reversing* 52 N. Y. S. R. 933, *mem.*, 23 N. Y. Supp. 1148, *mem.*, 69 Hun 617, *mem.*

Where the property delivered for transportation is of unusual and extraordinary

value, a condition that the carrier will not be responsible for loss if the true character and value of the articles are not stated and extra freight paid will operate to exempt the carrier from liability even for his own negligence, unless he was informed when or before the goods were received that they were of such special and unusual value. *Rathbone v. New York C. & H. R. R. Co.*, 140 N. Y. 48, 55 N. Y. S. R. 306, 35 N. E. Rep. 418; reversing 52 N. Y. S. R. 933, mem., 23 N. Y. Supp. 1148, mem., 69 Hun 617, mem. —FOLLOWING *Magnin v. Dinsmore*, 62 N. Y. 35, 70 N. Y. 410.

21. Stipulation for benefit of insurance.*—A carrier can provide in his contract of shipment that he shall have the benefit of any insurance effected upon the goods to be transported, and that if the owner has received from the insurance company the amount of the loss he will be precluded by such stipulation from recovering against the carrier. Such facts, however, the carrier must show to avoid liability. *Gulf, C. & S. F. R. Co. v. Zimmerman*, 81 Tex. 605, 17 S. W. Rep. 239.

A plea that the goods were carried on a just and reasonable condition, assented to by the sender, that the company should not be liable for loss or injury unless the goods were insured, and that they were not insured, is a plea in bar to the whole cause of action in respect of damage, however caused. *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768.—CONSIDERED IN *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124, 50 L. T. 281, 32 W. R. 207. FOLLOWED IN *Ashenden v. London, B. & S. C. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.

22. Limiting time for claiming damages.†—A carrier may provide in a shipping contract that notice of any claim for damages shall be given within a prescribed time. Such a provision is reasonable, and is not a limitation upon the common law duty of a carrier safely to deliver property received for shipment. *Wabash,*

St. L. & P. R. Co. v. Black, 11 Ill. App. 463. —QUOTING *Rice v. Kansas Pac. R. Co.*, 63 Mo. 314. REVIEWING *Lewis v. Great Western R. Co.*, 5 H. & N. 867; *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83.—*Chicago & A. R. Co. v. Simms*, 18 Ill. App. 68. *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—FOLLOWING *Dawson v. St. Louis, K. C. & N. R. Co.*, 76 Mo. 514.—*Hirshberg v. Dinsmore*, 12 Daly (N. Y.) 429, 67 How. Pr. 103.—APPLYING *Smith v. Dinsmore*, 9 Daly 188.

A stipulation in a bill of lading that all claims for damages shall be made at the delivery station before the goods are taken away is reasonable, and may be enforced, except as to such injuries as are latent when the goods are taken up. *Capehart v. Seaboard & R. R. Co.*, 77 N. Car. 355.

A notice posted up in a railroad depot requiring all claims for damages to be made within ten days of the time when the goods reach their place of delivery is not a usage, but a mere regulation, and, being unreasonable, will not be enforced. *Browning v. Long Island R. Co.*, 2 Daly (N. Y.) 117.

A shipping contract provided that a shipper should sue for any claim for damages within sixty days or be barred. A claim for damages was made, and forty-eight days were consumed in correspondence in a fruitless attempt to settle the matter, and he failed to sue during the remaining twelve days. Held, that the condition was reasonable, and an action brought after the full sixty days had run was barred. *Thompson v. Chicago & A. R. Co.*, 22 Mo. App. 321.

The contract in suit contained, amongst others, the two following conditions: No. 8, that no claim in respect of goods would be allowed unless made within three days after delivery, and No. 9, that all goods were received subject to the company's general lien both for carriage thereof and all other charges against the customer. Held, that "goods" in these conditions meant inanimate, not horses or cattle, and that the conditions were reasonable; but *semble*, that they did not properly come before the court for decision under the 17 and 18 Vict. c. 31, § 7, which only deals with the receiving, forwarding, or delivering of animals, goods, and things, and these conditions relate to something occurring after delivery. *Moore v. Great Northern R. Co.*, 10 Ir. L. R. 95, 4 Ry. & C. T. Cas. xx.

* See also FIRE INSURANCE, 13-15.

† Stipulations for notice to the carrier of claim for damages, see note, 30 AM. & ENG. R. CAS. 56.

Contracts between shipper and carrier limiting time for bringing suits, validity of, see note, 3 L. R. A. 344.

23. Company becomes a private carrier for hire.—The carrier may by special contract restrict his common law liability; and where this is done his relations are changed, and he becomes as to that transaction an ordinary bailee and private carrier for hire, which imposes upon him the responsibility of exercising ordinary care in the transportation of property. *French v. Buffalo & E. R. Co.*, 2 *Abb. App. Dec. (N. Y.)* 196, 4 *Keyes* 108.—FOLLOWED IN *Blossom v. Dodd*, 43 *N. Y.* 264. NOT FOLLOWED IN *Shriver v. Sioux City & St. P. R. Co.*, 24 *Minn.* 506.—*Lake Shore & M. S. R. Co. v. Perkins*, 25 *Mich.* 329, 5 *Am. Ry. Rep.* 249. *Meyer v. Harnden's Exp. Co.*, 24 *How. Pr. (N. Y.)* 290.

But a general notice to the public, limiting his obligations as a common carrier, will afford no evidence of such a contract, even if the existence and contents of such notice are brought home to the party. *Kimball v. Rutland & B. R. Co.*, 26 *Vt.* 247.—DISTINGUISHING *Hollister v. Nowlen*, 19 *Wend. (N. Y.)* 240; *Cole v. Goodwin*, 19 *Wend.* 272. QUOTING *Carr v. Lancashire & Y. R. Co.*, 14 *Eng. L. & Eq.* 344. QUOTING AND FOLLOWING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344.—APPROVED IN *Brown v. Adams Exp. Co.*, 15 *V. Va.* 812. FOLLOWED IN *Blumenthal v. Brainerd*, 38 *Vt.* 402. QUOTED IN *Kansas Pac. R. Co. v. Nichols*, 9 *Kan.* 235.

24. Company becomes an insurer by agreement.—By a contract limiting a carrier's liability he becomes an insurer by agreement, and according to its terms. If there be a loss, the agreement furnishes the extent of liability, unless the plaintiff can show that the loss occurred through the wilfulness or negligence of the carrier. *Farnham v. Camden & A. R. Co.*, 55 *Pa. St.* 53.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 *Neb.* 117.

25. Statutes restraining power to limit liability.—A contract for transportation limiting the carrier's liability at common law, in consideration for which the shipper received special rates and a pass over the road, is within the provisions of Iowa Code, § 1308, rendering such agreements void. *Brush v. Sabula, A. & D. R. Co.*, 43 *Iowa* 554, 14 *Am. Ry. Rep.* 479.

The intention of Miss. Act of Dec. 9, 1863, is to prohibit railroad companies in the state from making contracts to limit their common law liability, and to hold them

liable as common carriers, notwithstanding such special contracts. *Mobile & O. R. Co. v. Franks*, 41 *Miss.* 494.—QUOTING *Southern Exp. Co. v. Moon*, 39 *Miss.* 822.

Under the section of the Texas constitution relating to railroad companies and common carriers, the power of the legislature to vary their liability from that which pertains to common carriers as distinguished from private carriers is limited. *Missouri Pac. R. Co. v. Harris*, 1 *Tex. App. (Civ. Cas.)* 730.

26. Statutory restrictions do not apply to interstate commerce.—Tex. Rev. St. art. 278, providing that common carriers "within this state shall not limit or restrict their liability as it exists at common law," only applies to carriers who carry on business in the state, and does not apply to interstate traffic. *Texas & P. R. Co. v. Davis*, 2 *Tex. App. (Civ. Cas.)* 156. *Missouri Pac. R. Co. v. Sherwood*, 55 *Am. & Eng. R. Cas.* 478, 84 *Tex.* 125, 19 *S. W. Rep.* 455.

II. STIPULATIONS AGAINST LIABILITY FOR NEGLIGENCE.*

27. Stipulation against liability for carriers' negligence is void.—At common law a carrier of goods is charged as an insurer, unless the loss occur through the act of God or the public enemy. This liability may be limited by special contract, but a carrier cannot contract against his own negligence. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344.—CRITICISED IN *Lamb v. Camden & A. R. & T. Co.*, 2 *Daly (N. Y.)* 454. DISAPPROVED IN *Indianapolis, P. & C. R. Co. v. Allen*, 31 *Ind.* 394. DISTINGUISHED IN *Perkins v. New York C. R. Co.*, 24 *N. Y.* 196. EXPLAINED IN *Michigan S. & N. I. R. Co. v. Heaton*, 37 *Ind.* 448. FOLLOWED IN *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 10 *Biss. (U. S.)* 18; *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 *N. Y.* 180; *Seller v. Steamship Pacific*, 1 *Oreg.* 409; *Capehart v. Seaboard & R. R. Co.*, 81 *N. Car.* 438. QUOTED IN *Indiana C. R. Co. v. Mundy*, 21

* Power of common carrier to contract against liability for negligence, see note, 10 *AM. REP.* 366.

† Exemption from liability for negligence, see notes, 16 *AM. & ENG. R. CAS.* 149, 157; 26 *Id.* 286.

Carrier cannot exempt himself from liability for negligence, see note, 1 *L. R. A.* 500.

Ind. 48; *Nicholas v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 103, 89 N. Y. 370; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. (N. Y.) 136; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 42 Am. Rep. 713. REVIEWED IN *Smith v. New York C. R. Co.*, 24 N. Y. 222; *Virginia & T. R. Co. v. Sayers*, 26 Gratt. (Va.) 328.—*May v. Steamship Powhatan*, 5 Fed. Rep. 375. *Earnest v. Southern Exp. Co.*, 1 Woods (U. S.) 573.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.—*Steele v. Townsend*, 37 Ala. 247. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177. *Louisville, N. A. & C. R. Co. v. Nicholas*, 4 Ind. App. 119, 30 N. E. Rep. 424. *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ry. Rep. 7, 20 Am. Ry. Rep. 326. *New Orleans Mut. Ins. Co. v. New Orleans, J. & G. N. R. Co.*, 20 La. Ann. 302. *Sager v. Portsmouth, S. & P. & E. R. Co.*, 31 Me. 228.—QUOTING *Camden & A. R. & T. Co. v. Burke*, 13 Wend. (N. Y.) 611.—*Little v. Boston & M. R. Co.*, 66 Me. 239. *Ortl v. Minneapolis & St. L. R. Co.*, 36 Minn. 396, 31 N. W. Rep. 519. *Boehl v. Chicago, M. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 351, 44 Minn. 191, 46 N. W. Rep. 333. *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566. *Chicago, St. L. & N. O. R. Co. v. Abels*, 21 Am. & Eng. R. Cas. 105, 60 Miss. 1017.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. DISAPPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.—*Read v. St. Louis, K. C. & N. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201.—FOLLOWED IN *Pruitt v. Hannibal & St. J. R. Co.*, 62 Mo. 527. REVIEWED IN *Oxley v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 629.—*Ball v. Wabash, St. L. & P. R. Co.*, 25 Am. & Eng. R. Cas. 384, 83 Mo. 574. *McFadden v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689.—REVIEWED IN *Rogan v. Wabash R. Co.*, 51 Mo. App. 665.—*Nickey v. St. Louis, I. M. & S. R. Co.*, 35 Mo. App. 79. *Leonard v. Chicago & A. R. Co.*, 54 Mo. App. 293. *Texas & P. R. Co. v. Davis*, 2 Tex. App. (Civ. Cas.) 156. *Stoddard v. Long Island R. Co.*, 5 Sandf. (N. Y.) 180.—APPROVED IN *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.—*Capetari v. Seaboard & R. R. Co.*, 81 N. Car. 438.—FOLLOWING *Smith v. North Carolina R. Co.*, 64 N. Car. 235; *Glenn v. Charlotte & S. C. R. Co.*, 63 N.

Car. 510.—Pennsylvania R. Co. v. Raiordon, 119 Pa. St. 577, 12 Cent. Rep. 177, 13 Atl. Rep. 324, 21 W. N. C. 283. *Fairchild v. Philadelphia, W. & B. R. Co.*, 148 Pa. St. 527, 24 Atl. Rep. 79. *Buffalo, P. & W. R. Co. v. O'Hara*, 3 Pennyp. (Pa.) 190. *Houston & T. C. R. Co. v. Park*, 1 Tex. App. (Civ. Cas.) 142.

The contract of a common carrier which stipulates for exemption from responsibility for the results of his negligence is void as against public policy. *Galt v. Adams Exp. Co.*, *MacArth. & M. (D. C.)* 124.—APPROVING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.—*Grey v. Mobile Trade Co.*, 55 Ala. 387. *South & N. Ala. R. Co. v. Henlein*, 56 Ala. 368, 19 Am. Ry. Rep. 200.—DISTINGUISHED IN *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36.—*Chicago, B. & Q. R. Co. v. Hale*, 2 Ill. App. 150. *Chicago, St. L. & N. O. R. Co. v. Moss*, 21 Am. & Eng. R. Cas. 98, 60 Miss. 1003.—FOLLOWING *Whitesides v. Thurlkill*, 20 Miss. 599; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725; *New Orleans, St. L. & C. R. Co. v. Faler*, 58 Miss. 911.—*Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. (N. Y.) 136.—APPROVED IN *Brown v. Adams Exp. Co.*, 15 W. Va. 812. QUOTED IN *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590.—*Johnson v. Richmond & D. R. Co.*, 86 Va. 975, 11 S. E. Rep. 829.

The ruling of the supreme court of the United States has been uniformly against the validity of all contracts to exempt a common carrier from liability for loss resulting from any negligence. The earlier English cases were in entire accord with the decisions of the supreme court of the United States. But the later decisions, made between 1832 and 1854, hold the opposite doctrine. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177.

The right of a carrier to stipulate for exemption from liability for negligence is not a local question, upon which the decision of a state court must control; but the question is a matter of general law, upon which the federal courts will exercise their own judgment, even where their jurisdiction attaches only by reason of citizenship of the parties, and the contract is made and performed within the state. *Ellis v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903.

Where a carrier enters into a special contract under seal, attempting to limit the

carrier against all loss, and an agent gives a shipping receipt which is not under seal, the special contract will be deemed the one under which the goods are carried, or the two treated as one contract, so that both will be tainted with the illegality of the provision of the special contract, which attempts to release the carrier from all liability. *Woodburn v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 514, 40 Fed. Rep. 731. — QUOTING *Inman v. South Carolina R. Co.*, 129 U. S. 139, 9 Sup. Ct. Rep. 249; *Hart v. Pennsylvania R. Co.*, 112 U. S. 340, 5 Sup. Ct. Rep. 151; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 441, 9 Sup. Ct. Rep. 469.

A special contract for passage which in terms exempts the carrier from liability for loss of baggage occasioned by the negligence of the carrier's servants does not necessarily exempt the carrier from loss occurring through its own negligence. *Weinberg v. National Steam-Ship Co.*, 8 N. Y. Supp. 195.

28. Stipulation against liability for negligence of carrier or employees is void.*—It is within the power of a common carrier to limit his common law liability, but he cannot lawfully stipulate for exemption from responsibility for the misconduct or negligence of himself or his servants. *Phenix Ins. Co. v. Erie & W. Transp. Co.*, 10 Biss. (U. S.) 18. — FOLLOWING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344; *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. 107; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318; *Bank of Ky. v. Adams Exp. Co.*, 93 U. S. 174; *New York C. R. Co. v. Lockwood*, 17 Wall. 357. — *Little Rock, M. R. & T. R. Co. v. Talbot*, 47 Ark. 97, 14 S. W. Rep. 471. — QUOTING *Little Rock, M. R. & T. R. Co. v. Harper*, 44 Ark. 208. — *Louisville & N. R. Co. v. Oden*, 80 Ala. 38. — REVIEWED IN *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178, 4 So. Rep. 29. — *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869. *Wabash, St. L. & P. R. Co. v. Black*, 11 Ill. App. 465. *Evansville & C. R. Co. v. Young*, 28 Ind. 516. *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 16 Am. & Eng. R. Cas. 158, 30 Kan. 645, 46 Am. Rep. 104, 2 Pac. Rep. 821. — FOLLOWING *New*

York C. R. Co. v. Lockwood, 17 Wall. 357. QUOTING *Levering v. Union T. & I. Co.*, 42 Mo. 88. — APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. — *Christenson v. American Exp. Co.*, 15 Minn. 270 (Gil. 208). *Durgin v. American Exp. Co.*, (N. H.) 45 Am. & Eng. R. Cas. 325, 20 Atl. Rep. 328. *United States Exp. Co. v. Backman*, 28 Ohio St. 144. — REVIEWING *New York C. R. Co. v. Lockwood*, 17 Wall. 357. — *Ballou v. Earle*, 48 Am. & Eng. R. Cas. 31, 17 R. I. 441, 22 Atl. Rep. 1113. *Missouri Pac. R. Co. v. Harris*, 28 Am. & Eng. R. Cas. 107, 67 Tex. 166, 2 S. W. Rep. 574. *Missouri Pac. R. Co. v. Harris*, 1 Tex. App. (Civ. Cas.) 730. *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180. — OVERRULING *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87. — FOLLOWED IN *Zouch v. Chesapeake & O. R. Co.*, 36 W. Va. 524. REVIEWED IN *Brown v. Adams Exp. Co.*, 15 W. Va. 812. — *Brown v. Adams Exp. Co.*, 15 W. Va. 812.

Public policy and every consideration of right and justice forbid that a common carrier should be allowed to stipulate for exemption from liability for losses or injuries occurring through the want of his own skill or diligence, or that of the servants or agents he may employ, or through his or their wilful default or tort. *Alabama G. S. R. Co. v. Little*, 12 Am. & Eng. R. Cas. 37, 71 Ala. 611. — NOT FOLLOWING *Magnin v. Dinsmore*, 70 N. Y. 410; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. — APPROVED IN *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36; *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. — *Taylor v. Little Rock, M. R. & T. R. Co.*, 18 Am. & Eng. R. Cas. 590, 39 Ark. 148. *Little Rock, M. R. & T. R. Co. v. Talbot*, 18 Am. & Eng. R. Cas. 598, 39 Ark. 523.

An incorporated company is a common carrier as to all property within the scope of its chartered powers, and it cannot by special agreement divest itself of such character, and therefore it is liable for the negligence of its servants. *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117. — APPROVING *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 62; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St. 315; *Davidson v. Graham*, 2 Ohio St. 139; *Welsh v. Pittsburg, Ft. W. & C. R. Co.*, 10 Ohio St. 75; *Cleveland, P. & A. R. Co. v. Curran*, 19 Ohio St. 1; *New York C. R. Co. v. Lockwood*, 17 Wall.

* Carrier cannot stipulate for exemption from liability for negligence of itself, its servants or agents, see note, 6 L. R. A. 854.

357.—FOLLOWED IN *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb. 275.

A common carrier may diminish and restrict his common law liabilities by special contract, and he may, by express stipulations, absolve himself from any and every degree of negligence, however gross, if it falls short of misfeasance or fraud, provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intention of the parties. *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87.—OVER- RULED IN *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180.

29. May limit liability except for gross or wilful negligence.—Railroad companies may by contract exempt themselves from liability on account of the negligence of their servants other than that which is gross and wilful. *Arnold v. Illinois C. R. Co.*, 83 Ill. 273.

Common carriers cannot by contract shield themselves from liability for their own fraud, or their own wilful act or negligence; but they may contract against liability for that low degree of negligence or want of care on their part which is not equivalent to wilful or wanton neglect of duty or recklessness. *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 *Sheld.* 95.

When the carrier is a corporation whose affairs are intrusted to the management of a board of directors, it cannot exempt itself from liability for the wilful negligence, misconduct, or recklessness of its board of directors. *Heineman v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 *Sheld.* 95.—APPROVED IN *South & N. Ala. R. Co. v. Wood*, 9 Am. & Eng. R. Cas. 419, 66 Ala. 167.

It is well settled that a common carrier of persons and property cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud. *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. Rep. 244, 42 Am. Rep. 713.—QUOTING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344. REVIEWING *Hart v. Pennsylvania R. Co.*, 7 Fed. Rep. 630.—APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. DIS- APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331.—*Lawson v. Chicago, St. P.,*

M. & O. R. Co., 21 Am. & Eng. R. Cas. 249, 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. Rep. 618.

30. For failure to produce suitable means for transaction of business.—A contract, though signed by the shipper, agreeing to release the carrier will not exonerate him from resulting damage, or from his implied duty to furnish suitable means safely to transact his business. *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.—DISTINGUISHING *Sloan v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 220. FOLLOWING *Welsh v. Pittsburgh, Ft. W. & C. R. Co.*, 10 Ohio St. 65; *Indianapolis, B. & W. R. Co. v. Strain*, 81 Ill. 504; *Camden & A. R. & T. Co. v. Burke*, 13 Wend. (N. Y.) 611.—FOLLOWED IN *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—*Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—FOLLOWING *Potts v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 394.—REVIEWED IN *Rogan v. Wabash R. Co.*, 51 Mo. App. 665.

If the loss be attributable to the omission of the carrier to provide the safest vehicle in use for the transportation of the particular goods lost, or to a failure to do anything that diligence and care would suggest was feasible to have been done, the company is liable, even though it may have made a special contract for immunity against the cause of the loss. *New Orleans, St. L. & C. R. Co. v. Faler*, 9 Am. & Eng. R. Cas. 96, 58 Miss. 911.

The carrier must furnish vehicles necessary on his business of transportation safe, and public policy will not permit him to make a contract exonerating himself for a failure to do so. *Haynes v. Wabash R. Co.*, 54 Mo. App. 582.

A carrier may stipulate for a limitation of his responsibility, so far as he is an insurer against losses by mistake or accident; but he cannot exempt himself from losses caused by a neglect of that degree of diligence which the law casts upon him in his character of bailee. *Levering v. Union T. & I. Co.*, 42 Mo. 88.—FOLLOWED IN *Ketchum v. American Merchants' Union Exp. Co.*, 52 Mo. 390. QUOTED IN *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 16 Am. & Eng. R. Cas. 158, 30 Kan. 645, 46 Am. Rep. 104.

A receipt signed by a common carrier for goods intrusted to him for transportation for hire, which restricts his liability, will

not be construed as exempting him from liability for loss occasioned by negligence in the agencies he employs, unless the intention thus to exonerate him is expressed in the instrument in plain and unequivocal terms. *Hooper v. Wells*, 27 Cal. 11.

31. Effect of contract limiting amount recoverable upon liability for negligence.*—Where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Hart v. Pennsylvania R. Co.*, 18 Am. & Eng. R. Cas. 604, 112 U. S. 331, 5 Sup. Ct. Rep. 151.—APPROVING *Newburger v. Howard*, 6 Phila. (Pa.) 174; *Squire v. New York C. R. Co.*, 98 Mass. 239; *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *Belger v. Dinsmore*, 51 N. Y. 166; *Oppenheimer v. United States Exp. Co.*, 69 Ill. 62; *Magnin v. Dinsmore*, 56 N. Y. 168, 62 N. Y. 35, 70 N. Y. 410; *Earnest v. Southern Exp. Co.*, 1 Woods (U. S.) 573; *Elkins v. Empire Transp. Co.*, 81* Pa. St. 315; *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 368; *Muser v. Holland*, 17 Blatchf. 412; *Harvey v. Terre Haute & I. R. Co.*, 74 Mo. 538; *Graves v. Lake Shore & M. S. R. Co.*, 137 Mass. 33. DISSAPPROVING *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Steamboat City of Norwich*, 4 Ben. (U. S.) 271; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.*, 55 Wis. 319; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Kansas City, St. J. & C. B. R. Co. v. Simpson*, 30 Kan. 645; *Moulton v. St. Paul, M. & M. R. Co.*, 31 Minn. 85.—APPLIED IN *Zouch v. Chesapeake & O. R. Co.*, 49 Am. & Eng. R. Cas. 702, 36 W. Va. 524. APPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep.

311. DISAPPROVED IN *Grogan v. Adams Exp. Co.*, 30 Am. & Eng. R. Cas. 9, 114 Pa. St. 523. DISTINGUISHED IN *Eells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903; *Pacific Exp. Co. v. Foley*, 46 Kan. 457; *McFadden v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689; *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. FOLLOWED IN *Ghormley v. Dinsmore*, 21 J. & S. (N. Y.) 36. QUOTED IN *Woodburn v. Cincinnati, N. O. & T. P. R. Co.*, 40 Fed. Rep. 731; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236; *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134; *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568.—*Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870. *Ballou v. Earle*, 48 Am. & Eng. R. Cas. 31, 17 R. I. 441, 22 Atl. Rep. 1113.

In such a case the weight of authority seems to be that the shipper would be estopped from afterwards alleging that the value was more (even if there should be loss by the negligence of the carrier), for there would be no justice in allowing the shipper to be paid a larger value than that deliberately agreed upon for an article which he had induced the carrier to take at a rate lower than would otherwise have been charged. *Louisville, N. A. & C. R. Co. v. Nicholai*, 4 Ind. App. 119, 30 N. E. Rep. 424. *Zouch v. Chesapeake & O. R. Co.*, 49 Am. & Eng. R. Cas. 702, 36 W. Va. 524, 15 S. E. Rep. 185.

But such special contract does not protect the carrier against liability for fraud, nor for intentional, wanton, or reckless negligence. *Louisville & N. R. Co. v. Sherrod*, 35 Am. & Eng. R. Cas. 611, 84 Ala. 178, 4 So. Rep. 29.—QUOTING *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606. REVIEWING *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *Louisville & N. R. Co. v. Oden*, 80 Ala. 38.—DISTINGUISHED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311.

Such a contract is not a contract exempting the carrier from the consequences of its own negligence. If fairly entered into, such a contract leaves the carrier liable for its negligence, and simply fixes the rate of freight and liquidates the damages, and is therefore valid. *Harvey v. Terre Haute & I. R. Co.*, 6 Am. & Eng. R. Cas. 293, 74 Mo.

* Carriers' power to limit amount of liability in cases of negligence, see note, 14 L. R. A. 433. Limitation of amount of liability does not apply in cases of negligence, see notes, 16 Am. & Eng. R. Cas. 164; 18 Id. 612.

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538.—APPROVED IN *Hart v. Pennsylvania R. Co.*, 112 U. S. 331. DISTINGUISHED IN *McFadden v. Missouri Pac. R. Co.*, 30 Am. & Eng. R. Cas. 17, 92 Mo. 343, 10 West. Rep. 372, 4 S. W. Rep. 689; *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. EXPLAINED IN *Doan v. St. Louis, K. & N. W. R. Co.*, 38 Mo. App. 408. FOLLOWED IN *Brown v. Wabash, St. L. & P. R. Co.*, 18 Mo. App. 568. REVIEWED IN *Conover v. Pacific Exp. Co.*, 40 Mo. App. 31.

A common carrier cannot by special contract exonerate himself from liability for the negligence of himself or his servants, nor can the carrier limit the amount of his liability for negligence, though there may be an agreement for liquidated damages, made in good faith and in reliance upon representations of the shipper. *Doan v. St. Louis, K. & N. W. R. Co.*, 38 Mo. App. 408.

32. Company cannot relieve itself from the liability of a bailee for hire.

—Although a common carrier may by special contract restrict his liability so far as he is an insurer against losses by mistake or accident, he cannot thus exempt himself from losses caused by any neglect of that degree of diligence pertaining to his peculiar character as bailee. *Davidson v. Graham*, 2 Ohio St. 131.—APPROVED IN *Atchison & N. R. Co. v. Washburn*, 5 Neb. 117. FOLLOWED IN *Kent v. Baltimore & O. R. Co.*, 31 Am. & Eng. R. Cas. 125, 45 Ohio St. 284, 10 West. Rep. 459, 12 N. E. Rep. 798; *Shriver v. Sioux City & St. P. R. Co.*, 24 Minn. 506. QUOTED IN *Coward v. East Tenn., V. & G. R. Co.*, 16 Lea (Tenn.) 225, 57 Am. Rep. 226.

A contract limiting the responsibility of a railroad company as common carriers does not relieve them from ordinary care in the discharge of their duties. The most it can do is to relieve them from those conclusive presumptions of negligence which arise when the accident is not inevitable, even by the highest care, and to require that negligence be actually proved against them. *Goldey v. Pennsylvania R. Co.*, 30 Pa. St. 242.—FOLLOWED IN *Powell v. Pennsylvania R. Co.*, 32 Pa. St. 414.

33. New York rule.*—Common carriers cannot by notice limit their common

* New York rule as to clauses in bills of lading exempting carrier from liability for loss occurring through negligence, see note, 21 AM. & ENG. R. CAS. 150.

law liability as to the safety of the goods; the risk in that respect is upon them, and cannot be shifted to the owner. They may by notice brought home to the owner require the latter to state the nature or value of the property, or may, for that purpose, make a special acceptance; but they cannot by notice rid themselves of the duty imposed by law to be answerable for the goods, unless the loss accrues by inevitable accident or the acts of public enemies, or the owner has been guilty of fraud. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251.—DISTINGUISHED IN *Doyle v. Kiser*, 6 Ind. 242; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247. FOLLOWED IN *Camden & A. R. & T. Co. v. Belknap*, 21 Wend. 354; *Gould v. Hill*, 2 Hill (N. Y.) 623. REVIEWED IN *Slocum v. Fairchild*, 7 Hill 292.

It must now be considered as settled in this state that common carriers may limit their liability for negligence in almost any respect by express contract for such consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy. *Lee v. Marsh*, 28 How. Pr. (N. Y.) 275, 43 Barb. 102.

But in all such cases, where the exemption for loss from such cause is expressly provided in the agreement, it has been uniformly held that such contract had no application to losses occasioned by the fraud or gross negligence of the carrier or his servants and agents, and that the stipulation for exemption only applied to losses arising from want of ordinary care. Where there is no such stipulation in the contract, it must be held that the contract does not relate to losses arising from the negligence of the carrier or his agents. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349.

The same rule is applicable to a stipulation that any claim for loss shall be presented within thirty days from the accruing of the cause of action. The presentation of the claim within the time and in the manner specified is not a condition precedent to the right of action. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349.

Negligence alone is not misfeasance or an abandonment of the character of carrier which will deprive him of the benefit of the limitation. *Magnin v. Dinsmore*, 70 N. Y. 410; reversing 10 J. & S. 16.—DISTINGUISHING *Sleat v. Fagg*, 5 B. & Ald. 42. FOLLOWING *Batson v. Donovan*, 4 B. & Ald. 21.—NOT FOLLOWED IN *Alabama G. S. R.*

Co. v. Little, 12 Am. & Eng. R. Cas. 37, 71 A.L. 611.

The negligence against which a company is not permitted to contract must be confined to that of the board of directors, or, at all events, cannot be extended beyond that of the managing officers who make general regulations for the running of trains, and the transaction of the business of the road. *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 104; affirmed in 47 N. Y. 525.

Common carriers may by special contract relieve themselves from all responsibility for injury to or loss of the property intrusted to them for carriage occasioned by the negligence, misconduct, fraud, or felony of their employes or servants. *Heinemann v. Grand Trunk R. Co.*, 31 How. Pr. (N. Y.) 430, 1 *Sheld.* 95.

The rule in this state, that a common carrier may by express stipulation exempt himself from liability for negligence, will not be considered as overthrown or affected by the decision of the United States supreme court to the contrary. *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28, 15 Am. Ry. Rep. 412; reversing 7 Hun 399.—NOT FOLLOWING *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.

Although common carriers may by express contract exempt themselves from liability for their own negligence, yet such contracts in order to have such effect must be plainly and distinctly expressed, so that their purport cannot be misunderstood by the shipper. *Nicholas v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 103, 89 N. Y. 370.—FOLLOWING *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28. QUOTING *Magnin v. Dinmore*, 56 N. Y. 168.

34. Louisiana rule.—A contract by which a carrier stipulates for exemption from responsibility for losses occasioned to another from the negligence of his agents or servants is not against public policy or forbidden by law; but if the losses resulted from the fraudulent, wilful, or reckless misconduct of the agent or employé, it would be. *Higgins v. New Orleans, M. & C. R. Co.* 28 La. Ann. 133.

35. English rule.—A contract with a carrier exempting it from all liability was binding before the Railway and Canal Traffic Act 1854, 17 & 18 Vict. c. 31. *Carr v. Lancashire & Y. R. Co.*, 7 Ex. 707, 7 Railw. Cas. 426, 17 Jur. 397, 21 L. J. Ex. 261.

A railway company may, by a special contract signed as required by the Ry. & C. Tr. Act 1854, § 9, limit their liability for their own neglect or default, and this limitation is subject to but one restriction—that it be adjudged to be just and reasonable. The principle deducible from the authorities is that a contract of this nature, *prima facie* unjust and unreasonable, becomes just and reasonable if an alternative is left to the party forwarding or delivering the goods to enter into a contract which is just and reasonable. *Gallagher v. Great Western R. Co.*, 8 Ir. R., C. L. 326, 3 Ry. & C. T. Cas. xxviii.

A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog, delivered to them for carriage, above certain specified values, unless the value is declared, is not just and reasonable within section 7 of the Ry. & C. Tr. Act 1854, as it is in its terms unconditional, and would, if valid, protect the company, even in case of the negligence or wilful misconduct of their servants. *Ashenden v. London & B. R. Co.*, 5 Ex. D. 190, 42 L. T. 586, 3 Ry. & C. T. Cas. xxix.

The delivery of goods by a carrier to the wrong person, although his name is very similar to that of the consignee, amounts to wilful misconduct, within the terms of a special contract exempting the company from all liability except that caused by wilful misconduct. *Hoare v. Great Western R. Co.*, 37 L. T. 186, 25 W. R. 63.—DISTINGUISHED IN *Stevens v. Great Western R. Co.*, 52 L. T. 324.

Subsection 4, section 20, of the Railway Act of 1868, 31 Vict. c. 68 (D), does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of subsections 2 and 3. They are not prevented therefore from stipulating for a limited liability in other cases. *Scarlett v. Great Western R. Co.*, 41 U. C. Q. B. 211.—DISTINGUISHING *Scott v. Great Western R. Co.*, 23 U. C. C. P. 182; *Allan v. Great Western R. Co.*, 33 U. C. Q. B. 483.

A railway company, having no special powers to work steam vessels, contracted to convey the plaintiff's cattle from D. by sea to L., and thence by railway to S. The cattle were lost on the passage to L. through the negligence of the crew of the steam vessel, with the owners of which the railway company had a through booking arrangement

for the conveyance of their traffic. The contract was made subject to a written condition exempting the railway company from liability for "loss of, or any damage or injury to, animals, goods, or property intrusted to them arising from the dangers or accidents of the sea, or of steam navigation, the act of God, the queen's enemies, jettison, barratry, collision, improper, careless, or unskilful navigation, accidents connected with machinery or boilers, or any default or negligence of the master or any of the officers or crews of the company's vessels." Held, that the contract was governed by section 7 of the Ry. & C. Tr. Act 1854, that the words "master and crew of the company's vessels" in this condition applied to all such vessels as the company should employ, and not merely to vessels owned or worked by the company itself, and that the condition was unreasonable and void. *Doolan v. Midland R. Co.*, 2 App. Cas. 792, 3 Ry. & C. T. Cas. xxvii.

36. Canadian rule.—In Canada a carrier is liable as at common law, and this liability may be limited by special contract so as to exempt the company even in cases of gross negligence, misconduct, or fraud. *Dodson v. Grand Trunk R. Co.*, 7 Can. L. J. N. S. 263. *Dodson v. Grand Trunk R. Co.*, 8 Nov. Sc. 405.—APPLYING *Carr v. Lancashire & Y. R. Co.*, 7 Ex. 707; *Wilton v. Atlantic R. M. Steam Nav. Co.*, 10 C. B. N. S. 453; *Hinton v. Dibbin*, 2 Q. B. Rep. 646. FOLLOWING *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473.

37. Lex loci contractus controls.*—A contract limiting the liability of a carrier, valid in the state where it was made and from which the goods were shipped, will control the carrier's liability for a loss occurring in a state where such a contract is void. *Hazel v. Chicago, M. & St. P. R. Co.*, 49 Am. & Eng. R. Cas. 76, 82 Iowa 477, 48 N. W. Rep. 926.—FOLLOWING *McDaniel v. Chicago & N. W. R. Co.*, 24 Iowa 412; *Talbott v. Merchants' Despatch Transp. Co.*, 41 Iowa 247.—*Western & A. R. Co. v. Exposition Cotton Mills*, 35 Am. & Eng. R. Cas. 602, 81 Ga. 522, 7 S. E. Rep. 916, 2 L. R. A. 102.

III. BURDEN OF PROOF—PRESUMPTIONS.

38. Burden of bringing case within contractual exemption.—In an ac-

* Validity of stipulations limiting carriers' liability, determined according to *lex loci*, see note, 49 AM. & ENG. R. CAS. 80.

tion by the owner for damages to property shipped the burden of proof is upon the common carrier to prove the existence of a special contract of shipment, if there be one, and to prove that the injury complained of resulted without his fault, from some cause excepted by the contract. *Chicago, St. L. & N. O. R. Co. v. Abels*, 21 Am. & Eng. R. Cas. 105, 60 Miss. 1017.—FOLLOWED IN *Johnson v. Alabama & V. R. Co.*, 69 Miss. 191; *Illinois C. R. Co. v. Scruggs*, 69 Miss. 418.—*St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236. *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. Rep. 781.—QUOTING *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357.—*Johnson v. Alabama & V. R. Co.*, 69 Miss. 191, 11 So. Rep. 104.—FOLLOWING *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017.—*Knell v. United States & B. Steamship Co.*, 1 J. & S. (N. Y.) 423. *Cameron v. Rich*, 4 Strobb. (So. Car.) 168.

39. Burden of proving contract just and reasonable.—The burden of showing that a condition in a special contract limiting the carrier's liability is just and reasonable lies on the company. *Peck v. North Staffordshire R. Co.*, 10 H. L. Cas. 473, 9 Jur. N. S. 914, 32 L. J. Q. B. 241, 11 W. R. 1023, 8 L. T. 768.—CONSIDERED IN *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703, 53 L. J. Q. B. 124, 50 L. T. 281, 32 W. R. 207. FOLLOWED IN *Ashenden v. London, B. & S. C. R. Co.*, L. R. 5 Ex. D. 190, 42 L. T. 586, 28 W. R. 511, 44 J. P. 203.—*Ruddy v. Midland G. W. R. Co.*, 8 Ir. L. R. 224.

40. Burden of proof as to negligence.—A common carrier cannot contract against his own negligence. In case of loss the presumption of negligence is against the carrier. *Inman v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 663, 129 U. S. 128, 9 Sup. Ct. Rep. 249.—DISTINGUISHED IN *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129; *Louisville & N. R. Co. v. Manchester Mills*, 88 Tenn. 653, 14 S. W. Rep. 314. QUOTED IN *Woodburn v. Cincinnati, N. O. & T. P. R. Co.*, 40 Fed. Rep. 731.

A common carrier cannot escape liability for loss or injury to property transported under special contract, unless he shows not only a loss or injury from a cause within the limitation, but also that it was oc-

casioned without negligence on his part. *South & N. Ala. R. Co. v. Henlein*, 52 Ala. 606.—DISAPPROVED IN *Louisville & N. R. Co. v. Wynn*, 45 Am. & Eng. R. Cas. 312, 88 Tenn. 320, 14 S. W. Rep. 311. FOLLOWED IN *South & N. Ala. R. Co. v. Henlein*, 56 Ala. 368; *Central R. & B. Co. v. Smitha*, 85 Ala. 47, 4 So. Rep. 708. QUOTED IN *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178, 4 So. Rep. 29. REVIEWED IN *St. Louis, I. M. & S. R. Co. v. Weakly*, 35 Am. & Eng. R. Cas. 635, 50 Ark. 397, 7 Am. St. Rep. 104, 8 S. W. Rep. 134.—*Alabama G. S. R. Co. v. Little*, 12 Am. & Eng. R. Cas. 37, 71 Ala. 611. *Lube v. Atlantic & P. R. Co.*, 3 Mo. App. 77.—FOLLOWING *Ketchum v. American Merchants' Union Exp. Co.*, 52 Mo. 395. NOT FOLLOWING *Cochran v. Dinsmore*, 49 N. Y. 249; *Bankard v. Baltimore & O. R. Co.*, 34 Md. 197; *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 641.—*Swindler v. Hilliard*, 2 Rich. (So. Car.) 286. *Dillard v. Louisville & N. R. Co.*, 2 Lea (Tenn.) 288. *Missouri Pac. R. Co. v. China Mfg. Co.*, 79 Tex. 26, 14 S. W. Rep. 785.—FOLLOWING *Ryan v. Missouri, K. & T. R. Co.*, 65 Tex. 13.—*Brown v. Adams Exp. Co.*, 15 W. Va. 812.—NOT FOLLOWED IN *Witting v. St. Louis & S. F. R. Co.*, 101 Mo. 638.

When the responsibility is limited by special contract, the burden of proving negligence is on the shipper. *Kansas Pac. R. Co. v. Reynolds*, 8 Kan. 623, 5 Am. Ry. Rep. 260.

The act which will deprive the carrier of the benefit of a contract for limited liability fairly made must be an affirmative, but not necessarily an intentional, act of wrongdoing; and the onus of proving this is upon the party claiming it. *Magnin v. Dinsmore*, 70 N. Y. 410; reversing 10 J. & S. 16.

When a special contract for the carriage of goods is established, and the case is brought within the exemptions of such contract, and when the shipper then seeks to recover on the ground of negligence in the carriage of the goods, he has the burden of proving such negligence. But there is sufficient evidence of such negligence when it appears that the goods were delivered to the carrier in proper condition, and that, when delivered by the carrier, the breakage of them was such as does not ordinarily occur when they are transported with due care; and this rule is applicable to a delivery of goods in a damaged condition by the last of several connecting carriers, when

a delivery of them in good condition to the first carrier is shown. *Flynn v. St. Louis & S. F. R. Co.*, 43 Mo. App. 424.—REVIEWING *Witting v. St. Louis & S. F. R. Co.*, 28 Mo. App. 103.

41. Burden of proving the contract.*—If a carrier claims that by contract or the misconduct of a shipper his common law liability has been limited, the burden is upon him clearly to show it, and all such contracts will be interpreted most strictly against the carrier. *Rosenfeld v. Peoria, D. & E. R. Co.*, 21 Am. & Eng. R. Cas. 87, 103 Ind. 121, 53 Am. Rep. 500, 2 N. E. Rep. 344. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448. *Jennings v. Grand Trunk R. Co.*, 49 Am. & Eng. R. Cas. 98, 127 N. Y. 438, 28 N. E. Rep. 394, 40 N. Y. S. R. 318; affirming 52 Hun 227, 23 N. Y. S. R. 15, 5 N. Y. Supp. 140.

It is only necessary that a carrier makes satisfactory proof that a special contract was made, under circumstances indicating fairness and good faith, limiting its liability; and then it is incumbent upon a shipper to show that the contract ought not, for some good reason, to be enforced against him. *Adams Exp. Co. v. Guthrie*, 9 Bush (Ky.) 78.

Although it devolves upon a carrier to show affirmatively the terms of any contract which lessens his common law liability, yet that fact is to be proved, like any other, by any pertinent evidence. If in writing, the writing must be shown; but if by parol, there is no rule which requires different proof from that which would establish any other contract. The jury must be satisfied from the evidence that a certain contract exists, and, if satisfied, that is sufficient. *American Transp. Co. v. Moore*, 5 Mich. 368.—DISTINGUISHING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

The duties of a common carrier do not originate in contract, and where his liability has been limited by contract it is not necessary, in an action against the carrier, to sue on the contract, but it is incumbent upon him to show how far the liability was limited

* As to what will constitute a contract limiting carriers' liability, see note, 6 L. R. A. 850.

Burden of proof in actions against carrier where its liability has been limited, see note, 45 AM. & ENG. R. CAS. 367.

Burden of proof to show contract by notice between carrier and shipper, see note, 5 AM. ST. REP. 729.

by such contract. *Lupe v. Atlantic & P. R. Co.*, 3 Mo. App. 77.

42. Presumption against shipper's assent.—The fact that a restrictive notice is shown to have been actually received or seen by the owner of the goods will not raise a presumption that he assents to its terms, since it is as reasonable to infer that he intends to insist on his rights as that he assents to their qualification, and the burden of proof is upon the carrier to establish the contract qualifying his liability, if he claims that one exists. *McMillan v. Michigan S. & N. I. R. Co.*, 16 Mich. 79.—QUOTED IN *Louisville & N. R. Co. v. Brownlee*, 14 Bush (Ky.) 590.—*Gaines v. Union T. & I. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158. *Pittsburgh, C. & St. L. R. Co. v. Barrett*, 3 Am. & Eng. R. Cas. 256, 36 Ohio St. 448.

43. Contract construed strictly against company.—Contracts not clear in their meaning by which common carriers seek to avoid the responsibility which the law imposes upon them should be construed most strongly against them. *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302, 8 Am. Ry. Rep. 209. *Louisville, N. A. & C. R. Co. v. Nicholas*, 4 Ind. App. 119, 30 N. E. Rep. 424. *Edsall v. Camden & A. R. & T. Co.*, 50 N. Y. 661, mem.—FOLLOWING *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616; *Babcock v. Lake Shore & M. S. R. Co.*, 49 N. Y. 491.—*Blair v. Erie R. Co.*, 66 N. Y. 313. *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 104; affirmed in 47 N. Y. 525. *Cream City R. Co. v. Chicago, M. & St. P. R. Co.*, 21 Am. & Eng. R. Cas. 70, 63 Wis. 93, 23 N. W. Rep. 425, 53 Am. Rep. 267.

When general words in a shipping contract may operate without including the negligence of a carrier or its servants, it will not be presumed that it was intended to include such negligence. The presumption is against an intention to contract for immunity against ordinary diligence, and hence the ordinary rule is that contracts will not be so construed, unless expressed in unequivocal terms. *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28, 15 Am. Ry. Rep. 412; reversing 7 Hun 399.—*APPLYING Wells v. Steam Nav. Co.*, 8 N. Y. 375; *Steinweg v. Erie R. Co.*, 43 N. Y. 123. FOLLOWING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.—*APPLIED IN McKay v. New York C. & H. R. R. Co.*, 50 Hun 563, 20

N. Y. S. R. 816, 3 N. Y. Supp. 708. FOLLOWED IN *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275; *Nicholas v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 103, 89 N. Y. 370; *Ghormley v. Dinsmore*, 19 J. & S. (N. Y.) 196.—*Kenney v. New York C. & H. R. R. Co.*, 52 Am. & Eng. R. Cas. 235, 125 N. Y. 422, 26 N. E. Rep. 626, 35 N. Y. S. R. 447; affirming 54 Hun 143, 26 N. Y. S. R. 636, 7 N. Y. Supp. 255. *Keeney v. Grand Trunk R. Co.*, 59 Barb. (N. Y.) 104; affirmed in 47 N. Y. 525. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349. *Holsapple v. Rome, W. & O. R. Co.*, 3 Am. & Eng. R. Cas. 487, 86 N. Y. 275.—FOLLOWING *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180.—*Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. Rep. 244, 42 Am. Rep. 713.

So, under the above rule of construction, a provision in a shipping contract, which is entered into at a reduced rate, releasing the carrier from all liability "from whatsoever cause arising"—held, not to exempt the carrier from liability for losses arising from its own negligence. *Mynard v. Syracuse, B. & N. Y. R. Co.*, 71 N. Y. 180, 27 Am. Rep. 28, 15 Am. Ry. Rep. 412; reversing 7 Hun 399.

A contract undertaking to limit the liability to that of a mere forwarder does not relieve the company from the exercise of ordinary care while the goods are in its possession. *Overland M. & E. Co. v. Carroll*, 7 Colo. 43, 1 Pac. Rep. 682. *Westcott v. Fargo*, 63 Barb. (N. Y.) 349.

LIMITED TICKETS.

See TICKETS AND FARES, 42, 85-95.

LIQUIDATED DAMAGES.

Generally, see DAMAGES, 39, 40.

When awarded for breach of contract, see CONSTRUCTION OF RAILWAYS, 35.

LIQUIDATOR.

Appointment of, in proceedings to dissolve, see DISSOLUTION, ETC., 22.

Suits against, when barred by lapse of time, see LIMITATIONS OF ACTIONS, 45.

See also RECEIVERS.

LIQUORS.

Drinking of, by jurors as ground for new trial, see NEW TRIAL, 12.

See INTOXICATING LIQUORS.

LIS PENDENS.

1. When the doctrine of notice from lis pendens applies.—The defendant in ejectment conveyed the land to a corporation organized after the commencement of the action, and of which he was an incorporator, a stockholder, and the first president. *Held*, that the corporation must be regarded as having received the conveyance with full knowledge of the pendency of the suit. *Wisconsin C. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94, 36 N. W. Rep. 837. *White v. Nashville & N. W. R. Co.*, 7 Heisk. (Tenn.) 518.

2. — and when not.—It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, at their peril, purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. *Warren County v. Marcy*, 97 U. S. 96.—FOLLOWED IN *Scotland County v. Hill*, 112 U. S. 183; *Hill v. Scotland County*, 34 Fed. Rep. 208.

Where a contractor for the building of certain portions of a railway having filed a bill against the company, alleging, among other things, the execution by said company of several deeds of trust to the same trust company, and praying that an account be taken by the court of the valid indebtedness of said company, that a judgment recovered by said contractor for the amount of his claim be decreed a first lien upon a certain portion of the road, and that said deed of trust, without specifying which one, may be foreclosed for the satisfaction and payment of the debts secured thereby, except such bonds as were illegally issued, to which bill the trustee under the deeds of trust demurred and afterwards filed a bill to foreclose the trust deeds, and the suits were consolidated upon the court's own motion, the trustee being called complainant and the contractor intervener, a plea of *lis pendens* subsequently filed by the contractor to the complainant's bill is insufficient, although he prayed for the foreclosure in his bill, since no such foreclosure could be had in his suit unless the trust company had seen fit to ask it by way of cross-bill. *American L. & T. Co. v. East & W. R. Co.*, 36 Am. & Eng. R. Cas. 276, 37 Fed. Rep. 242.

LIVE STOCK.

Generally, see ANIMALS.

Actions for injuries to, see ANIMALS, INJURIES TO; STOCK YARDS, 4.

— **killing or injuring, when barred by lapse of time,** see LIMITATIONS OF ACTIONS, 61.

Burden of proof in cases of injury or loss of, see EVIDENCE, 137.

Carriage of, see CARRIAGE OF LIVE STOCK.

Collisions with, caused by failure to fence, see EMPLOYEES, INJURIES TO, 79.

Compromise by agent, of claim for injury to, see AGENCY, 60.

Contributory negligence of owner of, see ANIMALS, INJURIES TO, 213-288.

Destruction of, by flooding lands, see FLOODING LANDS, 47.

Doctrine of comparative negligence, how applied in actions for killing, see COMPARATIVE NEGLIGENCE, 10.

Duty to construct watering places for, see CONSTRUCTION OF RAILWAYS, 6.

— **fence against trespassing,** see FENCES, 83.

Evidence of danger to, on assessment of land damages, see EMINENT DOMAIN, 615, 696.

Excessive damages for killing or injuring, see NEW TRIAL, 39.

Frightening of, by passing trains as an element of land damages, see EMINENT DOMAIN, 686.

Injuries to cars by, see INJURY TO CARS BY CATTLE.

— **from failure to build or maintain fences,** see FENCES, 93.

Instructions in actions for injuries to, see TRIAL, 128, 153.

Liability of ferry owner as carrier of, see FERRIES, 10.

Loss of, by fire, liability for, see FIRES, 101.

Obligation to receive and deliver, see STOCK YARDS, 2, 3.

Opinions of farmers as to weight of, see WITNESSES, 103.

— **witnesses as to value of,** see WITNESSES, 110.

Permitting to run at large, when negligence, see CONTRIBUTORY NEGLIGENCE, 46.

Preventing access to water by, as an element of land damages, see EMINENT DOMAIN, 716.

Proper handling of, when calls for expert testimony, see WITNESSES, 142.

Release of damages for injuries to, see RELEASE, 30.

Transportation of diseased, see CARRIAGE OF LIVE STOCK, 109-115.

LOANS.

- By agents, see AGENCY, 60.
 — directors, to company, see DIRECTORS, 21C, 40.
 — state, application for, see STATE AID, 2.
 Expenses of obtaining, when exempt from taxation, see TAXATION, 178.
 Power to borrow money, see CHARTERS, 55; CORPORATIONS, 7; FOREIGN CORPORATIONS, 13.
 Priority of mortgage over, see MORTGAGES, 125.
 Transfer of stock by way of, see STOCK, 30.
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LOCAL.

- Actions, for causing death, see DEATH BY WRONGFUL ACT, 107.
 — what are, see ANIMALS, INJURIES TO, 294.
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 And through rates, what are, and how regulated, see CHARGES, 59-63; INTERSTATE COMMERCE, 60-71.
 — transitory actions, what are, see ACTIONS, 6, 7.
 Assessments, exemption from taxes when exemption from, see TAXATION, 147.
 — upon steam railroads in cities, see STREETS AND HIGHWAYS, 341-359.
 Authorities, consent of, to construction of railway, see ELEVATED RAILWAYS, 18; STREET RAILWAYS, 85-101; UNDERGROUND RAILWAYS, 2.
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I. GENERAL RULES.

1. Rights, powers, and duties of the company, generally.—The strip of land used as a right of way by a railroad is under the control of the company, and it may locate its track in such portion of the right of way as it may deem proper; and one location of its track will not deprive it of the right to make another location.

Dougherty v. Wabash, St. L. & P. R. Co., 19 Mo. App. 419.

A company is not chargeable with negligence because it lays a track near the border of the right of way. *Flinn v. New York C. & H. R. R. Co.*, 34 N. Y. S. R. 451, 58 Hun 230, 12 N. Y. Supp. 341.

Where a company is by its charter authorized to locate its road as it may deem expedient, it will not be restrained in equity as to the location of the road, unless it is shown that it capriciously or wantonly disregards the rights of others. *Auspach v. Mahanoy & B. M. R. Co.*, 5 Phila. (Pa.) 491. —REVIEWED IN *Lodge v. Philadelphia, W. & B. R. Co.*, 8 Phila. 345.

All incorporated companies for constructing roads or canals are subject to legal control in a proper case; yet chancery will not interpose such control in a controverted case of expediency of location within the proper points; nor will chancery in such case interpose upon the application of a person not otherwise affected or injured than by the actual location passing through his land. *Walker v. Mad River & L. E. R. Co.*, 8 Ohio 38.

It would be error to leave it as a question of fact to the jury whether the company could, without unreasonable expense, or undue injury to the road, have so changed the site of it as to avoid having caused the damage complained of. The company alone are intrusted with the location of their road, subject to the liability imposed on them by law for the damages thereby occasioned. *New York & E. R. Co. v. Young*, 33 Pa. St. 175.

When the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, and there are two routes between said points equally feasible, that which is most direct will be deemed to have been contemplated; but where there is a difference in the feasibility of the routes, a reasonable discretion must be allowed in the selection of that to be followed. *Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.

2. Delegation of power to make location.—Where the by-laws of a company provide for the appointment of an executive committee, and further provide "that such a committee shall have a general supervision of the operations and policy of the company, and shall have power to

authorize the execution by the president, secretary, or treasurer of such contracts or agreements as said executive committee may deem expedient," such authorization has reference only to the conduct of the ordinary business operations of the company, and does not extend to such important acts as the direction and approval of the location of its lines of railroad, since by statute (Act Pa. Feb. 19, 1849) the duty of location of the road is imposed upon the president and directors of the company, and this discretion cannot be delegated, nor can the board of directors approve and ratify the unauthorized action of its officers in making such location, as against the rights of another railroad company which may have attached to the property in question prior to such ratification. *Weidenfeld v. Sugar Run R. Co.*, 51 Am. & Eng. R. Cas. 505, 48 Fed. Rep. 615.

3. What constitutes a location.—The act of location of a railroad is the adoption of a line by resolution of the company, and not a mere experimental line of an engineer. *Hagner v. Pennsylvania S. V. R. Co.*, 154 Pa. St. 475, 25 Atl. Rep. 1082.

It is not necessary, in order to constitute a location of a railroad, for the purpose of fixing the liability of subscribers to stock, that the route be staked and marked on the ground, in such a manner that its precise line could be found and identified. It may be completed by resolutions or acts of the directors manifesting a corporate determination to construct the road over a particular route. *Parker v. Thomas*, 28 Ind. 277.

The want of any serious resistance to the location of the road at first on a street; the acquiescence in it by the public for a period of fourteen years; the affirmance of it by the plaintiff and others, by accepting a mortgage upon the road in its existing state for moneys advanced by them to pay for its construction; and the approval of it, at a public meeting of the citizens, called for that purpose, are strong proofs of the propriety of the original location. *Hents v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.

The line of the company's road was not otherwise located by the company nor approved by the commissioners than by a centre line with no statement of widths. This was fatally defective in itself. But it appeared that there had been a previous

understanding between the parties as to the location of the line, including widths and distances, and that in the award of damages the land taken was fully described. *Held*, that another intersecting company could not take advantage of the defect. *New York & N. E. R. Co. v. New York, N. H. & H. R. Co.*, 25 *Am. & Eng. R. Cas.* 215, 52 *Conn.* 274.

4. Location of termini, connections, etc.—Ill. St. of Feb. 27, 1841, relating to the construction of the Northern Cross railroad between the Illinois river and the city of Springfield, gave to the fund commissioner full power over that part of the road, and the matter was left to his judgment as to the terminus of the road in or near that city. *Taylor v. Whitney*, 5 *Ill.* 61.

And the provision of the statute authorizing the donation and acceptance of lands for depots and turnouts on the road cannot be construed as a declaration on the part of the state that if it should be deemed advantageous to the public to make a turnout and depot they should be placed on lands donated; but they may be constructed on other lands if deemed proper; but it seems that if such lands were not used by the state a reconveyance of them could be enforced. *Taylor v. Whitney*, 5 *Ill.* 61.

By Mass. St. 1850, ch. 268, the Midland R. Co. were authorized to locate and construct a railroad, "commencing at some convenient point on the Norfolk County railroad; thence through the southerly part of Dedham; thence through or near the westerly part of the towns of Canton and Milton." *Held*, that a location commencing at a point on the Norfolk County railroad in South Dedham, and not departing from that road at once, but running northerly upon it for more than two miles, and then approaching within two hundred rods of the northwesterly corner of Canton, and running near the westerly boundary of Milton, was authorized by the statute. *Boston & P. R. Corp. v. Midland R. Co.*, 1 *Gray (Mass.)* 340.

Where a charter authorizes a company to extend, locate, construct, and maintain a railroad "from a point at or near the present terminus of its track in Fall River, in a southerly direction, to the line of the state of Rhode Island," a location starting at a point 2475 feet, by the line of the railroad, northerly from the termination of the

old track is authorized. *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 *Allen (Mass.)* 221. — DISTINGUISHED IN *Currier v. Concord R. Corp.*, 48 *N. H.* 321.

A road twenty-four miles long was authorized "from a point on the Pennsylvania railroad at or near Parkesburg." *Held*, that a connection one mile and a half east of Parkesburg was not a transgression of the act *per se*. The connection with the Pennsylvania railroad was the great point; the place was subordinate. *Parke's Appeal*, 64 *Pa. St.* 137.

5. Passing near dwelling houses.—The question whether a railroad, under the condition of a bond, must be built on *certain premises* west and north of a dwelling house, or merely west and north of the dwelling house, being in doubt, it should be solved in favor of the grantee, the railroad company, more especially where the probabilities of the case favor the same conclusion. *Kirby v. Wabash, St. L. & P. R. Co.*, 109 *Ill.* 412.

Virginia Code, ch. 56, § 4, providing that no company shall invade the dwelling house of any free person for the construction of its road, or any space within sixty feet thereof, without the consent of the owner, does not prohibit a railroad company from laying a track on its own lands within sixty feet of a dwelling house. *Richmond & Y. R. R. Co. v. Wicker*, 13 *Gratt. (Va.)* 375.

6. Preliminary surveys.—Railroad companies may make experimental surveys at pleasure before finally locating their route. *Neal v. Pittsburgh & C. R. Co.*, 2 *Grant's Cas. (Pa.)* 137.

The preliminary survey under section 28 of the N. Y. General Railroad Act is to be made before the application for commissioners of appraisal under section 14. And the notice to occupants, under section 22, must be given before the right to proceed under section 14 begins. *In re New York & B. R. Co.*, 62 *Barb. (N. Y.)* 85.

The title to land for a railroad does not pass by the filing of the survey in the office of the secretary of state. *Hetfield v. Central R. Co.*, 29 *N. J. L.* 571; *reversing* 29 *N. J. L.* 206.

7. Extensions.—The Pa. Acts of April 18, 1843, April 18, 1853, and April 14, 1863, authorizing the Pittsburgh & Connellsville R. Co. to extend their road north and east of Connellsville, construed to author-

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ize a connection with the Baltimore & Ohio railroad at the line between Md. and Pa. *Com. ex rel. v. Pittsburg & C. R. Co.*, 58 Pa. St. 26.

The Canadian P. R. Co. have power, under their charter, to extend their line from Port Moody in British Columbia to English Bay. *Canadian Pac. R. Co. v. Major*, 13 Can. Sup. Ct. 233; *allowing appeal from 2 British Col. (part III.)* 287, 2 *British Col. (part III.)* 295.

The charter of a company required the road from Northborough to Southborough to be located as far north as a certain point, and in the location a curve was made in order to reach that point, and the road was thence continued toward Southborough by an acute angle. *Held*, that the subsequent continuation of the railroad for about a mile and one half northerly from the point of the angle to the village of Marlborough was unauthorized. *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316.

II. EXAMINATION OF PROPOSED ROUTE BY COMMISSIONERS.

8. Appointment of commissioners.

—Any person feeling aggrieved at the route determined upon by a railroad company may, within a certain time after written notice of the route, apply to a justice of the supreme court for the appointment of commissioners, whose duty it is, after a hearing of the parties, to affirm or alter the route. *Norton v. Wallkill Valley R. Co.*, 61 Barb. (N. Y.) 476, 42 How. Pr. 228.—*QUOTED IN* Durham & N. R. Co. v. Richmond & D. R. Co., 44 Am. & Eng. R. Cas. 168, 106 N. Car. 16, 10 S. E. Rep. 1041.

The duty of examining the route of a proposed railroad is not imposed on a justice of the supreme court. The nature of the examination is such that he cannot make it. His sole duty is to see that there is sufficient cause for the appointment of commissioners, who alone can make the examination, and one of whom must be a civil engineer. *Norton v. Wallkill Valley R. Co.*, 61 Barb. (N. Y.) 476, 42 How. Pr. 228.

Under the New York General Railroad Act of 1850, § 22, no person is authorized to apply to a justice of the supreme court for the appointment of commissioners to examine the proposed route of a railroad, and to affirm or alter the same, except one whose lands have not been acquired by the company, and after the service on him of

the written notice required by said section to be given by such company. And he must feel aggrieved by the proposed location over or through his land, and set forth his objections to the route designated through his land in his petition. *People ex rel. v. Tubbs*, 59 Barb. (N. Y.) 401; *affirmed in 49 N. Y.* 356.

A copy of the petition, under the above section, for appointment of commissioners should be served upon the company, as a part of the notice of hearing before the commissioners, so that the company may be advised of what it is to meet. The statute provides for a hearing before the commissioners of the parties, which includes the company. *People ex rel. v. Tubbs*, 59 Barb. (N. Y.) 401; *affirmed in 49 N. Y.* 356.

9. — or jurors.—Where an act of assembly authorized a railroad company to "locate and construct" a railroad, and declared that the "location shall be approved by the judges of the court of quarter sessions, upon the view of six jurors, to be appointed by said court as directed"—*held*, not a valid exception to the proceedings that the location was made by the jury, nor that there were not two full terms between the appointment of the jury and the confirmation of their report. *Case of Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25.

10. Powers and duties of the commissioners. — Commissioners appointed under New York General Railroad Act, § 22, to examine a proposed route must affirm or alter it, as may be consistent with the rights of the parties concerned and of the public; but they are not restricted to that part of it which lies within the bounds of the land of the party procuring their appointment. Any portion of the route within the county may be altered; but their alterations must not disturb the continuity of the line, nor so change the proposed route as to leave it disconnected at either end, and thus abridge or interrupt the road. *People ex rel. v. Tubbs*, 49 N. Y. 356, 4 Am. Ry. Rep. 127; *affirming* 59 Barb. 401.—*FOLLOWING IN* re Long Island R. Co., 45 N. Y. 364.

But there should be only one board of commissioners in a county; and when it has completed its work, either affirming the proposed route, or making the necessary alterations, the route through the county is fixed. *People ex rel. v. Tubbs*, 49 N. Y. 356, 4 Am. Ry. Rep. 127; *affirming* 59 Barb. 401.

Commissioners appointed under the New

York Act of 1890, ch. 565, § 6, as amended in 1892, ch. 676, to examine the proposed route of a railroad, on the petition of an aggrieved occupant or owner, are confined to the single alternative of approving the route proposed by the corporation, or adopting that proposed by the petitioner. They cannot select a different route over the lands of other persons. *In re Niagara Falls H. P. & M. Co.*, 68 Hun 391, 51 N. Y. S. R. 887.

But where a route is originally located four rods wide, and that as affirmed by the commissioners is but twenty feet wide on the petitioner's land, but the twenty feet is a part of the four rods, and the company by a resolution of its directors assents to this, and other conditions, the action is not in conflict with the above rule. *In re Niagara Falls H. P. & M. Co.*, 68 Hun 391, 51 N. Y. S. R. 887.—QUOTING *In re Lake Shore & M. S. R. Co.*, 89 N. Y. 442.

The charter of the Hartford & New Haven R. Co. does not require the width of the road to be determined before the route is approved by the commissioners, and the freeholders to assess the damages are appointed. *Williams v. Hartford & N. H. R. Co.*, 13 Conn. 110.

11. Review of commissioners' decisions.—Commissioners who are appointed to examine a proposed route are not empowered to determine the character of the corporation; and where their action comes before the general term on appeal, the court can only review the determination of the commissioners, and cannot determine whether the corporation is organized for a public purpose. *In re Niagara Falls H. P. & M. Co.*, 68 Hun 391, 51 N. Y. S. R. 887.

Where it appears that commissioners have exceeded their powers, and undertaken to canvass and sit in judgment upon, the duties and obligations of the company, under its charter, in locating its road generally, and in its choice of routes; and it is impossible to discover any benefit which could accrue to the petitioners by the new location over the one proposed by the company; and it appears that the commissioners were actuated by improper considerations, their decision changing the proposed route will be reversed. *People ex rel. v. T-ahs*, 59 Barb. (N. Y.) 401; affirmed in 49 N. Y. 356.

12. Forfeiture of location after approval.—Where a statute provides that

a railroad company must, within twelve months after the acceptance of its route by the commissioners, pay for all land taken, or the acceptance shall be void, such failure is not a forfeiture which can only be enforced by the state in a direct proceeding, but the whole proceeding becomes void at the expiration of the twelve months. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196.—QUOTED IN *Oakland R. Co. v. Oakland, B. & F. V. R. Co.*, 45 Cal. 365.

And where the location has been accepted before the passage of the statute, and it only acts prospectively, the case comes within the statute, and a failure to pay for land within twelve months from the passage of the statute forfeits the right thereto. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196.

III. FILING WRITTEN LOCATION, MAPS, PLANS, ETC.

13. Notice of location, generally.—A railroad company in determining upon its route acts arbitrarily. No one is entitled to notice until the route has been actually designated and the map and profile filed. Then, for the first time, the company is in a condition to notify the property holders whose lands are to be taken. *Norton v. Wallkill Valley R. Co.*, 42 How. Pr. (N. Y.) 228, 61 Barb. 476.

A file or entry in a surveyor's book is not notice of a location, unless such book be kept in the office of the surveyor, and be accessible to inspection, as provided by Tex. Act of 1856. *Houston & T. C. R. Co. v. McGehee*, 49 Tex. 481.

14. Filing written location—Validity, and what covered by.—Where the time for filing the location with the county commissioners was fixed by a statute to be on February 8, a depositing of it at their office, with their clerk, on February 6 was good, although a term of the commissioners' court did not occur until the following April. *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

Where by an act of the legislature, approved Jan. 17, 1869, "one year from and after the approval" was given to alter and amend the location between certain termini, and the amended location was adopted on Jan. 15, 1870, and received and filed by their clerk in the county commissioners' office on Jan. 17, 1870, the filing was season-

able, although there was no session of the commissioners' court until the following April. *Eaton v. European & N. A. R. Co.*, 59 Me. 520.

Under Mass. Gen. St. ch. 63, §§ 17, 18, authorizing railroad corporations to lay out their roads not exceeding five rods in width, and requiring the location to be filed with the county commissioners, defining the courses, distances, and boundaries in each county, a location which does not state the width of the land taken or the boundaries of the location, nor refer to a map of the land placed on file, is invalid. *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391.—QUOTED IN *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368.

Mass. Rev. St. ch. 39, § 75, is satisfied if the location of a railroad, as filed, identifies the land; and the name of the owner of the land need not be stated therein. *Brock v. Old Colony R. Co.*, 33 Am. & Eng. R. Cas. 96, 146 Mass. 194, 5 N. Eng. Rep. 724, 15 N. E. Rep. 555.

A company required by its charter to name in its report of location the owners of the lands taken by it for the location and construction of its railroad, so far as the same can be ascertained, in order that notice may be given to such owners of the taking, and to enable them to claim their damages, is not estopped, on the trial of a claim for damages, from disputing the title of one named in its report of location as owner of the land in respect of which damages are claimed, but may dispute such title, or the character of it, to the whole or any part of the land, especially when the owner of the land in question is no further designated than by his family name, his Christian name not being given in the report. *Allyn v. Providence, W. & B. R. Co.*, 4 R. I. 457.

The location by a railroad company of a part of its road closed thus: To a certain point, and thence "about six hundred feet into Depot No. 1" (a parcel of land belonging to the company). "The above described line is the centre line of the railroad, and is traced in blue on the accompanying plan." The plan was filed with the location. The blue line on the plan extended across the street on which Depot No. 1 was situated and into Depot No. 1; but a measurement of six hundred feet according to the plan from the said point extended into said street, but not quite across to Depot No. 1. The location defined its width as far as the

street, but neither the location nor the plan defined it any further. *Held*, that the location did not cover any part of Depot No. 1. *Pinkerton v. Boston & A. R. Co.*, 109 Mass. 527, 7 Am. Ry. Rep. 480.

In an action to try the title to a small parcel of land occupied by a company in the rear of its C. F. station, it appeared that a re-location duly filed by the company described the boundary line of the land taken, after running southwesterly "to the fence" between its land and that of the plaintiff's predecessor in title, as "thence turning and running westerly on the boundary line" between them. The location, further to identify the land taken, referred to a colored plan which included the parcel in question. The location and the plan agreed if the line "running westerly" was taken to be the line of such fence. Another plan furnished such predecessor in title was colored only up to the parcel in question, but showed it inclosed by a line and marked "C. F. station." Subsequently the company accepted from such predecessor a deed of land describing the granted premises as the "land of the grantors taken" by the location, and bounding it by "land of said company used for C. F. station," but not including the parcel in question. Soon after the same grantor gave to the company a license to occupy other land of his, which it ever after occupied, and which would have been of no use whatever if the company was not entitled to the parcel in question. *Held*, that the location included the parcel in question, and that the acceptance of the deed from the plaintiff's predecessor in title did not affect the company's rights under the location. *Cunningham v. Boston & A. R. Co.*, 153 Mass. 506, 27 N. E. Rep. 660.

15. Practical location by statute.—Where a company is chartered by the legislature to construct a road between designated points and on certain designated streets, this in itself constitutes a practical location of the route, and dispenses with notices and filing the map, as required by the General Railway Act. *In re Coney Island & B. R. Co.*, 12 Hun (N. Y.) 451.

16. Maps and plans.—Where a statute requires a map of a railroad to be filed with the secretary of the interior, the neglect of the secretary to file the map cannot impair the company's rights. *United States v. Northern. Pac. R. Co.*, 41 Fed. Rep. 842.

A plan or map filed by a corporation,

together with the location of its road, and expressly made "a part of the description of said location," may be referred to to explain, but not to modify or control, the written location. *Hazen v. Boston & M. R. Co.*, 2 Gray (Mass.) 574.—APPROVED IN *New York & B. R. Co. v. Godwin*, 12 Abb. Pr. N. S. (N. Y.) 21.

A location filed with the county commissioners, by which alone the true location upon the ground cannot be fixed and ascertained, is nevertheless sufficient if, by a plan which is made part thereof and filed therewith, the location can be determined. *Grand Junction R. & D. Co. v. Middlesex County Com'rs*, 14 Gray (Mass.) 553.

Where a company is authorized to build a road from a designated point in one county to a designated point in an adjoining county, and files a map of its location, which is entirely in the first county, it must be regarded either as a nullity, as not conforming to the articles of association, or it must be considered as a part only of the route, so that when a similar map of the residue is filed it may be considered one map, and sufficient under the law. *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. (N. Y.) 373.—APPLIED IN *People v. Brooklyn, F. & C. I. R. Co.*, 9 Am. & Eng. R. Cas. 457, 89 N. Y. 75. RECONCILED IN *East Ala. R. Co. v. Tennessee & C. R. R. Co.*, 29 Am. & Eng. R. Cas. 363, 78 Ala. 274.

A map of a portion of the route intended to be adopted by the company, filed in the county clerk's office as directed by the statute, cannot control or modify the charter of the company; and where the charter or the articles of association and the map are in conflict, the map must yield. It cannot work a change of the *termini*, or an abandonment of a portion of the road. *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. (N. Y.) 373.

The filing of a map of a proposed railroad does not definitely establish the route. Actual notice must be given to all occupants, and within fifteen days any party feeling aggrieved may apply for a change of route. *New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386.

Where a map of a route shows only a single line, and gives no information whether this is a centre or an exterior line of the route, and does not give the width or quantity of land to be taken, it is not sufficient,

where the statute allows the company to take land of different widths, not to exceed six rods. *New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386.

A map of the location which shows a single line running along a highway, with a note accompanying which states that the centre line of the railroad track is to be eighteen feet from the westerly line of the highway, shows the location of the railroad with sufficient certainty, and the extent of the land proposed to be taken. *In re Coney Island & B. R. Co.*, 12 Hun (N. Y.) 451.

Where the railroad was completed through the *locus in quo* prior to the act of 1872 (N. Car. Code, § 1952), it was not necessary to the validity of the location that a map of the route should be filed. *Purifoy v. Richmond & D. R. Co.*, 46 Am. & Eng. R. Cas. 232, 108 N. Car. 100, 12 S. E. Rep. 741.

IV. CHANGE OF ROUTE; RE-LOCATION.

17. Right to change location, generally.—A company may, at least before actual construction of the road, in accordance with its discretion, change its line or route after the same has been fixed. *Ma-haska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437. *Hagner v. Pennsylvania S. V. R. Co.*, 154 Pa. St. 475, 25 Atl. Rep. 1082. *Ex parte South Carolina R. Co.*, 2 Rich. (So. Car.) 434.—REVIEWED IN *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608.

Railroad companies may change the location of their depots and tracks, when no detriment to the public ensues therefrom, and may condemn property for such re-location. *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608.—CRITICISING *State v. Dawson*, 3 Hill (So. Car.) 100. REVIEWING *Moorhead v. Little Miami R. Co.*, 17 Ohio 340; *State v. Norwalk & D. Turnpike Co.*, 10 Conn. 157; *Hartford, N. L., W. & T. County Soc. v. Hosmer*, 12 Conn. 364; *New Orleans & C. R. Co. v. New Orleans*, 1 La. Ann. 128; *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; *Ex parte South Carolina R. Co.*, 2 Rich. (So. Car.) 434; *South Carolina R. Co. v. Blake*, 9 Rich. 225.—DISTINGUISHED IN *Petition of Providence & W. R. Co.*, 17 R. I. 324.

The fact that a company may have deviated elsewhere from the charter limits of its road will not make it liable to plaintiff

for breaking and entering his close, where it is within its charter limits on his land. *Newton v. Agricultural Branch R. Corp.*, 15 *Gray (Mass.)* 27.

The right of way may not "float," but the track may "float" to any portion of the right of way, but it may be liable in damages for the negligent construction of its tracks so changed in location. *Dougherty v. Wabash, St. L. & P. R. Co.*, 19 *Mo. App.* 419.

If the company should persist in capriciously changing their locations, so as to injure the title to lands once entered upon (if such injury could arise therefrom), such proceeding can be the subject of redress at the suit of those injured. *Roberts v. Philadelphia, G. & N. R. Co.*, 1 *Phila. (Pa.)* 262.

The line of a lateral railroad was surveyed and marked on the ground, differing somewhat from the location described in the petition, but the damages were assessed for it as located. *Held*, that this was the true and authorized line. *Boyd v. Negley*, 53 *Pa. St.* 387.—REVIEWED IN *Chicago & W. I. R. Co. v. Cogswell*, 44 *Ill. App.* 388.

When a petitioner adopts a grade before damages are assessed and marks the grade along the route, it would be inequitable to permit him to change it after assessment, and adopt one more injurious to the landowner. *Boyd v. Negley*, 53 *Pa. St.* 387.

18. — under statutory or charter provisions.—Me. Act of 1853, ch. 41, is general and remedial, applicable to railroads existing at the time of its passage, and passed in the exercise of the police power; but it cannot be construed to require railroads already constructed, or whose location has been completed and duly filed, and the construction begun under a binding contract, to locate anew in order to comply with its provisions. *Veazie v. Mayo*, 49 *Me.* 156.

In such case the provision making a railroad which has not conformed to the statute in crossing a street, etc., a nuisance, and holding the directors personally liable, does not apply. *Veazie v. Mayo*, 49 *Me.* 156.

By Mass. Rev. St. ch. 39, § 73, a railroad corporation, who file the location of their road with the county commissioners within one year, as required by section 75, may, after the expiration of that year, within the time prescribed by law for completing their road, vary the location of any portion of their road to any extent, provided they do

not locate any part thereof without the limits prescribed by their act of incorporation; although their act of incorporation, which provides that they shall have the powers and duties set forth in Rev. St. ch. 39, also provides that it shall be void, if their location be not filed within one year. And their power so to vary their location is not controlled or limited by the original location, as filed with the county commissioners. *Boston & P. R. Corp. v. Midland R. Co.*, 1 *Gray (Mass.)* 340.—DISTINGUISHED IN *Petition of Providence & W. R. Co.*, 17 *R. I.* 324.

The authority of a railroad corporation to locate its road, as affected by various special acts in amendment of its charter, and by the general statutes, considered. *Melvin v. Hoyt*, 52 *N. H.* 61, 2 *Am. Ky. Rep.* 195.

A provision in a charter authorizing a company, if necessary, to change the location of any turnpike, or other public road, does not constitute the company the sole judge of the necessity of such change. Their action is subject to review, and whether the necessity actually exists is a question of fact. *Easton & A. R. Co. v. Greenwich*, 25 *N. J. Eq.* 565.

The provision of the N. Y. General Railroad Act, Laws of 1850, § 23, ch. 140, as amended by Laws of 1876, ch. 77, authorizing the directors of a corporation, organized under it, by a two-third vote, to locate a new route in a county adjoining a county mentioned in the articles of association, does not, in order to constitute a valid exercise of the power, require a designation at the time of voting of the particular line to be occupied by the road; it is sufficient if the directors, by proper vote, determine that the road shall be built upon a new route in a specified county. The designation of the exact line is a subsequent proceeding. *In re New York, L. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 113, 88 *N. Y.* 279; *affirming* 25 *Hun* 556.

After the incorporation of the petitioners, its directors, by more than a two-third vote, passed a resolution to amend its articles of association, by omitting therefrom the counties of S. and T., named therein as counties through which its road was to run, and inserting in place thereof the county of C., which adjoins the counties so named. The preamble of the resolution recited that after the filing of the original articles it

had been ascertained by said directors that a part of the line of the road ought to be located in the state of Pennsylvania, to do which it was necessary that the road should be constructed through the county of C., and that to supply the omission to name that county in the original articles, it was considered expedient to file amended articles. *Held*, that, assuming the action of the directors was not effectual to operate as an amendment of the original articles, it might be regarded as a valid exercise of the power to change the route conferred by said provision. *In re New York, L. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 113, 88 *N. Y.* 279; *affirming* 25 *Hun* 556.

After the passage of the resolution these proceedings were instituted, as prescribed by said act (section 28, subdivision 6), to fix the place of crossing of the road of the N. Y., L. E. & W. R. Co., appellant. It was objected that such proceedings could not legally be taken until the petitioner's route had been finally located. It appeared that proceedings to change the place of crossing, instituted by appellant, were pending when these proceedings were commenced, but before the order was made, from which the appeal was taken, the prior proceedings had been terminated adversely to appellant. *Held*, that the objection was untenable, that it did not go to the jurisdiction, and the former proceedings having terminated, the order was regular. *In re New York, L. & W. R. Co.*, 10 *Am. & Eng. R. Cas.* 113, 88 *N. Y.* 279; *affirming* 25 *Hun* 556.

Variations in a route over which a railroad may run do not affect the identity of a corporate body that builds it, when subsequent acts are amendatory of the original charter, and give permission for a deflection from the line first projected; and the right to exemption of property from tax granted in the original charter is retained unimpaired. *Cheraw & S. R. Co. v. Com'rs of Anson*, 17 *Am. & Eng. R. Cas.* 431, 88 *N. Car.* 519.

A railroad company authorized to change the location of its track on account of "difficulty of construction" and other causes may do so at any time before the track is completed. *Atkinson v. Marietta & C. R. Co.*, 15 *Ohio St.* 21.—FOLLOWING *Moorhead v. Little Miami R. Co.*, 17 *Ohio* 340.

The charter of a railway company conferred the power of re-location, and an ordi-

nance of a city was passed giving the company permission to construct and operate its road in and over certain streets of the city, and over a bridge to be built at a certain place, and such ordinance was confirmed by an act of the legislature, which conferred the same power as the ordinance, until the same might be altered, changed, or amended by the city council, with the consent of the company, and gave such power to amend, alter, or change the ordinance, with the company's consent. *Held*, that such company, after having once located and built its road within the city, had still ample legitimate authority, with the consent of the city, to re-locate its track within the city, and take up its former track. *McCartney v. Chicago & E. R. Co.*, 29 *Am. & Eng. R. Cas.* 326, 112 *Ill.* 611.

19. — under provisions in contract with landowners.—After a track has been located and built the parties may, by mutual consent, and pursuant to an oral agreement, change the location of the track, so as to make the change valid. *Minneapolis & St. L. R. Co. v. St. Paul, M. & M. R. Co.*, 26 *Am. & Eng. R. Cas.* 638, 35 *Minn.* 265, 28 *N. W. Rep.* 705.

A court of equity will decree the change of route of a passenger railway where a road has been constructed and run under a joint agreement, and authorize the construction of a separate track, if in accordance with its corporate rights. *Thirteenth & F. St. Pass. R. Co. v. Union Pass. R. Co.*, 15 *Phila. (Pa.)* 275.—FOLLOWING *Union Pass. R. Co. v. Continental R. Co.*, 11 *Phila.* 321.

Where a deed conveying a right of way contains a condition that the company shall be at "liberty to make such slight alterations in the route now surveyed as not materially to change the route now surveyed," and afterwards it becomes a question whether the road was located on the land conveyed, evidence of the situation, value, and condition of the land over which the road was originally surveyed, as well as that where it was actually located, is admissible to show the materiality of a change of location. *Carr v. Georgia R. & B. Co.*, 1 *Ga.* 524.—DISTINGUISHED IN *Butman v. Vermont C. R. Co.*, 27 *Vt.* 500.

A company were allowed five years, under their charter, to construct their railroad, by making and filing their location with the county commissioners of counties through which it passed on or before December 31,

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1850. After they made a survey, and staked out the track across plaintiff's land, but before it was accepted and filed, the company purchased of him six rods in width of his land, and took a deed of the same, in which it was described as "covered by the location of the said railroad, or that may finally be covered by such location." Afterwards under the authority of the legislature, a further time was granted to the company to file their location, and they made a different one across the plaintiff's land, and accepted and filed the same, on which the road was constructed. *Held*, that the company obtained no rights in such new location under the deed. *Hall v. Pickering*, 40 Me. 548.

20. Right to make new location denied.—Where a company has fixed the terminal point of its road in a town or city, it cannot afterwards change the location. It may have a discretion as to its terminal or the selection of its intermediate points; but when this power of location is once exercised, it is exhausted, and the company cannot change the location without legislative authority. *Illinois C. R. Co. v. People*, 143 Ill. 434, 33 N. E. Rep. 173.

Where a company is chartered to build a railroad between designated points and take land of a designated width, after the road has been constructed and in operation it has no power to make a new location or lay a branch road not included in the original plan. *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205.—DISTINGUISHED IN *State (Mayor, etc., of Jersey City, Pros.) v. Montclair R. Co.*, 35 N. J. L. 328; *Atlantic & P. R. Co. v. St. Louis*, 66 Mo. 228.

Where the charter of a railroad company requires the whole line of the road to be surveyed and located, and the certificate of location to be filed in the clerk's office, before the commencement of the work, the corporation is not authorized to change the route of its road after it has been once located, and a certificate of such location made and filed. *Hudson & D. Canal Co. v. New York & E. R. Co.*, 9 Paige (N. Y.) 323.

Where the act of incorporation, or articles of association, prescribe the limits within which a railroad company shall construct its road, it cannot, even under section 23 of the N. Y. General Railroad Act, alter or change the route after it has been located

so as to transcend those limits: at least not without releasing previous subscribers for stock who have not consented to such change. *Buffalo, C. & N. Y. R. Co. v. Potte*, 23 Barb. (N. Y.) 21.

Where a charter gives a company the right to vary its route and change its location whenever a better or cheaper route can be had, or whenever the road is found difficult of construction, or the right of way cannot be procured at reasonable cost, the company is not authorized to re-locate its road after once completing it, and condemn private property for that purpose; and if it attempts to do so, a court of chancery may enjoin it. *Moorhead v. Little Miami R. Co.*, 17 Ohio 340.—DISTINGUISHED IN *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. 553; *Toledo & W. R. Co. v. Daniels*, 16 Ohio St. 390. FOLLOWED IN *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21. REVIEWED IN *Mississippi & T. R. Co. v. Devaney*, 42 Miss. 555, 2 Am. Rep. 608.

21. — because charter power has been exhausted.*—When a corporation chartered for the purpose of constructing a railway has located its line, it cannot change the location and adopt a new route, unless the power to do so is expressly granted in its charter, and then only in the manner indicated. When the power thus conferred upon a company has once been exercised, it is exhausted. *Mason v. Brooklyn City & N. R. Co.*, 35 Barb. (N. Y.) 373.

When the charter of a railroad company merely fixes a few points through which a road is to pass from its commencement to its terminus, leaving the location of the road, between the points specified, to the discretion of the corporation, the company having once located the road, their power to re-locate, and for that purpose to appropriate the property of an individual, or occupy a street, has ceased. *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235.—DISTINGUISHED IN *Toledo & W. R. Co. v. Daniels*, 16 Ohio St. 390. REVIEWED IN *Kinealy v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 658.

The charter of a railroad company empowered it to locate its railroad and to file its location in court, to alter the location after filing, and "to make a new location in whole or in part." A limit of time was fixed

* Decisive act of company in fixing location and termini; exhaustion of powers, see note, 4 AM. & ENG. R. CAS. 199.

within which the road was to be completed. The road was built and operated by the company under the charter. Twenty-five years afterwards an amendment to the charter authorized the construction of a branch road, as provided by statute, or by the charter and its amendments. Under this amendment a location of the branch road was made and abandoned, and a re-location made, a part of which was over the railroad property of another company. This latter company permitted the use of its property by the former at first by license and then by formal lease. Nineteen years later another location of a part of this branch road was filed. *Held*, that the charter powers to locate were exhausted before the last location. *Petition of Providence & W. R. Co.*, 17 R. I. 324, 21 *Atl. Rep.* 965.

22. Notice of application for change.—The notice required by New York Act of 1850, ch. 140, § 22, as amended in 1871, of a proposed change in the route of a railroad must be personally served. Notice left with the wife of a landowner at his dwelling house, he being absent from home, but in the state, is not sufficient; neither is notice to one of two or more partners sufficient. *People ex rel. v. Lockport & B. R. Co.*, 13 *Hun* (N. Y.) 211.

23. Validity of agreement to change route.—Where a construction company contracts with a railroad company to locate and construct the latter's road "by the nearest, cheapest, and most suitable route" between two points for a certain sum per mile, an agreement by which a manufacturing company agrees to donate lands for right of way, etc., and pay a sum to the construction company in consideration of the latter changing the route so as to deviate some miles from the shortest and most suitable route, and to cause the road to pass through a town in the development of which the manufacturing company is interested, is contrary to public policy, and a fraud upon the public, and cannot be enforced. *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 38 *Am. & Eng. R. Cas.* 683, 129 *U. S.* 643, 9 *Sup. Ct. Rep.* 402.

24. Effect of change of route.—Where a company changes the line of their road, the change operates as an abandonment by them of the land upon the line deviated from, so that they can no longer claim any right or interest in said land, or in any easement growing out of it. *Stacey*

v. Vermont C. R. Co., 27 *Vt.* 39.—FOLLOWING *Com. v. Westborough*, 3 *Mass.* 406; *Com. v. Cambridge*, 7 *Mass.* 163.

V. RIVAL LOCATIONS.

25. In general.—Under Pennsylvania Act of April 4, 1868, when a railroad corporation has ascertained and located its road, such location secures to the company the right of way, and another company cannot come in and take such route by any arrangement with the landowners. *Titusville & P. C. R. Co. v. Warren & V. R. Co.*, 12 *Phila. (Pa.)* 642.

As against a landowner, a railroad company can acquire only a conditional title by its act of location, which ripens into an absolute title upon making compensation; but as to third persons and rival corporations, the action of the company in adopting a definite location is enough to give it title. *Williamsport, & N. B. R. Co. v. Philadelphia & E. R. Co.*, 47 *Am. & Eng. R. Cas.* 224, 141 *Pa. St.* 407, 21 *Atl. Rep.* 645.

26. What amounts to such a location as to give priority.*—When there is a question of location between two rival railway companies, that which has first made a survey and staked out a centre line is entitled to a priority of right. *Davis v. Titusville & O. C. R. Co.*, 30 *Am. & Eng. R. Cas.* 341, 114 *Pa. St.* 308, 6 *Atl. Rep.* 736.

When a corporation has, as required by the New York General Railroad Act of 1850, made and filed a map and survey of the line of route it intends to adopt for the construction of its road, and has given the required notice to all persons affected by such construction, and no change of route is made, as the result of any proceedings instituted by any landowner or occupant, such corporation has acquired a right to construct and operate a railroad upon such line in the nature of a lien upon the lands which ripens into title through purchase or condemnation proceedings, and which is exclusive as to all other railroad corporations, and free from the interference of any party. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 35 *Am. & Eng. R. Cas.* 267, 110 *N. Y.* 128, 13 *Cent. Rep.* 232, 17 *N. E. Rep.* 680, 16 *N. Y. S. R.* 838; *affirming* 44 *Hun* 206, 8 *N. Y. S. R.* 237.—QUOTED IN

* What is sufficient location of a railroad to prevent a rival company from appropriating, see note, 12 *L. R. A.* 220.

Barre R. Co. v. Montpelier & W. R. R. Co., 61 Vt. 1.

A railroad company, by causing the location of its road to be recorded in the proper office, acquires a prior right to construct its road on the line of such survey, as against another company which, subsequent to such record, but before the condemnation of the land, has purchased it from the owner. *Barre R. Co. v. Montpelier & W. R. R. Co.*, 39 Am. & Eng. R. Cas. 17, 61 Vt. 1, 4 L. R. A. 785, 17 Atl. Rep. 923.—QUOTING *Rochester, H. & L. R. Co. v. New York, L. & W. R. Co.*, 110 N. Y. 128.

A contract to sell the land over which such location is made to another company, which is not recorded, and of which the locating company has no notice, does not alter the rights of the parties, although such contract was made before the location was recorded. *Barre R. Co. v. Montpelier & W. R. R. Co.*, 39 Am. & Eng. R. Cas. 17, 61 Vt. 1, 4 L. R. A. 785, 17 Atl. Rep. 923.

27. What does not.—Where a company has been chartered some sixteen years, and has filed a map of its proposed route some fourteen years before, but has only obtained subscriptions to a small proportion of its capital stock, and has not actually constructed any part of its railroad, and has acquired but little land for a right of way, it will not be awarded an injunction to restrain another company from occupying the route, where it has a large paid-up capital, and is proceeding with the utmost speed to construct its road. *New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386.

A company which has filed a map of the route of its road cannot prevent another company from constructing its road on land which it already owns until it condemns the same or purchases it. *New York & A. R. Co. v. New York, W. S. & B. R. Co.*, 11 Abb. N. Cas. (N. Y.) 386.

The making of a location, so as to give title to one railroad company as against another, involves some corporate action on the part of the company establishing and adopting some definite route; an engineer alone, by surveying and making a line, cannot make a location and effect a valid appropriation of the land. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 47 Am. & Eng. R. Cas. 224, 141 Pa. St. 407, 21 Atl. Rep. 645.

Wherefore, when the chief engineer of a

railroad company surveyed and staked out the centre line of a proposed railroad, and returned a map thereof to the office of the company, but no action was taken by the board of directors adopting the location, the act of the engineer conferred no title as against a rival corporation. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 47 Am. & Eng. R. Cas. 224, 141 Pa. St. 407, 21 Atl. Rep. 645.

In such case, in the absence of a location of its right of way by corporate action, a railroad company has no standing to ask for an injunction restraining another company from proceeding regularly to appropriate land for its roadway, even though the land in question may be owned by the plaintiff company. *Williamsport & N. B. R. Co. v. Philadelphia & E. R. Co.*, 47 Am. & Eng. R. Cas. 224, 141 Pa. St. 407, 21 Atl. Rep. 645. See also *Appeal of New Brighton & N. C. R. Co.*, 105 Pa. St. 13.

28. Two roads running between same termini.—Where two railroad companies have the authority to build and run a railroad between the same *termini*, neither can take exception to any irregularity or unlawfulness in the exercise of such franchise by the other, unless it can show a particular injury to itself from such course. *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 283.

29. — or authorized to use same street.—Where two companies have the right to lay their tracks along a certain street, the company which first actually takes possession by constructing its track acquires the right to complete its construction to the exclusion of the other company. *Waterbury v. Dry Dock, E. B. & B. R. Co.*, 54 Barb. (N. Y.) 388, 32 How. Pr. 193; reversing 30 How. Pr. 39.

30. Right to make use of prior location.—A company may be authorized to locate its route so as to take lands already appropriated by another company; but in doing so no unnecessary damage should be done to the existing company or the public. *New York, H. & N. R. Co. v. Boston, H. & E. R. Co.*, 36 Conn. 196.

A statute authorizing the construction of a railroad between certain *termini*, without describing its course, but leaving that to be determined by the corporation as provided by the general laws, does not, *prima facie*, confer power to lay out the road over land already devoted to, and within the recorded

location of, another railroad. *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391.—QUOTED IN *Alexandria & F. R. Co. v. Alexandria & W. R. Co.*, 75 Va. 780. REVIEWED IN *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 621.

Mass. Act of 1874, ch. 372, §§ 23-31, authorizing the construction of extensions of roads, upon agreeing with the board of railroad commissioners as to crossings, and with the selectmen of a town or the mayor and aldermen of a city as to the location, does not authorize a railroad, except upon a grant from the legislature, within the location of the lands of another railroad company. *Boston & M. R. Co. v. Lowell & L. R. Co.*, 124 Mass. 368.—APPLYING *Worcester & N. R. Co. v. Railroad Com'rs*, 118 Mass. 561. QUOTING *Housatonic R. Co. v. Lee & H. R. Co.*, 118 Mass. 391.—DISTINGUISHED IN *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 10 Am. & Eng. R. Cas. 444, 17 W. Va. 812. FOLLOWED IN *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359; *Barre R. Co. v. Montpelier & W. R. R. Co.*, 61 Vt. 1. REVIEWED IN *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 621; *Petition of Providence & W. R. Co.*, 17 R. I. 324.

One railroad corporation is not empowered under the General Railroad Act (Mont. Rev. St. 1879, div. 5, art. 3, ch. 15) to pass upon the necessity for taking or using the roadbed or right of way built or secured by another company through a canyon or defile; such necessity is a question for decision in the district court of the county in which the canyon is located. *Montana C. R. Co. v. Helena & R. M. R. Co.*, 6 Mont. 416, 12 Pac. Rep. 916.—QUOTING *Denver & R. G. R. Co. v. Denver, S. P. & P. R. Co.*, 17 Fed. Rep. 867.

31. Question for jury in contest between rival locations.—It is proper to submit to the jury, in a contest between two locations, whether in point of fact a location on file was made in a book of entries kept for that purpose in the proper office; the date, as shown in an entry in a memorandum book of the surveyor, being insisted on as determining the true date of the entry. *Houston & T. C. R. Co. v. McGehee*, 49 Tex. 481.

LOCUS IN QUO.

Irregularity connected with view of, as ground for setting aside verdict, see

EMINENT DOMAIN, 833; NEW TRIAL, 14.

View of, in criminal cases, see CRIMINAL LAW, 8.

— — — proceedings to assess damages, see EMINENT DOMAIN, 511, 564-571; TRIAL, 45.

See also PREMISES.

LONG AND SHORT HAULS.

Regulation of rates for, see CHARGES, 34-36.

Discrimination as to, see DISCRIMINATION, 37-41; INTERSTATE COMMERCE, 109-130.

LOOK AND LISTEN.

Duty to, see CARRIAGE OF PASSENGERS, 393, 453; COLLISIONS, 23; CONTRIBUTORY NEGLIGENCE, 30; CROSSINGS, INJURIES, ETC., AT, 231-307; DEATH BY WRONGFUL ACT, 194, 195; EMPLOYÉS, INJURIES TO, 325-329; LICENSEES, INJURIES TO, 27; STATIONS AND DEPOTS, 115; STREET RAILWAYS, 490, 491; TRESPASSERS, INJURIES TO, 105-137.

Failure of child to, when contributory negligence, see CHILDREN, INJURIES TO, 82.

Instructions as to failure of traveler to, see CROSSINGS, INJURIES, ETC., AT, 360.

LOOKOUT.

Duty to keep, see ANIMALS, INJURIES TO, 62-64, 120, 164, 195; CHILDREN, INJURIES TO, 3, 4, 37, 62; CROSSINGS, INJURIES, ETC., AT, 164-167; EMPLOYÉS, INJURIES TO, 158; STREET RAILWAYS, 466, 467; TRESPASSERS, INJURIES TO, 44-51.

— — — look and listen as affected by failure to provide, see CROSSINGS, INJURIES, ETC., AT, 267.

Instructions relating to duty to keep, see ANIMALS, INJURIES TO, 563.

Keeping inefficient, when negligence, see NEGLIGENCE, 25, 36.

Negligence in regard to, when question of fact, see ANIMALS, INJURIES TO, 540; EMPLOYÉS, INJURIES TO, 697.

Requirement of, in cities, see STREETS AND HIGHWAYS, 338.

Sufficiency of evidence of failure to keep, see ANIMALS, INJURIES TO, 450.

LOS ANGELES.

Decisions particularly applicable to, see MUNICIPAL CORPORATIONS, 42.

LOST INSTRUMENTS.

Actions on, see BONDS, 63; CONTRACTS, 102; COUPONS, 22.

LOST TICKETS.

Rights of passenger in cases of, see TICKETS AND FARES, 12, 66.

LOTTERIES.

1. In aid of railways under Mo. Act of 1839.—The Act of the General Assembly of February 8, 1839 (Sess. Acts 1839, p. 311), entitled "An act to amend 'an act to incorporate the town of New Franklin,' approved January 16, 1833," only repealed so much of the seventh section of the amended act as provided that the board of trustees of New Franklin should have power to raise by lottery a sum of money, not exceeding \$15,000, for the construction of a railroad from the bank of the Missouri river to the town of New Franklin. The object of the act of 1839 was, not to overthrow the power to raise money by lottery, but to divert the application of the money so to be raised from the construction of a railroad to that of a macadamized road. The trustees of New Franklin were authorized, after the passage of the act of 1839, to contract, as provided for in the third section of the act of February 26, 1835 (Sess. Acts 1835, p. 56), with any person to have said lottery drawn in any part of the United States, etc. *State v. Morrow*, 26 Mo. 131.

2. — under Mo. Act of 1855.—The general assembly, by an act passed in December, 1855, enacted "that all contracts made by the trustees of the town of New Franklin, for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be, legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act but two contracts had been made by the trustees, one in 1842, and the other in 1849; and long prior to its passage the contract of 1842 had been declared valid by the judgment of this court. *Held*, that the state, by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the state of a contract made by one of its own agencies is

equivalent to a previous authorization. *State ex rel. v. Miller*, 66 Mo. 328.

The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operation; the state, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849 as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *State ex rel. v. Miller*, 66 Mo. 328.

LOUISIANA.

Aid to railways by the state, see STATE AID, 19-22.

Assessment and levy of taxes in, see TAXATION, 202.

Civil rights acts of, see COLORED PERSONS, 2.

Constitutional provisions in, relative to condemnation of land, see EMINENT DOMAIN, 11.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 34.

— — tax laws of, see TAXATION, 20.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 737.

Federal grants to, see LAND GRANTS, 31.

License taxes in, see TAXATION, 306.

Local assessment upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 347.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 45.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 21.

Rule in, as to imputed negligence, see IMPUTED NEGLIGENCE, 9.

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MALICIOUS PROSECUTION.

1. When the action will lie, generally.*—When a criminal prosecution is instituted by a railroad corporation through its agents and attorneys for a malicious injury to its property, the person in its employment who gave the information which led to the investigation, and made the affidavit on which the warrant of arrest was issued, is not in any sense the prosecutor. *Jordan v. Alabama G. S. R. Co.*, 81 Ala. 220, 8 So. Rep. 191.

Where an action for a malicious prosecution is brought jointly against a corporation and its servant, the latter will be liable, though he obeys the orders of his employer in preferring the charge, if at the same time he is shown to have acted maliciously and without probable cause. *Stevens v. Midland Counties R. Co.*, 10 Ex. 352, 2 C. L. R. 1300, 18 Jur. 932, 23 L. J. Ex. 328.—NOT FOLLOWED IN *Edwards v. Midland R. Co.*, L. R. 6 Q. B. D. 287, 50 L. J. Q. B. 281, 43 L. T. 694, 29 W. R. 609, 45 J. P. 374.

2. — against an express company.—Where an express agent charged with the duty of protecting property and collecting charges thereon attempts to collect such charges on property unlawfully taken without payment of the charges, and in such attempt as agent mistakenly institutes a criminal prosecution without probable cause, the principal will be liable in an action for malicious prosecution, though where the agent acts as a citizen and for the purpose of vindicating justice the rule is otherwise. *Cameron v. Pacific Exp. Co.*, 48 Mo. App. 99.—REVIEWING *Allen v. Railroad Co.*, 34 Victoria 65; *Gilliman v. South & N. Ala. R. Co.*, 70 Ala. 268.

3. When the action will lie against a railroad company.†—An action for malicious prosecution may be maintained

* Liability of private corporations for malicious prosecution, see note, 26 AM. ST. REP. 131.

Liability of corporations for torts, such as assault and battery, malicious prosecution, slander, etc., see note, 34 AM. REP. 495.

† Action for malicious prosecution lies against a railroad company, see notes, 20 AM. & ENG. R. CAS. 632; 26 *Id.* 174.

against a corporation. *Vance v. Erie R. Co.*, 32 N. J. L. 334.—REVIEWING *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328; *Stevens v. Midland Counties R. Co.*, 10 Ex. 352; *Whitfield v. South Eastern R. Co.*, El., Bl. & El. 115; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202.—*Woodward v. St. Louis & S. F. R. Co.*, 85 Mo. 142.—FOLLOWING *Boogher v. Life Assoc.*, 75 Mo. 319. OVERRULING *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315.—*Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167. *Edwards v. Midland R. Co.*, 1 Am. & Eng. R. Cas. 571, L. R. 6 Q. B. D. 287.—APPLYING *Whitfield v. South Eastern R. Co.*, El., Bl. & El. 122; *Green v. London Gen. Omnibus Co.*, 7 C. B. N. S. 290. NOT FOLLOWING *Stevens v. Midland Counties R. Co.*, 10 Ex. 352.

An action on the case for a malicious prosecution may be maintained against a railroad corporation. *Jordan v. Alabama G. S. R. Co.*, 20 Am. & Eng. R. Cas. 628, 74 Ala. 85, 49 Am. Rep. 800.—OVERRULING *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560. QUOTING *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 210.

An action of trespass for false imprisonment lies against a corporation, but an action on the case for a malicious prosecution does not. *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560, Ala. Sel. Cas. 485.—APPROVING *Childs v. Bank of Missouri*, 17 Mo. 213; *Stevens v. Midland Counties R. Co.*, 26 Eng. L. & Eq. 410; *McLellan v. Cumberland Bank*, 24 Me. 566; *State v. Great Works M. & M. Co.*, 20 Me. 41. DISAPPROVING *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1. QUOTING *Reg. v. Great North of England R. Co.*, 9 Q. B. 315; *Com. v. Prop'rs of New Bedford Bridge*, 2 Gray (Mass.) 345.—EXPLAINED IN *South & N. Ala. R. Co. v. Chappell*, 61 Ala. 527. FOLLOWED IN *Mobile & M. R. Co. v. McKellar*, 59 Ala. 458. OVERRULED IN *Jordan v. Alabama G. S. R. Co.*, 20 Am. & Eng. R. Cas. 628, 74 Ala. 85, 49 Am. Rep. 800.

In Georgia the common law rule as to malicious prosecutions is followed, and no action lies for a malicious civil suit, unless there be special damage, whether the suit be at law or in equity. *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

A railway company is liable for malicious prosecution if the prosecution is instituted by it against a person solely with a view of terrifying parties from the commission of some prevalent offense. *Stevens v. Midland Counties R. Co.*, 2 C. L. R. 1300, 10 Ex. 352, 18 Jur. 932, 23 L. J. Ex. 328.—NOT FOLLOWED IN *Edwards v. Midland R. Co.*, L. R. 6 Q. B. D. 287, 50 L. J. Q. B. 281, 43 L. T. 694, 29 W. R. 609, 45 J. P. 374.

4. — for prosecution instituted by its agents.*—When a prosecution is instituted by an agent, the authority of the agent must be shown, and it cannot be inferred that a party who swore out a warrant and instituted a prosecution was the agent of a railroad simply because he was one of the company's conductors. *Diel v. Missouri Pac. R. Co.*, 37 Mo. App. 454.

A railroad company is not liable for a malicious prosecution instituted by its agents against one of its officers for embezzling funds, as such prosecution is not within the general powers of a railroad corporation. *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315.—CRITICISING *Childs v. Bank of Missouri*, 17 Mo. 213. QUOTING *Maynard v. Firemen's Fund Ins. Co.*, 34 Cal. 48. REVIEWING *Higgins v. Watervliet T. R. Co.*, 46 N. Y. 23; *Whitfield v. South Eastern R. Co.*, 96 E. C. L. 115; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Coleman v. New York & N. H. R. Co.*, 106 Mass. 160; *Goodspeed v. East Haddam Bank*, 22 Conn. 530; *Perkins v. Missouri, K. & T. R. Co.*, 55 Mo. 201.—NOT FOLLOWED IN *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34. OVERRULED IN *Woodward v. St. Louis & S. F. R. Co.*, 85 Mo. 142.

If a servant of a railway company institutes a criminal proceeding without the company's knowledge or direction, it is not liable for malicious prosecution. *Stevens v. Midland Counties R. Co.*, 2 C. L. R. 1300, 10 Ex. 352, 18 Jur. 932, 23 L. J. Ex. 328.—NOT FOLLOWED IN *Edwards v. Midland R. Co.*, L. R. 6 Q. B. D. 287, 50 L. J. Q. B. 281, 43 L. T. 694, 29 W. R. 609, 45 J. P. 374.

A railway company is liable to an action for malicious prosecution where an officer employed by it wrongfully and without cause arrests a man on a charge of theft. *Henderson v. Midland R. Co.*, 20 W. R. 23, 25 L. T. 881.

* Liability of corporations for malicious prosecution instituted by agents or employees, see note, 26 AM. ST. REP. 131.

A spike having been found driven in between the rails on defendants' line of railway, plaintiff was arrested on suspicion of being the guilty party. The evidence against him was that he had been seen on the day the act was supposed to have been committed lounging about the railway bridge and track early in the afternoon for two or three hours, and that his boots would make prints corresponding with the footmarks about the place. Plaintiff, having been acquitted, brought an action against defendants for malicious prosecution, and the jury having given him damages, the court, considering the insufficient nature of the evidence against him, refused to interfere with the verdict. *Hagerty v. Great Western R. Co.*, 44 U. C. Q. B. 319.

5. Plaintiff must show termination of prosecution.—In malicious prosecution the plaintiff must affirmatively show that the original prosecution has been determined. *McKensie v. Missouri Pac. R. Co.*, 24 Mo. App. 392.

Where a *nolle prosequi* is entered by the procurement of the party prosecuted, or by his consent, or by way of compromise, such party cannot have an action for malicious prosecution. So where a party is arrested for failing to pay his fare, and a *nolle prosequi* is entered after the complaint is sent to the superior court, by the district attorney, at the procurement of plaintiff's attorney, without any order of discharge by the court, an action cannot be maintained. *Langford v. Boston & A. R. Co.*, 30 Am. & Eng. R. Cas. 653, 144 Mass. 431, 4 N. Eng. Rep. 209, 11 N. E. Rep. 697.

6. — that there was malice in the prosecution.—In malicious prosecution it devolves upon the plaintiff to show affirmatively that the prosecution was malicious and without probable cause. *Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167.

The plaintiff is not entitled to recover where it appears from his own testimony that the investigation which led to his arrest was instituted by the police for the purpose of discovering criminals who were engaged in a series of systematic robberies of the cars of the defendant, a railroad company. *Madison v. Pennsylvania R. Co.*, 147 Pa. St. 509, 23 Atl. Rep. 764.

Public policy and the demands of public justice cannot permit a jury to punish a prosecutor where the inference of malice,

drawn from the discharge of the plaintiff by the magistrate, is rebutted by plaintiff's own testimony disclosing circumstances showing entire absence of malice. *Madison v. Pennsylvania R. Co.*, 147 Pa. St. 509, 23 Atl. Rep. 764.

A jury ought not to be permitted to infer malice from the mere want of probable cause when, by other circumstances, it is disproved. *Madison v. Pennsylvania R. Co.*, 147 Pa. St. 509, 23 Atl. Rep. 764.

7. — and a want of probable cause for the prosecution.—In a suit for the malicious prosecution of a civil action and proceedings therein, the affirmative is on the plaintiff to show want of probable cause. *Burton v. St. Paul, M. & M. R. Co.*, 33 Minn. 189, 22 N. W. Rep. 300. *Molloy v. Long Island R. Co.*, 59 Hun 424, 36 N. Y. S. R. 626, 13 N. Y. Supp. 382; affirmed in 137 N. Y. 629, mem., 51 N. Y. S. R. 931, 33 N. E. Rep. 745, mem. *Walker v. South-Eastern R. Co.*, 39 L. J. C. P. 346, L. R. 5 C. P. 640, 18 W. R. 1032, 23 L. T. 14. *Montreal St. R. Co. v. Ritchie*, 5 Montr. L. R. 77.

And this is so, although the plaintiff proves that he is innocent, and although the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury. *Abrath v. North Eastern R. Co.*, L. R. 11 Q. B. D. 440, 52 L. J. Q. B. D. 620, 49 L. T. 618, 32 W. R. 50, 47 J. P. 692, 15 Cox C. C. 354; reversing L. R. 11 Q. B. D. 79, 52 L. J. Q. B. D. 352; affirmed in L. R. 11 App. Cas. 247.

Where a magistrate finds that there is probable cause for a prosecution and commits the party, and the grand jury subsequently ignores the charge and refuses to find an indictment, the one merely negatives the other, and leaves the burden of proof on the plaintiff, in a subsequent action for malicious prosecution, to show want of probable cause. *Miller v. Chicago, M. & St. P. R. Co.*, 41 Fed. Rep. 898.

Where a corporation is not otherwise liable for a prosecution instituted by its agents, it cannot defend by alleging that there was reasonable cause for the prosecution. *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315.—APPROVING *Mali v. Lord*, 39 N. Y. 381.—NOT FOLLOWED IN *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34.

Plaintiff was employed as general passenger agent of a steamship company, and failing to make proper returns of tickets sold,

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the company instituted a replevin suit to recover certain tickets in his hands. The sheriff made return that the tickets had been "eloigned, removed, concealed, or disposed of, so that he could not find the same." Thereupon an order of arrest was procured under which plaintiff was imprisoned for some time, but subsequently the order was vacated. In a subsequent action for an accounting the company recovered a large sum of money against plaintiff for tickets received and not accounted for. *Held*, not sufficient to establish want of probable cause. *Sheahan v. National Steamship Co.*, 49 N. Y. S. R. 484, 66 Hun 48, 20 N. Y. Supp. 740; affirmed on opinion below in 142 N. Y. 655, mem., 37 N. E. Rep. 569, mem.

8. What constitutes malice, and how shown.—Where there is a wanton, gross, reckless disregard of the rights of another in instituting a prosecution, and where there is no excuse for it, or no reasonable ground, then the jury may infer malice. *Blunk v. Atchison, T. & S. F. R. Co.*, 38 Fed. Rep. 311.

Malice will be inferred from want of probable cause, and to show its existence it is not necessary to prove that the suit was instituted by ill will, resentment, or hatred towards the owner of the property involved. In a legal sense, any act done wilfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. Rep. 490.

If a passenger on a railroad is prosecuted, on a complaint by the conductor, for fraudulently evading his fare, and is acquitted, in an action by him against the railroad corporation for malicious prosecution the honest and reasonable belief of the conductor in making the complaint is a necessary element in determining whether he acted without probable cause and maliciously. *Krulevitz v. Eastern R. Co.*, 26 Am. & Eng. R. Cas. 118, 140 Mass. 573, 5 N. E. Rep. 500.

The mere fact that an order of arrest is finally vacated does not show that the defendant was actuated by malice in obtaining it. *Sheahan v. National Steamship Co.*, 49 N. Y. S. R. 484, 66 Hun 48, 20 N. Y. Supp. 740; affirmed in 142 N. Y. 655, mem., 37 N. E. Rep. 569, mem.

9. What is want of probable cause, and how shown.—A prosecuting attor-

ney or a witness is not required to go to the accused party and advise him of a contemplated prosecution, and that he is suspected, and ask him if he is guilty or innocent, before instituting proceedings. *Miller v. Chicago, M. & St. P. R. Co.*, 41 Fed. Rep. 898.

In California, where a defendant may appear by his witnesses before a grand jury, the fact that the grand jury dismiss a charge affords no evidence of want of probable cause. *Ganea v. Southern Pac. R. Co.*, 51 Cal. 140.

An officer of a railroad company having reasonable grounds for supposing a person had in his possession fraudulent tickets of the company is justified in proceeding by search warrant to ascertain that fact; and the failure to find such tickets does not show that he had not sufficient ground to justify him in instituting the search. *Thelin v. Dorsey*, 13 Am. & Eng. R. Cas. 145, 59 Md. 539.

Nor would the failure to find any such tickets be necessarily sufficient to convince a reasonably prudent and cautious man that the suspected person had not fraudulently issued a ticket, which prior to the search he was suspected of issuing, or even might not still have others in his possession, though none were found in the place which was searched. *Thelin v. Dorsey*, 13 Am. & Eng. R. Cas. 145, 59 Md. 539.

A question of probable cause is to be tested by inquiring whether a discreet man would have been warranted in instituting and following up the proceedings. *Kelly v. Midland G. W. R. Co.*, 7 Ir. C. L. 8.

A company was sued for personal injuries growing out of the derailment of a train, and plaintiff testified that one of the cars had a loose wheel before the accident, for which the company subsequently instituted a prosecution for perjury. In an action for maliciously instituting such prosecution the evidence showed that a telegram passed between agents of the company containing the words "loose wheel," and that the company's general passenger agent said, "Of course we understand it, but the world does not," and that the general passenger agent knew that another witness had testified that the accident was caused by a loose wheel. *Held*, sufficient to authorize the jury in finding a want of probable cause. *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.

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10. Pleading.—Where a petition, intending to state a cause of action for an unlawful arrest and imprisonment, sufficiently states a cause of action for malicious prosecution and defectively states a cause of action for false imprisonment, and the evidence clearly shows a cause of action for false imprisonment, and the defendant is not misled, the petition may be amended at any time during the trial so as to make it sufficiently state a cause of action for false imprisonment. *Atchison, T. & S. F. R. Co. v. Rice*, 36 Kan. 593, 14 Pac. Rep. 229.

An action may be sustained by a master against one maliciously causing the arrest of his servant when no legal cause of action existed against the servant, and the arrest was for the sole purpose of injuring the master; and maliciously causing the arrest of a railroad company's engineer while running a train of cars, to delay the train and thereby damage the company, is actionable. It is not necessary to aver what became of the defendant's suit against the servant if the pleadings admit that it was malicious, false, and hopeless. *St. Johnsbury & L. C. R. Co. v. Hunt*, 15 Am. & Eng. R. Cas. 113, 55 Vt. 570, 45 Am. Rep. 639.

11. Evidence.—A plaintiff in an action for malicious prosecution cannot show by a member of the grand jury what testimony was given before that body by defendant procuring plaintiff to be indicted. *Fotheringham v. Adams Exp. Co.*, 34 Fed. Rep. 646.

In an action for malicious prosecution on a charge of selling a fraudulent railroad ticket, the defendant may introduce evidence of his having had knowledge, anterior to the charge, of the sale of fraudulent tickets by the plaintiff on other occasions. *Thelin v. Dorsey*, 13 Am. & Eng. R. Cas. 145, 59 Mo. 539.

In an action for malicious prosecution, to show that a criminal prosecution was instituted by authority of a railroad corporation, it is not necessary to produce a resolution of its board of directors. It is sufficient to show that its legal advisers, acting in conjunction with such of its servants and agents as have knowledge of the facts, instituted the proper proceedings. *Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167.—QUOTED IN *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.

12. Defenses, generally.—Where a company is sued for a malicious prosecution instituted by its general manager, it cannot defend on the ground that the act was not authorized by its charter. *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.—QUOTING *Pressley v. Mobile & G. R. Co.*, 11 Am. & Eng. R. Cas. 229, 15 Fed. Rep. 199.

13. Advice of counsel.—Advice of counsel after a full disclosure of facts justifies the institution of a criminal prosecution. *Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167.

Where an attorney is empowered to begin such proceedings by prosecution as he may see fit, and for which he is to receive a certain sum for each prosecution by him begun, the rule which protects a client when acting under the advice of an attorney, upon whose unbiased judgment he has a right to rely, has no application. *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340.

14. Probable cause, and how shown.—(1) *Generally.*—Evidence of information received, before preferring the charge, by the person who institutes a prosecution for a criminal offense, and tending to establish the guilt of the person prosecuted, is competent as to the question of probable cause, but evidence of information received after the charge has been preferred is not. *Pennsylvania Co. v. Weddle*, 26 Am. & Eng. R. Cas. 120, 100 Ind. 138.

If the evidence is such that a reasonable man would think a person to be guilty of a felony which has been proved to have been committed, probable cause is established, and he is protected in making a complaint; and where stolen goods are found in the possession of the accused, and such possession is not explained, probable cause is established. *Molloy v. Long Island R. Co.*, 59 Hun 424, 36 N. Y. S. R. 626, 13 N. Y. Supp. 382; affirmed in 137 N. Y. 629, mem., 51 N. Y. S. R. 931, 33 N. E. Rep. 745, mem. *Chicago, B. & Q. R. Co. v. Kriski*, 30 Neb. 215, 46 N. W. Rep. 520.

A judicial finding by a court of original jurisdiction is conclusive as to probable cause, when such finding is not procured by unfair means, even if such finding is reversed on appeal. *Welch v. Boston & P. R. Corp.*, 14 R. I. 609.

A railway company is not liable to an action for malicious prosecution in procuring the arrest of an employé on the ground

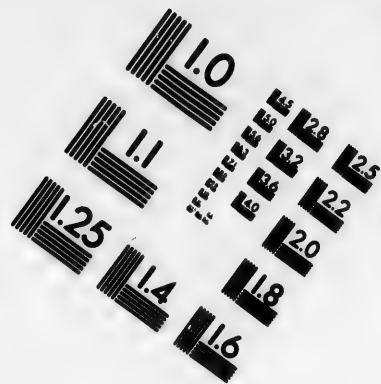
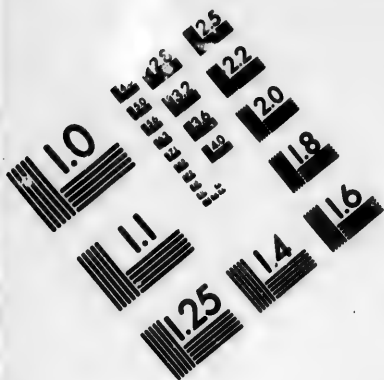
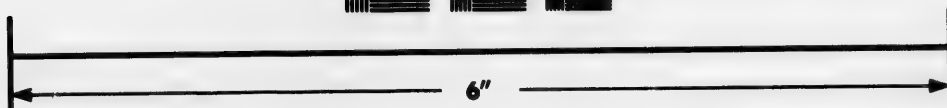
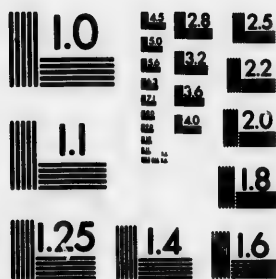


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that he charged a passenger a greater amount than that for which he gave a receipt, where both the passenger and his wife swore to the truth of their accusation, notwithstanding which the jury acquitted the employé. *Kelly v. Midland G. W. R. Co.*, 7 Ir. C. L. 8.

(2) *Illustrations*.—It appearing that certain personal property had been stolen from the defendant company, and that competent legal counsel and the county attorney advised the defendant that there was probable cause for the prosecution of the plaintiff after the supposed facts had been stated to them, embracing an affidavit of a confessed accomplice alleging circumstantially that the plaintiff participated in the larceny, with other affidavits of a corroborative nature—*held*, that the case showed probable cause, and that a verdict against the defendant could not be sustained. *Moore v. Northern Pac. R. Co.*, 37 Minn. 147, 33 N. W. Rep. 334.

The defendant caused the arrest of plaintiff, and supported its charge with evidence sufficient to procure his commitment and indictment for embezzlement. *Held*, that this was *prima facie* evidence of the existence of probable cause. *Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167.

The defendant affirmatively showed that it acted in perfect good faith, under the advice of counsel, and the decision of the district court and of the supreme court, that there was good reason to charge a second offense for embezzlement. *Held*, that the court erred in not instructing the jury that there was probable cause for the prosecution. *Ricord v. Central Pac. R. Co.*, 2 Am. & Eng. R. Cas. 394, 15 Nev. 167.

Defendant brought an action and obtained a judgment against the plaintiff's engineer for injuries to his heifer, claimed to have been caused by negligence in running an engine; and while the writ was being served its train of cars was delayed for a short time. Thereupon the plaintiff commenced this action for malicious prosecution, alleging that the engine was properly managed at the time of the accident, that the defendant instituted his suit for the sole purpose of injuring the plaintiff by delaying its train, and the declaration was sustained on demurrer. *Held*, on trial of the merits, that evidence was admissible to prove that the plaintiff had neither fenced its road nor built cattle-guards, for the purpose of show-

ing that the defendant had a cause of action, and therefore probable cause. *St. Johnsbury & L. C. R. Co. v. Hunt*, 29 Am. & Eng. R. Cas. 234, 59 Vt. 294, 7 Atl. Rep. 277.

15. Instructions.—If the facts are not disputed, the court must decide, as matter of law, whether they constitute probable cause; but where the facts are disputed the court must hypothetically state the material facts which there is evidence fairly tending to prove, and positively direct as to the law thereon, leaving to the jury to determine the existence or non-existence of the facts. *Pennsylvania Co. v. Weddle*, 26 Am. & Eng. R. Cas. 120, 100 Ind. 138. *Atchison, T. & S. F. R. Co. v. Watson*, 37 Kan. 773, 15 Pac. 857. *Burton v. St. Paul, M. & M. R. Co.*, 33 Minn. 189, 22 N. W. Rep. 300. *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340.

16. Damages.—Whatever may have been paid out by a plaintiff, in a malicious prosecution, for counsel fees, for expenses in defending himself, and whatever may be the value of the time lost in that defense, and in addition whatever damage may have been done to his reputation by the prosecution, are to be considered in determining the amount of his damages. *Blunk v. Atchison, T. & S. F. R. Co.*, 38 Fed. Rep. 311.

Exemplary damages may be given whenever malice is an essential ingredient. *McGarry v. Missouri Pac. R. Co.*, 36 Mo. App. 340.

Where a jury finds both a want of probable cause and malice, such finding is no ground for setting aside a verdict for actual damages only, where exemplary damages might have been allowed. *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.

In an action for malicious prosecution for perjury, plaintiff claimed \$15,000 actual damages and the same exemplary damages, and the jury gave him \$8,000 actual damages. The evidence showed that the prosecution ruined plaintiff financially; prevented him, in a measure, from obtaining employment; caused him to perform labor he had not previously done; and estranged him from those, or many of them, with whom he had associated in business. *Held*, that the verdict was not so excessive as to warrant the court in interfering. *Gulf, C. & S. F. R. Co. v. James*, 73 Tex. 12, 10 S. W. Rep. 744.—**QUOTING** *Gulf, C. & S. F. R. Co. v. Gordon*, 70 Tex. 90.

Plaintiff with his son and a friend had a dispute with the conductor of the train on which they were passengers as to whether the particular tickets they offered entitled them to travel on the particular train. When the train reached Hoboken, the three, on the complaint of the conductor, were arrested under color of a statute authorizing the apprehension of any person attempting to ride in a carriage of any railroad company without having paid his fare and with intent to avoid payment thereof. Plaintiff and his companions were discharged by the magistrate. In an action by each to recover damages for causing the arrest, the plaintiffs had a verdict, but for different amounts. Plaintiff herein had a verdict for \$500. *Held*, not excessive. *Toomey v. Delaware, L. & W. R. Co.*, 4 *Misc.* 392, 53 *N. Y. S. R.* 567, 24 *N. Y. Supp.* 108.

Another of the plaintiffs had a verdict for six cents. *Held*, that as the trouble had its origin in an honest mistake, of which plaintiff was the responsible author, and the conductor acted without malice or evil intent, the verdict should not be set aside on the ground of inadequate damages. *Toomey v. Delaware, L. & W. R. Co.*, 2 *Misc.* 82, 49 *N. Y. S. R.* 623, 21 *N. Y. Supp.* 448.

MANAGING AGENTS.

Service of process on, see *PROCESS*, 30.

MANDAMUS.

Appeals from order granting or refusing, see *APPEAL AND ERROR*, 20.

As a remedy for wrongful interference with property, see *EMINENT DOMAIN*, 1052.

— to the landowner, under English compulsory purchase acts, see *EMINENT DOMAIN*, 1208.

By creditor, to compel payment of subscription, see *STOCKHOLDERS*, 28.

Compelling appointment of commissioners by, see *EMINENT DOMAIN*, 502.

— deposit of land damages by, see *EMINENT DOMAIN*, 394.

Enforcement of awards by, under English compulsory purchase laws, see *EMINENT DOMAIN*, 1177.

— commissioners' orders by, see *RAILWAY COMMISSIONERS*, 31.

— judgments by, see *EMINENT DOMAIN*, 860.

— taxes by, see *TAXATION*, 324.

Removal of proceedings for, to federal court, see *REMOVAL OF CAUSES*, 17.

Review of condemnation proceedings on, see *EMINENT DOMAIN*, 967.

To compel allowance of costs, see *EMINENT DOMAIN*, 776.

— carrier to receive and carry, see *CARRIAGE OF MERCHANDISE*, 48.

— — — transport liquor, see *INTOXICATING LIQUORS*, 2.

— construction of highway crossing, see *CROSSING OF STREETS AND HIGHWAYS*, 11, 12.

— — — road, see *CONSTRUCTION OF RAILWAYS*, 1.

— delivery of grain by elevator proprietor, see *ELEVATORS*, 9.

— election of directors, see *DIRECTORS, ETC.*, 6.

— extension of track, see *STREET RAILWAYS*, 31.

— further proceedings under notice to treat, see *EMINENT DOMAIN*, 1131.

— inspection of books, see *STOCKHOLDERS*, 7.

— issue and delivery of railway aid bonds, see *MUNICIPAL AND LOCAL AID*, 286, 287.

— — — and reissue of stock, see *STOCK*, 14, 15.

— — of warrant to summon jury, see *EMINENT DOMAIN*, 531, 1184.

— operation of branch road, see *BRANCH AND LATERAL ROADS*, 14; *LEASES, ETC.*, 6.

— payment of coupons, see *COUPONS*, 23.

— restoration of highway, see *CROSSING OF STREETS AND HIGHWAYS*, 26; *STREETS AND HIGHWAYS*, 192.

— transfer of stock, see *STOCK*, 63, 64.

— enforce duty to construct bridge, see *BRIDGES, ETC.*, 19.

— — — locate station, see *STATIONS AND DEPOTS*, 29.

— review town bonding proceedings, see *MUNICIPAL AND LOCAL AID*, 439-455.

When proper remedy, and not creditors' suit, see *CREDITORS' BILL*, 5.

I. NATURE AND USE OF THE WRIT. 373

1. *In General*. 373

2. *In Particular Cases*. 375

II. PROCEDURE. 382

I. NATURE AND USE OF THE WRIT.

1. *In General*.

1. Purpose of the writ, and when lies, generally.*—The writ of mandamus

*What duties a railroad company may be compelled to perform by mandamus, see note, 30 *AM. & ENG. R. CAS.* 515.

lies to compel a railroad company to perform the public duties imposed upon it by its charter. *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269.—QUOTING *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.—APPROVED IN *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

Mandamus never lies to enforce the performance of private contracts. *Florida C. & P. R. Co. v. State ex rel.*, 56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103.

Mandamus will not ordinarily be issued to command the doing of an act enjoined by the decree of a competent court; but when one who was not a party to that decree has rights which can be secured only by the writ of mandamus, it may be issued. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 12 Kan. 127.

2. Relator's right must be clear.—Courts, as a general rule, will not interfere with the management of railways in the equipment and operation of their road, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167.

Where the right of a company to construct a railroad is not free from doubt, a mandamus will not issue to compel the commissioner of public works to issue a permit. *People ex rel. v. Newton*, 34 N. Y. S. R. 584, 26 J. & S. 439, 19 Civ. Pro. 416, 11 N. Y. Supp. 782; *appeal dismissed in* 126 N. Y. 656, 37 N. Y. S. R. 391, 27 N. E. Rep. 370.

Mandamus will not be allowed to compel a corporation to issue its bonds to one of its creditors in order to obtain the benefit of a mortgage security, where the right of the creditor to such security is doubtful, and the property sought to be affected has passed into the hands of third parties as purchasers. The remedy in such case should be by a suit brought in equity against the parties whose interest it is sought to affect. *Ham v. Toledo, W. & W. R. Co.*, 29 Ohio St. 174.

After a petition was filed for a mandamus to the court below to take certain rolling stock out of the hands of a receiver and deliver it to petitioners, the supreme court decided a case between the same parties

that the petitioners were not entitled to the property. *Held*, that the petition must be denied. *Ex parte Milwaukee & M. R. Co.*, 18 Law. Ed. (U. S.) 887.

3. There must be no other adequate legal remedy.—Mandamus does not lie to compel corporations to perform obligations arising simply from contract, nor when there exists other adequate legal remedy, and especially when such remedy is expressly provided by the statute imposing the duty. *State ex rel. v. New Orleans & C. R. Co.*, 37 La. Ann. 589.—DISTINGUISHING *Hayes v. Michigan C. R. Co.*, 111 U. S. 227; *Louisville & N. A. R. Co. v. State*, 25 Ind. 177.

Two things must concur—a specific legal right, and the absence of an effectual legal remedy. *State ex rel. v. Paterson, N. & N. Y. R. Co.*, 9 Am. & Eng. R. Cas. 134, 43 N. J. L. 505; *affirmed in* 45 N. J. L. 186.

An application for a mandamus to compel the receiver of a railroad appointed in a foreclosure suit to operate the road will be denied, as there is a plain, speedy, and adequate remedy, if the plaintiff is entitled to any, in the cause and court in which the defendant was appointed receiver. *People ex rel. v. McLane*, 62 Cal. 616.

A petition for mandamus to compel a transfer of shares by a corporation to the petitioner will not be granted if the petitioner can be indemnified for the refusal by the recovery of damages in an action at law. *Murray v. Stevens*, 110 Mass. 95.

Under the Ill. statute mandamus will lie in all cases when it affords a proper and sufficient remedy for the enforcement of a legal right or an obvious duty, the performance of which involves no discretion, without regard to whether there may be some other adequate remedy or not. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 427, 121 Ill. 483, 13 N. E. Rep. 236, 11 West. Rep. 375.

Where the remedy by action is not so efficacious as that by mandamus, the right to the latter is not taken away. *Ex parte Attorney-General of New Brunswick*, 17 New Brun. 667.—QUOTING *Rex v. Severn & W. R. Co.*, 2 B. & Ald. 646.

The charter of the Paterson & Newark R. Co. provided that in passing by the lands of the Mount Pleasant cemetery the said railroad should be constructed entirely outside a stone wall embankment of the cemetery, and near the line of high water in

the Passaic river; and that before entering upon the lands the company should enter into an agreement with the cemetery company to construct a suitable stone wall, not less than six feet high, on the line between said railroad and the cemetery grounds. The company located its road as indicated, and, before it commenced the construction thereof, executed and delivered to the cemetery company a bond conditioned to construct a wall in compliance with the charter within three years. On application for a mandamus to compel the company to build the wall—*held*, that it was the legislative purpose to secure to the relator a satisfactory location of the railroad, and an agreement for the erection of a wall, and that the specific duty imposed on the company by its charter in this respect had been fully performed, and that the relator had adequate legal remedy on the contract, and if that remedy had become inefficacious by reason of delay and the intervening insolvency of the obligor, the relator could have no relief by mandamus. *State ex rel. v. Paterson, N. & N. Y. R. Co.*, 9 *Am. & Eng. R. Cas.* 134, 43 *N. J. L.* 505; *affirmed in 45 N. J. L.* 186.

4. Not granted if unavailing or obedience impossible.—A mandamus will not be granted where it is clear that it will prove unavailing. So it will not issue to compel a company to put its road in proper condition, where it is apparent that the financial condition of the company renders it impossible for it to comply with the order. *Ohio & M. R. Co. v. People ex rel.*, 30 *Am. & Eng. R. Cas.* 509, 120 *Ill.* 200, 11 *N. E. Rep.* 347, 9 *West. Rep.* 167. *In re Bristol & N. S. R. Co.*, *L. R.* 3 *Q. B. D.* 10, 47 *L. J. Q. B. D.* 48, 26 *W. R.* 236.

5. Not a substitute for appeal or writ of error.—Mandamus will not lie to relieve against the acts of an inferior court, where the party complaining has a remedy by appeal or writ of error. *State ex rel. v. Lubke*, 85 *Mo.* 338.

A railroad company instituted a suit in replevin to get possession of certain cars. On a plea to the jurisdiction of the court the suit was dismissed at the costs of plaintiff and execution awarded. *Held*, that this was a final decree, reviewable on a writ of error, but not by mandamus. *Ex parte Baltimore & O. R. Co.*, 108 *U. S.* 566, 2 *Sup. Ct. Rep.* 876.—FOLLOWING *Ex parte Des Moines & M. R. Co.*, 103 *U. S.* 796.

6. Will not lie to review discretionary action.—A mandamus will issue only when the duty to be performed is ministerial in its character; when a duty is imposed upon an officer requiring the exercise of judgment or discretion, a mandamus will not lie. *Bledsoe v. International R. Co.*, 40 *Tex.* 537.—QUOTING *Decatur v. Paulding*, 14 *Pet. (U. S.)* 515.—FOLLOWED IN *Galveston, B. & C. N. G. R. Co. v. Gross*, 47 *Tex.* 428.

A railroad company appealed from a decree in a U. S. circuit court, directing a sale of the road, to the supreme court, but the court below refused to accept the *supersedeas* bond offered. *Held*, that the supreme court will not attempt to control the discretion of the lower court in rejecting the bond by issuing a mandamus to compel it to accept it, though not agreeing with it in the reasons for such refusal; but it will grant the *supersedeas* upon filing the proper bond. *Ex parte Milwaukee & M. R. Co.*, 5 *Wall. (U. S.)* 188.

A suit between two railroads, growing out of the right to use a narrow pass or canyon, was reversed by the U. S. supreme court. After it was sent back the lower court permitted supplemental bills to be filed which developed a state of facts antagonistic to the company prevailing in the supreme court. That company then petitioned for a mandamus to compel the lower court to carry out the mandate of the supreme court. *Held*, that the supplementary proceedings were within the discretion of the court, and that a mandamus would not lie to review the exercise of the discretionary powers of a lower court. *Ex parte Denver & R. G. R. Co.*, 101 *U. S.* 711.

2. In Particular Cases.

7. Regulating construction and operation of railroads, generally.

A mandamus is the proper remedy to compel a company to grade its tracks, so as to make its crossings convenient and useful; to compel it to construct its road across a stream so as not to interfere with navigation; to replace a part of its track which it has wrongfully taken up; to operate its road as a continuous line; to compel it to build a bridge; to run daily trains; and, where there is a statute requiring it, to compel it to stop a certain number of trains each day at a particular station, and to perform any other

specific duty which it owes to the public. *Ohio & M. R. Co. v. People ex rel.*, 30 *Am. & Eng. R. Cas.* 509, 120 *Ill.* 200, 11 *N. E. Rep.* 347, 9 *West. Rep.* 167.—APPROVED IN *Illinois C. R. Co. v. People*, 143 *Ill.* 434.

A railroad company, by consolidation with another company, became the owner of two lines of road between two termini. It abandoned one of the two lines, but substantially accommodated the people of the state by operating the other line between the two points. *Held*, that it could not be compelled by mandamus to maintain and operate both lines, there being no public right to protect, and no public duty to enforce. *People v. Rome, W. & O. R. Co.*, 28 *Am. & Eng. R. Cas.* 35, 103 *N. Y.* 95, 8 *N. E. Rep.* 369, 3 *N. Y. S. R.* 39; reversing 38 *Hun* 640, *mem.* *State v. Des Moines & Ft. D. R. Co.*, 84 *Iowa* 419, 51 *N. W. Rep.* 38.

8. — of street railroads.—Mandamus will lie against a street-railway company to compel it to perform a clear legal duty to the public. *State ex rel. v. Jacksonville St. R. Co.*, 50 *Am. & Eng. R. Cas.* 179, 29 *Fla.* 590, 10 *So. Rep.* 590.

The performance of the duties which a street-railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by mandamus. *Potwin Place v. Topeka R. Co.*, 56 *Am. & Eng. R. Cas.* 549, 51 *Kan.* 609, 33 *Pac. Rep.* 309.—QUOTING *Sioux City St. R. Co. v. Sioux City*, 138 *U. S.* 107; *Atchison St. R. Co. v. Nave*, 38 *Kan.* 744.

Quare, whether a city railway company can be compelled by mandamus to construct and operate a line of railroad along a street in accordance with conditions in an ordinance which it has accepted, no such duty being imposed by its charter. *People ex rel. v. Chicago W. D. R. Co.*, 25 *Am. & Eng. R. Cas.* 258, 118 *Ill.* 113, 7 *N. E. Rep.* 116.

A city council required a street-railway company to remove so much of the ties upon 2400 feet of its road as were outside of the stringers on which the rails rested, so that a concrete foundation might be used in paving the street in which the track was laid, and assigned as a reason that, in the judgment of the council and board of public works of the city, if such removal was not made the passage of the cars would, by their vibration, injure the concrete foundation. A compliance with the requirement necessitated the adoption of some other

form of bracket or mode of staying the stringers upon the portion of road affected. It was conceded that other brackets and other modes of staying stringers were used and employed in the city, in view of which concession the requirement was held reasonable, and a mandamus was granted to enforce it. *Detroit v. Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.

The objections that the like requirement was not made of other street-railway companies, and that it was made by resolution, instead of by ordinance, and that a compliance therewith would involve large expense to the company, are untenable. *Detroit v. Ft. Wayne & E. R. Co.*, 50 *Am. & Eng. R. Cas.* 447, 90 *Mich.* 646, 51 *N. W. Rep.* 688.

9. Compelling the purchase of land.—The Great Western R. Co. cannot be compelled to purchase land which had been inclosed by one of the engineers without the knowledge of the directors, but which they had never expressed any intention to acquire permanently. *Baby v. Great Western R. Co.*, 13 *U. C. Q. B.* 291.

10. Compelling construction of road.*—Mandamus will lie against a corporation to compel it to perform a specific duty, to build its road, imposed by its charter, or the general law, when the right to have it performed is a complete and perfect legal right, and there is no other specific, adequate remedy. *State ex rel. v. Southern Minn. R. Co.*, 18 *Minn.* 40 (*Gil.* 21).—FOLLOWED IN *Kansas ex rel. v. Southern Kan. R. Co.*, 22 *Am. & Eng. R. Cas.* 198, 24 *Fed. Rep.* 179.

Mandamus is a proper remedy to compel a railroad company in making its track across a navigable stream to pursue the mode prescribed by its charter, and not to obstruct the navigation. *State ex rel. v. North-Eastern R. Co.*, 9 *Rich. (So. Car.)* 247.—QUOTED IN *Moundville v. Ohio River R. Co.*, 37 *W. Va.* 92. REVIEWED IN *People v. New York C. & H. R. R. Co.*, 9 *Am. & Eng. R. Cas.* 1, 28 *Hun (N. Y.)* 543, 3 *Civ. Pro.* 11, 2 *McCar.* 345.

Where a company has forfeited a part of its land grant by failing to build a part of its road within the time required, a man-

* Mandamus to compel a railroad company to relay a portion of its track. Sufficiency of the return, see 25 *AM. & ENG. R. CAS.* 261, *abstr.*

damus will not issue to compel it to build the part of the road to which the forfeiture attaches. *Kansas ex rel. v. Southern Kan. R. Co.*, 22 *Am. & Eng. R. Cas.* 198, 24 *Fed. Rep.* 179. — FOLLOWING *State ex rel. v. Southern Minn. R. Co.*, 18 *Minn. 40* (Gil. 21).

Plaintiff, a taxpayer of a certain town, sought, on behalf of himself and others, to compel a company to re-locate the main line of its road^{*so} as to run through the town, on the ground that it had originally been so located, and had been aided by the town. *Held*, that unless the interests of the general public were shown to be injured by the removal of the main line from said town, but a branch built to it, plaintiff was not entitled to the relief sought. If he had suffered personal damage, his remedy was by ordinary suit. *Crane v. Chicago & N. W. R. Co.*, 74 *Iowa* 330, 7 *Am. St. Rep.* 479, 37 *N. W. Rep.* 397.

A statute which obliged several railroad corporations having their tracks in a city to unite in one station, and provided for the discontinuance of some of the existing tracks, and the extension by the city of a street therein, enacted that the city should maintain a suitable track upon the extension of the street, or partly upon the extension and partly upon the discontinued railroad location, to be connected with the tracks of one or more of the railroads in the city, "for the accommodation of the business establishments on the line of said extension which were accommodated by the tracks of" a certain railroad when the act was passed. *Held*, that, after the city had in its discretion constructed a track for the purposes named, the court could not, on a petition for a writ of mandamus, exercise a supervisory power over the mode in which it was done, and determine whether a track in another place would better accommodate the petitioner. *Rice, B. & F. M. & I. Co. v. Worcester*, 130 *Mass.* 575.

11. — of depots or stations.*—The courts are not authorized by mandamus to control a railroad company's discretion in the matter of the location of its depot buildings so far as to indicate, in any case, the exact spot of such location. *Florida C. & P. R. Co. v. State ex rel.*, 56 *Am. & Eng. R. Cas.*

306, 31 *Fla.* 482, 13 *So. Rep.* 103.—APPLYING *People v. New York, L. E. & W. R. Co.*, 104 *N. Y.* 58; *Northern Pac. R. Co. v. Washington Ter.*, 142 *U. S.* 492, 12 *Sup. Ct. Rep.* 283. QUOTING *Marsh v. Fairbury, P. & N. W. R. Co.*, 64 *Ill.* 414.

The charter of the Northern Pacific railroad imposed no specific duties as to the location of stations along its line. For a time trains stopped at a town, but no depot was built. After the road was extended a station was located four miles beyond, and trains no longer stopped at the town. On mandamus to compel a station at the town it appeared that such station would not pay expenses, that since the building of the road the town had largely depopulated, and that a village around the station was fast becoming the principal town, and better accommodated the community as a whole. *Held*, that the writ ought not to issue. *Northern Pac. R. Co. v. Washington Ter. ex rel.*, 48 *Am. & Eng. R. Cas.* 475, 142 *U. S.* 492, 12 *Sup. Ct. Rep.* 283.—APPLIED IN *Florida C. & P. R. Co. v. State ex rel.*, 31 *Fla.* 482.

12. — of bridges and viaducts.—Where a duty rests upon a company to construct a viaduct over its railroad tracks where the same cross a public street in a city, mandamus will ordinarily lie to compel the company so to construct such viaduct. And the action may, in some cases, be prosecuted in the name of the state by the county attorney. *State v. Missouri Pac. R. Co.*, 20 *Am. & Eng. R. Cas.* 45, 33 *Kan.* 176, 5 *Pac. Rep.* 772.

And it is no objection to granting such relief that the company is liable to indictment for failing to erect or maintain such bridges. *People ex rel. v. Troy & B. R. Co.*, 37 *How. Pr. (N. Y.)* 427.

Under La. Act 133 of 1888 mandamus is provided as a special statutory remedy applicable to the enforcement of obligations involved in a contract between the city and a street-railway corporation relative to the erection and maintenance of bridges. *State ex rel. v. Canal & C. St. R. Co.*, 44 *La. Ann.* 526, 10 *So. Rep.* 940.

Towns may compel a railroad bound to maintain such bridges to make any reasonable repairs by the writ of mandamus, or if they have been obliged to make expenditures thereon, may reimburse themselves by an action on the case. *State v. Gorham*, 27 *Me.* 451.

Where a mandamus commanding a com-

* Compelling a railroad company to build stations, see notes, 35 *AM. & ENG. R. CAS.* 464; 30 *Id.* 180; 29 *Id.* 485; 22 *Id.* 509.

pany to make a bridge and carry a highway over its track in conformity with plans and sections filed by a company goes beyond the obligation imposed by law, the writ is altogether bad. *Reg. v. Caledonian R. Co.*, 16 Q. B. 19, 15 Jur. 396, 20 L. J. Q. B. 147.

A company wholly without funds will not be compelled by mandamus to construct a bridge in lieu of a level crossing pursuant to an order of the board of trade. *In re Bristol & N. S. R. Co., L. R.*, 3 Q. B. D. 10, 47 L. J. Q. B. D. 48, 26 W. R. 236.

13. Compelling the restoration of streets and highways.—Mandamus will lie to require a company having its track upon, along, or across the streets and alleys of a city so to build and erect the same, and level and grade the said streets and alleys, their full width, as to render the use of the streets and alleys and the crossing of the track convenient for the public. *Indianapolis & C. R. Co. v. State ex rel.*, 37 Ind. 489, 5 Am. Ry. Rep. 170.—**DISTINGUISHING** Louisville & N. A. R. Co. v. State, 25 Ind. 177.—**REVIEWED IN** Moundsville v. Ohio River R. Co., 37 W. Va. 92; *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

Mandamus lies by the city against a railroad company to compel performance of a contract to pave a street in consideration of a grant of right of way therein. *State ex rel. v. New Orleans & N. E. R. Co.*, 43 Am. & Eng. R. Cas. 263, 42 La. Ann. 11, 7 So. Rep. 84.

La. Act 133 of 1888, which purports to provide a summary remedy by mandamus to enforce the obligations of certain corporations, with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, cannot be construed as extending to an obligation to construct a new levee or embankment. *State ex rel. v. New Orleans & N. E. R. Co.*, 43 Am. & Eng. R. Cas. 258, 42 La. Ann. 138, 7 So. Rep. 226.

Mandamus is an appropriate remedy to compel the restoration of a highway by a railway to its proper condition, and, in this respect, to the company to perform its charter duties. *State ex rel. v. Hannibal & St. J. R. Co.*, 29 Am. & Eng. R. Cas. 604, 86 Mo. 13.

Supervisors of a township may apply for a writ of mandamus commanding a railroad

company to make a road for public accommodation, required by their charter. *Whitemarsh Tp. v. Philadelphia, G. & N. R. Co.*, 8 Watts & S. (Pa.) 365.

Mandamus proceedings lie to determine the mode in which a railroad company shall be required to restore a street and to compel it to perform its duty, although the city council has not yet changed the established grade of the street to conform to the lawful change which the relator claims should be adopted. *State ex rel. v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153.

The manner in which the duty of restoring the streets should be performed being uncertain, the mandate of the court may properly be specific in that regard. *State ex rel. v. Minneapolis & St. L. R. Co.*, 35 Am. & Eng. R. Cas. 250, 39 Minn. 219, 39 N. W. Rep. 153.

14. — and streams.—A company succeeding to all the rights and property of another company may be compelled to restore the waters of a stream to their original channel, which has been wrongfully diverted by the former company. *Lefurgy v. New York & N. R. Co.*, 21 N. Y. S. R. 113, 50 Hun 606, mem., 3 N. Y. Supp. 302.—**APPLYING** Brown v. Cayuga & S. R. Co., 12 N. Y. 486.

Where it appears that the change in the bed of the stream did not take place at once upon making an excavation, the action will not be barred in six years from the time of the excavation. *Lefurgy v. New York & N. R. Co.*, 21 N. Y. S. R. 113, 50 Hun 606, mem., 3 N. Y. Supp. 302.

15. Compelling carriage of freight and passengers, running of trains, etc.—Mandamus lies to compel a railway company to stop all its regular passenger trains at county seat stations long enough to allow passengers time to get on and off the same. *Illinois C. R. Co. v. People*, 143 Ill. 434, 33 N. E. Rep. 173.

Mandamus will lie to compel a railroad company to issue a commutation ticket to one entitled. *State ex rel. v. Delaware, L. & W. R. Co.*, 23 Am. & Eng. R. Cas. 470, 48 N. J. L. 55.

The performance of the duty to receive and transport freight is compellable on behalf of the people, through the courts, by mandamus; and their attorney-general is the proper officer to set the process in motion. The fact that injured individuals

may have private remedies for damages sustained does not preclude the state from its remedy by mandamus, where there is a general or partial suspension of the duty of receiving or transporting freight affecting large numbers of people. *People v. New York C. & H. R. R. Co.*, 9 *Am. & Eng. R. Cas.* 1, 28 *Hun* (N. Y.) 543, 3 *Civ. Pro.* 11, 2 *McCar.* 345; reversing 2 *Civ. Pro.* 82.—APPROVING Railroad Com'r's *v. Portland & O. C. R. Co.*, 63 *Me.* 269. REVIEWING Union Pac. R. Co. *v. Hall*, 91 U. S. 343; *State v. Hartford & N. H. R. Co.*, 29 *Conn.* 538; *People ex rel. v. Rochester & S. L. R. Co.*, 14 *Hun* 373, 76 N. Y. 294; *People ex rel. v. Boston & A. R. Co.*, 70 N. Y. 569; *State ex rel. v. North Eastern R. Co.*, 9 *Rich.* (So. Car.) 247; *In re New Brunswick & C. R. & L. Co.*, 1 P. & B. 667; *Chicago & N. W. R. Co. v. People ex rel.*, 56 *Ill.* 365; *Farmers' L. & T. Co. v. Henning*, 17 *Am. Law Reg.* (N. S.) 266; *People ex rel. v. Dutchess & C. R. Co.*, 58 N. Y. 152; *New York C. & H. R. Co. v. People*, 12 *Hun* 195, 74 N. Y. 302; *Indianapolis & C. R. Co. v. State ex rel.*, 37 *Ind.* 489; *State v. New Haven & N. Co.*, 37 *Conn.* 153; *Rex v. Severn & W. R. Co.*, 2 B. & Ald. 646; *People v. Albany & V. R. Co.*, 24 N. Y. 261.

The refusal of a company to receive and transport freight is not such a public wrong as will authorize a mandamus. If the individual shipper suffers a loss, he is entitled to an action for damages. *People v. New York, L. E. & W. R. Co.*, 63 *How. Pr.* (N. Y.) 291.—FOLLOWING *People ex rel. v. New York, L. E. & W. R. Co.*, 22 *Hun* 533. QUOTING *People v. Albany & S. R. Co.*, 57 N. Y. 161.

Mandamus will not lie, in the absence of a statutory duty, to compel a railway company to increase the number of trains on its road, or to run daily a particular number of trains over its road. *Ohio & M. R. Co. v. People ex rel.*, 30 *Am. & Eng. R. Cas.* 509, 120 *Ill.* 200, 11 *N. E. Rep.* 347, 9 *West. Rep.* 167.

A mandamus will not issue to compel a company to run more than one train a day to a particular station, each way, where it appears that there is not business enough to make it profitable to do so, and where there is another station not more than two miles distant at which all trains stop. *People ex rel. v. Long Island R. Co.*, 31 *Hun* (N. Y.) 125. *Ex parte Attorney-General of New Brunswick*, 17 *New Brun.* 667.

16. Compelling transportation of coal.—Mandamus does not lie, when the relator who seeks to transport his coal over a lateral railroad has not opened or mined his coal or offered it in cars for transportation. If this has been caused by the refusal of the proprietor to pass the relator's empty cars into his mine, such refusal forms the matter of complaint; for he has an undoubted right to such a passage, and if the proprietor does not prescribe reasonable rules for its exercise, the court will prescribe them. *Com. ex rel. v. Corey*, 2 *Pittsb. (Pa.)* 444.

The transporter has no right to use the inclined plane, the tippie, or chute, the screens, or the landing of the proprietor of a lateral railroad, as these are his private property. *Com. ex rel. v. Corey*, 2 *Pittsb. (Pa.)* 444.

When such transporter has provided himself with a landing immediately above that of the proprietor of the road, he must approach such landing from the head of the inclined plane by means of his own providing. *Com. ex rel. v. Corey*, 2 *Pittsb. (Pa.)* 444.

17. Regulation of charges.—Where the charter of a corporation, or a general statute, imposes a specific duty, either in terms or by implication, and where there is no specific or adequate remedy, a writ of mandamus will be awarded, as well for private persons as for the public. So where a statute authorizes county subscriptions to railroad stock, with a provision that the company shall receive tax certificates in payment of either freight or passage, and the road accepts a subscription thereunder, mandamus is the proper remedy to compel it to take such certificates in payment of fare. *Mobile & O. R. Co. v. Wisdom*, 5 *Heisk. (Tenn.)* 125, 1 *Am. Ry. Rep.* 107.—DISTINGUISHED IN *State ex rel. v. Mobile & M. R. Co.*, 59 *Ala.* 321.

Ordinarily a mandamus will not issue where the party has an adequate remedy by ordinary action at law. So where a statute authorizes the recovery of double damages for an excessive freight charge, a mandamus will not be awarded. *State ex rel. v. Mobile & M. R. Co.*, 59 *Ala.* 321.—DISTINGUISHING *Mobile & O. R. Co. v. Wisdom*, 5 *Heisk. (Tenn.)* 125; *Chicago & N. W. R. Co. v. People ex rel.*, 56 *Ill.* 365.—FOLLOWED IN *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559. QUOTED IN *Murray*

v. Gulf, C. & S. F. R. Co., 22 Am. & Eng. R. Cas. 464, 63 Tex. 407.

18. Enforcement of taxes.—A railroad company against whom taxes were assessed, and the assessments removed into the supreme court and affirmed, may be required to pay them by a mandamus if there is no other adequate remedy for collecting them, as where it has leased its road and has but little personal property. *Person v. Warren R. Co.*, 32 N. J. L. 441.

In mandamus to compel a county treasurer to pay certain school taxes collected from a railroad to the treasurer of the school district, the county treasurer cannot set up that the township in which the school district was situate had subscribed a certain sum to the railroad, a part of which was unpaid; that under the act of April 16, 1869, providing for funding and paying railroad debts of counties, towns, etc., he was required to pay into the state treasury all taxes collected in the town for any purpose on railroads, when it does not appear that the town and school district were territorially the same. *Allhands v. People ex rel.*, 82 Ill. 234.

19. — of municipal aid bonds.*—Mandamus will lie against a board of county commissioners to compel them to take action upon the petition of a taxpayer of a township asking them to take stock in a railroad company to the amount of money collected on a tax voted for that purpose. *Pfister v. State*, 82 Ind. 382.

When a municipality, under the Mich. Railroad Aid Law (S. L. 1869, p. 89), has issued and deposited bonds in aid of a railroad with the state treasurer, who, on demand therefor, has declined to deliver the same to the proper authorities of such municipality, a writ of mandamus will be granted to compel such delivery. *People ex rel. v. State Treasurer*, 23 Mich. 499, 1 Am. Ry. Rep. 96.

The county court will not be compelled by mandamus to issue a warrant on the common fund of the county for the payment of railroad bonded indebtedness, when the result would be to withdraw from the treasury all the funds necessary for the support of the county government, and thus to disrupt and disorganize it. *State ex rel. v.*

Macon County Court, 68 Mo. 29.—QUOTING *Carroll County Supr's v. United States*, 18 Wall. (U. S.) 77; Com. ex rel. *v. Philadelphia County Com'rs*, 1 Whart. (Pa.) 1.

Mandamus is not the proper remedy by which to compel the delivery of municipal debentures claimed under a promised bonus to a railway. *Grand Junction R. Co. v. Peterborough County*, 13 Ont. App. 420. See also *Grand Junction R. Co. v. Peterborough County*, 6 Ont. App. 339; reversing 45 U. C. Q. B. 302.

20. — of state aid bonds.—Section 8 of the N. Car. Ordinance of the Convention of 1868 having provided that, when the president and chief engineer of the North-Western North Carolina R. Co. should have complied with certain terms in respect to the first division of the said road, the governor should direct that the public treasurer should make a loan to the company by the issue of a certain amount of state bonds, and the terms having been complied with—*held*, that the company was entitled to have a peremptory mandamus to compel the treasurer to issue the bonds, notwithstanding the subsequent legislation contained in the acts of 1868-69, ch. 32, of 1869-70, chs. 71 and 100, as all those acts taken together left the ordinance above mentioned in full force and effect. *North-Western N. C. R. Co. v. Jenkins*, 65 N. Car. 173.

21. Mandamus to inferior courts.—Where the supreme court of the United States has decided a controversy as to the right of contending parties to the possession of a railroad, and has decided that one of the parties is entitled to possession, a mandamus will issue directing the circuit judge to proceed to execute the judgment of the court. *Ex parte Milwaukee R. Co.*, 5 Wall. (U. S.) 825.

Stockholders in a railroad who petitioned to be admitted as parties in a suit to foreclose a mortgage on the road, but who were not in fact admitted nor treated as parties, are not entitled to a mandamus to allow an appeal from a decree entered in the cause. *Ex parte Cutting*, 94 U. S. 14.

Stockholders, as such, cannot appeal from a decree foreclosing a mortgage on the road represented by their stock where they are not parties. In extreme cases they may be admitted as parties to protect their interests, but the question of such admission is addressed to the sound discretion of the

* Mandamus in municipal bond cases, see notes, 12 AM. & ENG. R. CAS. 609; 15 Id. 629.

trial court, and cannot be controlled by a mandamus to such court. *Ex parte Cutting*, 94 U. S. 14.

A railroad company borrowed money from a state, and executed a mortgage on its property to secure it. The state also indorsed an issue of the bonds of the company, and took a statutory lien on the property. Afterwards the company issued other bonds, and secured them by a deed of trust on its property. A holder of these last bonds filed a bill to foreclose the deed of trust, but no mention was made of the first mortgage to the state. Another railroad company was made a party, and filed a cross-bill setting up ownership of the first mortgage to the state, claimed priority, and asked a foreclosure. A second suit was instituted to foreclose the statutory lien in favor of the state, which was answered by the company holding the first lien in favor of the state. Pending the suit the company transferred its interest under the mortgage to the state. A decree was entered ordering a sale, and giving the latter mortgage priority, but at a later day the suits were consolidated, and a further decree entered decreeing a sale, the purchaser to take title subject to such lien as might be finally adjudicated to the holders of said first mortgage. *Held*, that the company that had owned, but transferred, said first mortgage lien had a right to appeal from this decree, and such appeal being refused by the trial court, a mandamus would lie to compel an appeal. *Ex parte South & N. Ala. R. Co.*, 95 U. S. 221.

An employé of a railroad obtained a judgment against the company for a personal injury which said nothing about interest. On appeal the supreme court affirmed the judgment with costs, and remanded it with privilege of execution. The lower court then entered judgment with \$1700 interest added. *Held*, that the lower court had no power to add interest, and as the amount was too small to be reviewed on writ of error, a mandamus would issue directing the court below to strike off the interest. *In re Washington & G. R. Co.*, 140 U. S. 91, 11 *Sup. Ct. Rep.* 673.—FOLLOWING *Ex parte Dubuque & P. R. Co.*, 1 Wall. (U. S.) 69; *Durant v. Essex Co.*, 101 U. S. 555; *Boyce v. Grundy*, 9 Pet. (U. S.) 275.—FOLLOWED *in Green v. Chicago, S. & C. R. Co.*, 49 Fed. Rep. 907.

22. Mandamus to governor.—A mandamus lies against the governor of the state, as well as any other public functionary, to compel the performance of a purely ministerial duty enjoined by statute. *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371.

Where a sum of money is loaned by act of the legislature to a railroad company, on its complying with certain terms and conditions in said act prescribed, and the governor is required, on the performance of these conditions, to accept its bonds for the faithful application and repayment of the money, and to draw his warrant in its favor on the custodian of the fund for the sum thus loaned, a mandamus will lie to compel the performance by the governor of this ministerial duty, since an action for damages, if it could be maintained, would not afford adequate and complete redress. *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371.—FOLLOWED *in State ex rel. v. Cobb*, 64 Ala. 127.

Whether the governor, in the performance of duties devolved on him in his official capacity, can be controlled by the judicial department of the government, "is a question not free from difficulty, and embarrassed by a conflict of authority"; and the court expresses no opinion on that question in this case, nor on the correctness of the rule laid down in the case of *Tennessee & C. R. Co. v. Moore*, 36 Ala. 371. *State ex rel. v. Cobb*, 7 Am. & Eng. R. Cas. 147, 64 Ala. 127.

Under an application for a mandamus to the governor requiring him to issue the bonds of the state to a railroad company under a law alleged by him to have been passed by the general assembly over his veto without the observance of the forms prescribed in the constitution, a majority of the court concurred in sustaining jurisdiction of the application, and passing upon the validity of the law, reserving the question of power to mandamus the governor for the final hearing upon the return to a conditional writ. *Pacific R. Co. v. Governor*, 23 Mo. 353.

23. Mandamus to heads of departments and public officers.—A state treasurer cannot, in his official capacity, be compelled by mandamus to pay out money upon a warrant signed by the governor and attorney-general. *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317.—DISTIN-

GUISHED IN *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382. QUOTED IN *Bledsoe v. International R. Co.*, 40 Tex. 537.

Mandamus will not lie to compel defendant, as county treasurer, to pay over to plaintiff company certain taxes collected for its use by his predecessor in office, and by such predecessor transferred to the county fund by order of the board of supervisors. Such transfer was such an appropriation of the money as to release defendant from all liability to plaintiff on account of it. *Minneapolis & St. L. R. Co. v. Becket*, 75 Iowa 183, 39 N. W. Rep. 260.

Mandamus lies against the commissioner of the general land office, at the suit of a railroad company, to enforce the issuance of land certificates to which the company had acquired a right under its charter and the general laws of the state. Under such circumstances the commissioner had no discretion to withhold or to refuse to issue the certificates. *Houston & G. N. R. Co. v. Kuechler*, 36 Tex. 382.—DISTINGUISHING *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317. QUOTING *Marbury v. Madison*, 1 Cranch (U. S.) 137.

24. Mandamus to municipal officers.—Where a statute directs certain work on city streets and the laying of tracks thereon, one half to be paid by the company and the other half by the city, to be raised by taxation, after the work has been done and the taxes collected a mandamus will issue to compel the mayor to countersign warrants issued by the comptroller in favor of the company for the portion to be paid by the city. *People ex rel. v. Havemeyer*, 3 Hun (N. Y.) 97, 16 Abb. Pr. N. S. 219, 4 T. & C. 365, 47 How. Pr. 494.

Conceding that an action might be brought to enforce the payment of the corporation, that does not preclude the party from proceeding by mandamus. *People ex rel. v. Havemeyer*, 3 Hun (N. Y.) 97, 16 Abb. Pr. N. S. 219, 4 T. & C. 365, 47 How. Pr. 494.

Where the common council of a city consents to the construction of a street railway, and the franchise is sold, under the statute, to the highest bidder, the city comptroller has no right to require a bond with conditions not imposed by statute or the common council; and a mandamus will issue to compel him to accept and approve of a bond which is sufficient in form, and contains the conditions imposed by the council. *People*

ex rel. v. Barnard, 36 Am. & Eng. R. Cas. 70, 110 N. Y. 548, 18 N. E. Rep. 354, 18 N. Y. S. R. 542; reversing 48 Hun 57, 15 N. Y. S. R. 689.

A mandamus will not lie to compel the county commissioners or the mayor and aldermen of the city of Boston to revise their decision upon the merits of the claim of an owner of land for damages sustained by the construction of a railroad. *Smith v. Mayor, etc., of Boston*, 1 Gray (Mass.) 72.

When the county court has refused the application of a creditor of the county, whose claim has been reduced to judgment, for a warrant on the treasury payable out of a particular fund, it will not be compelled by mandamus to change its decision and grant the warrant: (1) because its action on the application is judicial; (2) because an appeal lies from its order to the circuit court. *State ex rel. v. Macon County Court*, 68 Mo. 29.—QUOTING *State ex rel. v. Lafayette County Court*, 41 Mo. 224.

A mandamus will not issue to compel the commissioner of public works to remove obstructions from city streets which have been erected by a railroad company under color of legislative authority, especially where the obstructions are in the suburbs of the city, where but few live, and are not likely to do much, if any, immediate damage. *People ex rel. v. Manhattan R. Co.*, 20 Abb. N. Cas. (N. Y.) 393.

Mandamus will not lie upon relation of a citizen and owner of land abutting upon a street through which a line of railroad would pass if constructed to compel the city clerk to make the advertisement for offer to build the road required of him by an ordinance of council, when he wrongfully refuses or neglects so to do. *State ex rel. v. Henderson*, 38 Ohio St. 644.

II. PROCEDURE.

25. Jurisdiction to grant the writ.—Where a U. S. circuit court has jurisdiction of a writ on bonds of a county issued for stock in a railroad, and enters judgment against the county, it also has jurisdiction to compel payment of the judgment by mandamus. *Knox County Com'rs v. Aspinwall*, 24 How. (U. S.) 376.

And the U. S. supreme court has jurisdiction to review such mandamus proceeding. *Riggs v. Johnson County*, 6 Wall. (U. S.) 166.—FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.

The act of March 3, 1873 (17 U. S. St. at L. 509), gives to the proper circuit court jurisdiction in mandamus to compel the Union Pacific R. Co. to operate its road as required by law. There must be jurisdiction over the company by a service upon it to enable the court to exercise the power conferred by the act. *Hall v. Union Pac. R. Co.*, 3 Dill. (U. S.) 515. *United States ex rel. v. Union Pac. R. Co.*, 2 Dill. (U. S.) 527.—FOLLOWED IN *People ex rel. v. Colorado C. R. Co.*, 45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638.

And under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company, found in the district. *United States ex rel. v. Union Pac. R. Co.*, 3 Dill. (U. S.) 524.

The Minnesota Railroad Commission Act, § 8, vests the supreme court, concurrently with a district court, with original jurisdiction of all proceedings by mandamus therein provided for to compel compliance with the provisions of the act. *State ex rel. v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. Rep. 782.—APPROVED IN *Railway Transfer Co. v. Railroad & W. Commission*, 39 Minn. 231, 39 N. W. Rep. 150.

Under the Pa. Act of June 14, 1836, giving the courts of common pleas, within their respective counties, power to issue writs of mandamus "to all corporations being or having their place of business within such county," a court of common pleas cannot issue a mandamus to a railroad company whose office and chief place of business is not in such county, although their road may pass through the same. *Whitmarsh Tp. v. Philadelphia, G. & N. R. Co.*, 8 Watts & S. (Pa.) 365.

The constitution of Texas does not confer upon the supreme court original jurisdiction in cases of mandamus. *International R. Co. v. Comptroller*, 36 Tex. 641.

The district court has not the power or authority under the constitution to compel an officer of the executive department of the government to perform an official duty. *Bledsoe v. International R. Co.*, 40 Tex. 537.—QUOTING *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 335.

The district court has no jurisdiction, by a writ of mandamus or otherwise, to control the action of the commissioner of the general land office in the issuance of railroad certificates. *Galveston, B. & C. N. G. R. Co.*

v. Gross, 47 Tex. 428.—FOLLOWING *Bledsoe v. International R. Co.*, 40 Tex. 537.

A rule nisi for a mandamus cannot be granted by the practice court. *In re Williams & G. W. R. Co.*, 26 U. C. Q. B. 340.

26. Motion generally—Pleading—Petition.—Where a private person petitions for a mandamus on behalf of the people of the state, he must show in his petition and in the alternative writ that he is a citizen of such state, and that his interests as such are injuriously affected. *People ex rel. v. Colorado C. R. Co.*, 45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638.

The word "unused" in the N. J. Act of 1880 signifies abandonment by the public. Therefore, in a proceeding to compel a railroad to replace certain highway bridges, an allegation that before and at the time of the passage of the act of 1880 legal proceedings were pending in the supreme court by the relators to compel defendants to rebuild the bridges which they had removed, and that by the wrongful refusal of the defendants to do so the road could not be used, sufficiently negatives the averment of non-user. It shows that there had not been an abandonment of the highway, and consequently not such non-user as the statute contemplates. *State ex rel. v. Pennsylvania R. Co.*, 45 N. J. L. 82.

A petition by a railroad company for a mandamus against the state treasurer (if maintainable, to compel him to discharge warrants issued to it by the board of school commissioners for a loan out of the school fund should show that the company was one of those entitled by law to apply for the loan. *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317.

Where a motion for a peremptory mandamus, filed in October, 1891, asks that respondent railway company be compelled to restore certain trains, charged to have been wrongfully abandoned and discontinued by it in violation of a final judgment rendered in October, 1883, awarding a peremptory writ of mandamus commanding said respondent to run such trains, alleges that respondent, prior to June, 1890, had fully executed all of the specific requirements of that judgment, and seeks relief for alleged failure of respondent since the last-named date to discharge its duties as ascertained and fixed by such judgment, it will be regarded as an original application for a writ of mandamus, and not an adjunct to the

original one. *State ex rel v. Missouri Pac. R. Co.*, 114 Mo. 283, 21 S. W. Rep. 813.

27. Demand.—In a proceeding of mandamus to compel the performance of a public duty no formal demand upon the defendants is necessary where their course and conduct manifest a settled purpose not to perform the duty, and where it clearly appears that a formal demand would be useless and unavailing. *Chicago, K. & W. R. Co. v. Chase County Com'rs*, 49 Kan. 399, 30 Pac. Rep. 456.

An averment that the defendants have refused to make any provision for the payment of the interest claimed is sufficient, without showing that a demand was made upon them to do so. *Com. ex rel. v. Select & C. Councils of Pittsburgh*, 34 Pa. St. 496.

28. Who may be relator.—A petition for mandamus to compel a railroad company to perform a definite duty to the public which it has distinctly manifested an intention not to perform is rightly presented in the name of the state at the relation of its prosecuting attorney and without previous demand. *Northern Pac. R. Co. v. Washington Ter. ex rel.*, 48 Am. & Eng. R. Cas. 475, 142 U. S. 492, 12 Sup. Ct. Rep. 283. *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.—APPROVED IN *Illinois C. R. Co. v. People*, 143 Ill. 434. QUOTED IN *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269. REVIEWED IN *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345.

Where an action of mandamus was brought in the name of the state of Kansas on the relation of the railroad company, and the state had no interest in the result of the action, and the railroad company was the real party in interest, and the defendants moved that the action should be dismissed because it was not brought in the name of the real party in interest—*held*, that the motion should be sustained. *State ex rel. v. Jefferson County Com'rs*, 11 Kan. 66.

Private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law may institute proceedings under the act of March 3, 1873 (17 U. S. St. at L. 509), without the sanction of the attorney-general. *Hall v. Union Pac. R. Co.*, 3 Dill. (U. S.) 515; *affirmed in* 91 U. S. 343.—REVIEWING *Rex v. Severn & W. R. Co.*, 2 B. & Ald 646.

—*Union Pac. R. Co. v. Hall*, 91 U. S. 343.—FOLLOWING *People v. Collins*, 19 Wend. (N. Y.) 56; *Pike County Com'rs v. State*, 11 Ill. 202; *Ottawa v. People*, 48 Ill. 233; *Hamilton v. State*, 3 Ind. 452; *People v. Halsey*, 37 N. Y. 344; *State v. Marshall County Judge*, 7 Iowa 186; *State v. Rahway*, 33 N. J. L. 110; *Watts v. Carroll Police Jury*, 11 La. Ann. 141.

When mandamus is resorted to for the purpose of enforcing a private right, the person interested in having the right enforced must be the relator. In such case the relator is considered the real party, and his right to the relief must clearly appear. But where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed and the duty in question enforced. *Florida C. & P. R. Co. v. State ex rel.*, 56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.

It is sufficient for the relators in such proceeding to show that they are citizens, and thus interested in the performance of a public duty. *State ex rel. v. Hannibal & St. J. R. Co.*, 29 Am. & Eng. R. Cas. 604, 86 Mo. 13.

An allegation that plaintiffs are qualified voters and freeholders of a township discloses no such peculiar and specific interest as will sustain a mandamus to compel the county board to order in such township an election on the question of issuing bonds. *Turner v. Jefferson County Com'rs*, 10 Kan. 16.

Under the New Hampshire statute (Gen. Laws, ch. 158, §§ 11, 12) which prohibits the operation of a railroad by a rival and competing road, and provides that any citizen may apply for an injunction to prevent it, a citizen, as such, cannot maintain a petition for a writ of mandamus to compel a railroad corporation, one of two rival and competing roads, to operate its own road. *State ex rel. v. Manchester & L. R. Co.*, 62 N. H. 29.

29. Parties defendant.—When on application for writ of mandamus to compel a corporation to place a public road crossed by its railway in a satisfactory condition the rule *nisi* is served on persons

who deny that they are the agents of the corporation, but are in the employ of another corporation having control of its railroad, and there is no evidence to show that the persons served are the agents of the corporation proceeded against, the application should be denied. *Mobile & G. R. Co. v. Pike County Com'rs Court*, 97 Ala. 105, 11 So. Rep. 732.

When it appears that the railway neglecting the duty imposed by statute has been leased for a long term of years to another corporation, which in turn had leased all its lines of railway to another corporation, the owner of the road as well as the corporation in possession of the road should be made parties to the proceeding. *Mobile & G. R. Co. v. Pike County Com'rs Court*, 97 Ala. 105, 11 So. Rep. 732.

A decree commanding a railway company named, and its successors, assigns, grantees, and lessees, to maintain and operate a specific portion of its line of road is binding upon, and is enforceable by mandamus against, a railway company which was not a party to the action in which said decree was rendered, but was organized subsequent thereto, and acquired its interest in said railway property from a purchaser thereof at a receiver's sale upon the foreclosure of a mortgage. *State v. Iowa C. R. Co.*, 83 Iowa 720, 50 N. W. Rep. 280.

The directors of a railroad corporation created by the laws of New York are not public officers, or a public body or board, within the meaning of N. Y. Rev. St. § 587, § 60, but they are officers of a corporation, which may be compelled by mandamus to perform specific acts enjoined by law for the benefit of the public. *People ex rel. v. Rochester & S. L. R. Co.*, 76 N. Y. 294; *modifying* 14 Hun 371.

A petition for a mandamus to compel a railroad company to operate its road made the lessee of such road a party defendant. Both the petitioner and the defendant admitted that the lease was illegal, and of no force and effect. *Held*, that the lease imposed no obligation on the lessee to operate the road. *People ex rel. v. Colorado C. R. Co.*, 45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638.

30. Form and contents of the writ.

—The granting of a writ of mandamus rests largely in the sound discretion of the court, and where it is asked to enforce the performance of a duty to the public the interest of all the people concerned will be regarded,

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and the writ will be so framed as will best preserve and enforce the rights of all parties. *Potwin Place v. Topeka R. Co.*, 56 Am. & Eng. R. Cas. 549, 51 Kan. 609, 33 Pac. Rep. 309.

The mandatory part of an alternative writ of mandamus must conform to the case made by the recitals in such writ, and must not require more to be done than is justified by such recitals. *Florida C. & P. R. Co. v. State ex rel.*, 56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103.

The range of action required of the respondent by an alternative writ of mandamus should be clearly, particularly, and explicitly set forth in the mandatory part of such writ. The duty commanded should not be left to indiscriminate outside ascertainment *dehors* the writ. *Florida C. & P. R. Co. v. State ex rel.*, 56 Am. & Eng. R. Cas. 306, 31 Fla. 482, 13 So. Rep. 103.

A peremptory writ of mandamus must conform strictly to the alternative writ, being necessarily limited to its terms. So a company cannot be compelled to run all of its trains to a certain station, which is not on the main line, when it is not demanded in the alternative writ. *State ex rel. v. Kansas City, St. J. & C. B. R. Co.*, 16 Am. & Eng. R. Cas. 297, 77 Mo. 143.—**OVERRULING** *Osage Valley & S. K. R. Co. v. Morgan County Court*, 53 Mo. 157.

A provision in a mandamus requiring a company "to put the road in a good, safe, and suitable condition" is so general, and involves so much discretion on the part of the company in respect to the details of the work, as to lead to difficulties in the enforcement of the order, and to make the remedy at least of doubtful propriety. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167.—**QUOTED IN** *People ex rel. v. Chicago & A. R. Co.*, 40 Am. & Eng. R. Cas. 352, 130 Ill. 175, 22 N. E. Rep. 857.

The writ should simply require the corporation to resume the duties of carrier of the goods and property offered for transportation, and upon its return all questions, whether what had been done was a sufficient compliance with its command would become a subject of further consideration. *People v. New York C. & H. R. R. Co.*, 9 Am. & Eng. R. Cas. 1, 28 Hun (N. Y.) 543, 3 Civ. Pro. 11, 2 McCar. 345; *reversing* 2 Civ. Pro. 82.

A mandamus requiring a municipal corporation to provide for the payment of the interest on its bonds need not set forth when the principal will become due, nor when nor where the interest is to be paid. Nor is it necessary that the relator's title to the bonds should be set forth; the averment of his ownership is sufficient to show his right to ask the interference of the court by mandamus. *Com. ex rel. v. Select & C. Councils of Pittsburgh*, 34 Pa. St. 496.

An alternative writ of mandamus to compel the operation of a railroad alleged that the defendant, being a corporation of the state in which the suit was brought, on a certain date ran and operated a certain line of road. The writ did not show when or for what purposes the company was chartered, or what railroad, if any, it built, or was authorized to build. *Held*, that the alternative writ was not sufficient to show that the defendant was under any legal obligation to operate said railroad, and that a peremptory writ could not be awarded upon it. *People ex rel. v. Colorado C. R. Co.*, 45 Am. & Eng. R. Cas. 599, 42 Fed. Rep. 638.

31. Direction of the writ.—In a proceeding by mandamus against a railroad company, it is proper to direct the writ to the company in its corporate name. *State ex rel. v. Chicago, M. & N. R. Co.*, 49 Am. & Eng. R. Cas. 304, 79 Wis. 259, 48 N. W. Rep. 243.

Without naming the officers. *In re Goodwin*, 13 U. C. C. P. 254.

Where a company has been incorporated as a "railway," and a mandamus is directed to it as a "railway company," upon the return the court will amend the writ by striking out the superfluous word. *Reg. v. Derbyshire, S. & W. J. R. Co.*, 2 C. L. R. 1653, 18 Jur. 1054, 23 L. J. Q. B. 333.

A mandamus to compel the assessment and collection of a tax for the payment of the interest on bonds issued by the city of Pittsburgh, is properly directed to the individuals composing the select and common councils of the city. *Com. ex rel. v. Select & C. Councils of Pittsburgh*, 34 Pa. St. 496.

A peremptory mandamus, in substance, required the R. & S. L. R. Co. to build, on or prior to January 1, 1877, a fence on each side of its road, or such portions thereof where fences were not already built "as may then, or thereafter, be used or operated as a railroad." *Held*, that the direction, so far as it related to the portion of the line

which should be in operation January 1, 1877, was sufficiently definite and was capable of being obeyed; and that, therefore, the writ could not be held nugatory. *People ex rel. v. Rochester & S. L. R. Co.*, 76 N. Y. 294; modifying 14 Hun 371.

32. Service of the writ.—In Kansas a mandamus to compel a county to levy a tax to pay a judgment against it on bonds issued for railroad stock is properly directed to the board of county commissioners in its corporate capacity, and service on the clerk of the board is service on the board. In such case change in the membership of the board is immaterial. *Leavenworth County Com'rs v. Sellow*, 99 U. S. 624.—DISTINGUISHING *United States v. Boutwell*, 17 Wall. 604.

To make a writ efficacious it must be served on the officers of the corporation who have the power and whose duty it is to execute it, and against whom an attachment to enforce obedience may issue. So where an alternative writ directs a company to construct certain bridges over its road, or show cause why it has not done so, it is not sufficient to serve the writ upon the superintendent of a division of the road. *State ex rel. v. Pennsylvania R. Co.*, 41 N. J. L. 250.

The eighty-seventh and eighty-eighth sections of the act concerning corporations (N. J. Rev. p. 193), which provides for service of process on corporations by service on any officer or agent, etc., do not apply to prerogative writs, which are enforceable only by attachments for contempt; they relate only to personal actions, where the fruits of the litigation are secured by a common law judgment. *State ex rel. v. Pennsylvania R. Co.*, 41 N. J. L. 250.

The court will not set aside the service of a writ of alternative mandamus because of the failure to leave the original with the person to whom it is directed, if a correct copy is delivered. A return may be made to a copy as well as to the original, and, if necessary, the court will permit the original to be taken from the files for the purpose of a return to it. *State ex rel. v. Pennsylvania R. Co.*, 41 N. J. L. 250.

Under Pa. Act of March 15, 1847 (P. L. 361, § 2), the acts of May 25, 1881 (P. L. 32), and June 24, 1885 (P. L. 150), not conflicting, where the principal office of the company is without the state, the writ of alternative mandamus may issue from the county

where its works are situate, and be served upon a director residing in an adjoining county. *Com. ex rel. v. New York, P. & O. R. Co.*, 138 Pa. St. 58, 20 Atl. Rep. 951.

Mandamus can issue in the case of a private corporation, and the writ can be directed to and be served upon the officers individually. *Com. ex rel. v. Keim*, 15 Phila. (Pa.) 1.—DISTINGUISHING *Com. v. Coxe*, 1 Leg. Chron. 89. FOLLOWING *Com. ex rel. v. Baldwin*, 14 Phila. 93.

On the 4th of September, 1890, C. obtained in a proceeding by mandamus an order for a peremptory writ commanding a railway company forthwith to receive and recognize him as a director of the said railway company for the year for which directors were elected at the last general meeting of stockholders of said company, held to elect directors for said company for the year 1890, in the place of T., who was an acting director for that year under a claim of right, T. being named as a party in the alternative writ, but not served with process or in any way brought before the court. *Held*: (1) the writ of mandamus from its nature and subject-matter must not leave its range of action to indeterminate outside ascertainment, but must indicate with reasonable certainty the precise thing to be done; (2) the acting director must have an opportunity to be heard before his right is passed upon and determined. *Cross v. West Virginia C. & P. R. Co.*, 34 W. Va. 742, 12 S. E. Rep. 765.

In an action by a purchaser of stock at sheriff's sale claiming a mandamus to the company to enter the plaintiff in their register as a shareholder in respect of such stock—*held*, that the provisions of Consol. St. C. c. 70, as well as the C. L. P. A. §§ 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin v. Ottawa & P. R. Co.*, 22 U. C. Q. B. 186.

33. Return.—A party making return to an alternative mandamus must show that he has complied with the order of the writ to the extent of his ability. *Silverthorne v. Warren R. Co.*, 33 N. J. L. 173.

Where application is made to compel a county to complete subscriptions to the stock of a railroad company, it is competent for the defendants to deny the incorporation of the company, or that it has complied with the requirements of the law re-

garding its organization, or that it is doing business as a railroad corporation. *Oroville & V. R. Co. v. Plumas County*, 37 Cal. 354.

Where an alternative writ issues to compel a company to relocate a portion of its track which it has torn up, a return that the company is proceeding as rapidly as possible to change its worn-out narrow gauge to a broad gauge is sufficient, on demurrer, to prevent a peremptory writ to compel the restoration of the narrow gauge. *State ex rel. v. Missouri Pac. R. Co.*, 80 Mo. 117.

Where an alternative writ issues to compel a company to restore a highway crossing to its former condition, as required by statute, a return thereto is sufficient which traverses the allegations of the writ in the same form of words in which they are made. *Buffalo, N. Y. & P. R. Co. v. Com.*, 120 Pa. St. 537, 12 Cent. Rep. 707, 14 Atl. Rep. 443, 21 W. N. C. 513.

Where a judgment has been obtained against a municipal corporation on coupons from bonds in aid of a railroad, and a mandamus issues commanding it to levy a tax sufficient to pay the judgment, and to collect the tax and pay the judgment, a return that it did levy a tax to pay the judgment and other claims is bad on demurrer. Such return should show the amount of the levy, and all the facts attending it, show that it was a specific levy; and if not collected and paid over, some excuse should be shown for not doing so. *Bentow v. Mayor, etc., of Iowa City*, 7 Wall. (U. S.) 313.—FOLLOWED IN *Leavenworth County Com'rs. v. Miller*, 7 Kan. 479.

In a mandamus proceeding to compel a railway company so to construct its road as not to prevent the public from using a specified part of a highway, it is no defense that the track had formerly been placed in the highway by another railway company. Such fact is no justification of the continuance of the obstruction of the highway by defendant, to the entire exclusion of the public. *State ex rel. v. Hannibal & St. J. R. Co.*, 29 Am. & Eng. R. Cas. 604, 86 Mo. 13.

An averment in the return that the liability of the city upon the bonds is disputed is not sufficient to prevent the issuing of a peremptory mandamus; the defendants must obey the writ, or show facts from which the court may determine that the debt is not due; or, at least, that it is doubtful whether it be due. *Com. ex rel. v. Select & C. Councils of Pittsburgh*, 34 Pa. St. 496.

34. Trial—Traverse—Demurrer.

Where a proceeding is instituted against a company to compel it to bridge its tracks over certain city streets and to construct approaches at one end, and the tracks of another company cross the same street so near as to suggest the necessity, if either system of tracks should be bridged, that the bridges be made continuous over the tracks of both companies, and a like proceeding is pending against the latter company, it is proper to require both proceedings to be heard together. *State ex rel. v. Minneapolis & St. L. R. Co.*, 35 *Am. & Eng. R. Cas.* 250, 39 *Minn.* 219, 39 *N. W. Rep.* 153.

To an allegation by the defendants, in a proceeding to compel a railroad to replace certain highway bridges, that a public road had been unused for a period of five years, and that by virtue of section 1 of the N. J. Act of March 4, 1880, it had been vacated by the written consent of the landowners, it is not a sufficient traverse to reply that the road had always been open to travel, and is now used, as far as it can be, with the bridges removed. This allegation does not negative the defense that the road had been unused for the statutory period. *State ex rel. v. Pennsylvania R. Co.*, 45 *N. J. L.* 82.

Where a proceeding is instituted to compel a company to replace certain highway bridges, and the company alleges that it is a foreign corporation, and owes no duty to the state or the relators, a reply thereto that it is defendant's duty to erect the bridges is not sufficient. The reply should state the facts out of which the alleged duty arises. *State ex rel. v. Pennsylvania R. Co.*, 45 *N. J. L.* 82.

Where a company has the right to use a street under an ordinance, and a petition for a mandamus to compel the company to build a sewer as required by ordinance contains an allegation that it is necessary, a denial of this allegation by the answer raises a question of fact, and a demurrer to the answer should be overruled. *Ohio & M. R. Co. v. People ex rel.*, 32 *Ill. App.* 69.

To an application for a mandamus to compel a railway company to register bonds, it was objected that it did not appear that the company had made default in payment of the interest, the coupons not being shown to have been presented at the place named for payment. *Held*, that the fact of the company never having been ready to pay

them there or elsewhere was a sufficient answer to their objection. *In re Thomson*, 9 *Ont. Pr.* 119.

35. Dismissal.—In a proceeding for mandamus to compel the defendant, under Cal. Act of April 3, 1876 (St. 1875-76, p. 783), to furnish to the commissioners of transportation created by that act certain information, the default of the defendant was entered and a peremptory writ issued. *Held*, that the writ of mandamus cannot be granted by default, and that, the act having been repealed, the proceeding should be dismissed. *People ex rel. v. Central Pac. R. Co.*, 62 *Cal.* 506.—FOLLOWED IN *People ex rel. v. Central Pac. R. Co.*, 62 *Cal.* 507.

This was an application for a mandamus to require the respondent to join its track with that of another company, as required by statute. After the hearing the tracks were connected. Thereupon, and for this reason, the proceedings were dismissed. *State ex rel. v. Port Royal & W. C. R. Co.*, 31 *So. Cal.* 609, 10 *S. E. Rep.* 1104.

36. Appeal.—Where an alternative writ issues directing a company to construct certain fences and cattle-guards, and the company appears and asks for an extension of the time in which to comply with the writ, which is granted, it will be inferred therefrom that the only opposition made by the company was to ask for further time, and it cannot, therefore, appeal from an order directing a peremptory writ. *People v. Rochester & S. L. R. Co.*, 15 *Hun (N. Y.)* 188; see 14 *Hun* 371.

Where a mandamus had been erroneously issued requiring a railway company to make a road, and the return merely traversed a part, and the issue then raised was found against the company and a peremptory mandamus awarded, the court on a writ of error reversed the whole judgment. *Reg. v. Southeastern R. Co.*, 4 *H. L. Cas.* 471, 17 *Jur.* 901.

37. Punishment for disobedience.*—Attachment against the president of a company for disobedience of the writ was refused, because it appeared that he could not by himself, and without a majority of the board of directors, perform the act required by the writ, and the other directors had not been served. *Demorest v. Midland R. Co.*, 10 *Ont. Pr.* 82.

* See also CONTEMPT.

MANITOBA.

Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 98.

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Validity of releases by, see RELEASE, 7.

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See HUSBAND AND WIFE.

MARYLAND.

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Assessment and levy of taxes in, see TAXATION, 264.

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Right to sue in, for causing death in foreign state, see DEATH BY WRONGFUL ACT, 118.

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Statute of, regulating liability for injuries caused by fire, see FIRES, 8.

MASSACHUSETTS.

Assessment and levy of taxes in, see TAXATION, 265.

Conditions exempting carrier from liability to person riding on free pass in, see PASSES, 24.

Constitutionality of statutes of, relative to condemnation of land, see EMINENT DOMAIN, 33.

— tax laws of, see TAXATION, 32.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 739.

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MEDICAL SERVICES.

1. Company's duty to employ physician. — Where a railroad company assumes to furnish a physician or surgeon for an injured passenger it must furnish a competent one, and is not liable beyond that. The physician himself is liable for any damage caused by his negligence, and not the company. *Secord v. St. Paul, M. & M. R. Co.*, 5 *McCrory* (U. S.) 515, 18 *Fed. Rep.* 221. *Laubheim v. Netherland Steamship Co.*, 11 *N. Y. S. R.* 469.

Whether it is within the corporate powers of a railroad company, under any circumstances, to oblige itself to the rendition of medical or surgical aid to its sick or injured employes by assuming it as a duty or otherwise, or to become liable for any negligence of any such surgeon acting in the line of his profession: *quere?* If it can become so liable—*held*, that its whole duty in that respect will have been performed when it employs a person of ordinary competence and skill in that profession; and that, having done so, it cannot be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such. *South Fla. R. Co. v. Price*, 32 *Fla.* 46, 13 *So. Rep.* 638.

2. Contract of employment, generally. — When an employe has been disabled while in the employ of a railroad company, and in the discharge of his hazardous duties, this is a sufficient consideration to support a promise to pay for the nursing and medical attendance necessary to his cure. *Toledo, W. & W. R. Co. v. Rodriguez*, 47 *Ill.* 188.

The conductor of a train testified that he

employed a physician to dress the wounds of an injured person. The physician testified that the conductor informed him that he would leave the injured man in his care for treatment, and he was corroborated by two other witnesses. *Held*, that the evidence was sufficient to sustain a finding that the employment of the physician, which was subsequently ratified by the company, covered all services necessary and proper which the physician rendered until the patient had become convalescent, and that the physician was not confined to a claim for dressing the injured person's wounds. *Terre Haute & I. R. Co. v. Stockwell*, 37 *Am. & Eng. R. Cas.* 278, 118 *Ind.* 98, 20 *N. E. Rep.* 650.

A physician attended for several days, as his patient, a man who had been injured by a railroad accident, and while this attendance was going on, the company, by its agent, requested him to continue his attendance, and promised that the company would pay him for his services. *Held*, that this did not amount to an original undertaking or promise on the part of the company to pay for future services, unless the jury should believe they were rendered upon the credit of the company, and not upon that of the patient. *Northern C. R. Co. v. Prentiss*, 11 *Md.* 119.

Plaintiff was employed by a railroad company to render such service as might be necessary as consulting oculist and aurist. The contract of employment was partly printed and partly written. In the printed portion plaintiff agreed "to perform all necessary surgical and medical services, * * * if required to do so, and to furnish the necessary medicines and surgical appliances." The words "and to furnish the necessary medicines and surgical appliances" were stricken out. *Held*, that the employment was only as consulting oculist and aurist, and not as operating physician or surgeon. *Union Pac. R. Co. v. Graddy*, 25 *Neb.* 849, 41 *N. W. Rep.* 809.

3. Who has authority to employ, generally.*—It is the duty of railroad companies to have some officer or agent at all times competent to exercise a discretionary authority in such cases, and on grounds of public policy they should not

be suffered to do otherwise. But it is a fact, to which the court will not close its eyes, that in emergencies every person connected with the road can open communication with the superintendent and officers in less time than it has taken us to write this sentence. Having officers charged with the duty of seeing to it that the necessary attention is rendered to the injured in case of accident, the court will not infer that any and every employé has authority to bind the company by employing physicians and surgeons whenever they please or think it proper to do so. *Houston & T. C. R. Co. v. Watkins*, 1 *Tex. App. (Civ. Cas.)* 147.

Evidence that an agent of a street railway company was authorized by it generally to see that injured persons were taken where medical aid could be given, construed as justifying the conclusion that the agent was authorized to employ medical aid in such cases. *Hanscom v. Minneapolis St. R. Co.*, 54 *Am. & Eng. R. Cas.* 226, 53 *Minn.* 119, 54 *N. W. Rep.* 944.

The authority of railway employés to contract on behalf of the company for medical attendance to injured passengers may be inferred from the conduct of directors on former occasions in recognizing similar contracts, or from evidence that such powers are usually exercised by similar agents. *Cox v. Midland Counties R. Co.*, 3 *Ex.* 268, 13 *Jur.* 65, 18 *L. J. Ex.* 65.—CONSIDERED IN *Walker v. Great Western R. Co.*, L. R. 2 *Ex.* 228, 36 *L. J. Ex.* 123, 15 *W. R.* 769.

Engine drivers, station guards, and traffic superintendents do not have implied authority to make contracts on behalf of the railway company for medical attendance to injured passengers. *Cox v. Midland Counties R. Co.*, 3 *Ex.* 268, 13 *Jur.* 65, 18 *L. J. Ex.* 65.—CONSIDERED IN *Walker v. Great Western R. Co.*, L. R. 2 *Ex.* 228, 36 *L. J. Ex.* 123, 15 *W. R.* 769.

4. — company's attorney.—Whatever may be their authority in emergencies in the absence of any superior officer, neither a conductor, station agent, nor solicitor of a railway company is authorized in ordinary cases to bind the company for surgical attendance on a passenger or an employé injured in operating its trains. *St. Louis, A. & T. R. Co. v. Hoover*, 53 *Ark.* 377, 13 *S. W. Rep.* 1092.

5. — company's physician.—A physician who is only occasionally em-

* Authority of railroad officers and employés to bind company by contract for medical services, see notes, 44 *AM. & ENG. R. CAS.* 461; 11 *Id.* 30.

ployed by a railroad company to attend to persons injured on its road, but who is not its regularly employed physician, has no power to bind the company in the employ of another physician to assist in a case in which he, the former, is especially employed by such company. *Evansville & I. R. Co. v. Spellbring*, 1 *Ind. App.* 167, 27 *N. E. Rep.* 239.

A railroad conductor, in a pressing emergency, may employ a surgeon to attend a brakeman who is injured while on duty, and, in a proper case, bind the company for the professional services so rendered; but he cannot authorize the surgeon to employ, at the expense of the company, such assistants as he may deem necessary. *Terre Haute & I. R. Co. v. Brown*, 107 *Ind.* 336, 8 *N. E. Rep.* 218.

6. — conductor.—As a general rule, a railroad company is not under any legal obligation to provide surgical attendance for an employé who is injured while in the discharge of his duties, though it may do so, and its general manager or superintendent has implied power to bind it by a contract for such attendance; but the conductor of a train has no such power under ordinary circumstances, and the company is not bound by his employment of a physician and surgeon to attend an injured brakeman, unless it is shown that his action has been ratified by the proper authorities, or that exceptional circumstances justified it, and prevented communication with higher officials. *Sevier v. Birmingham, S. & T. R. R. Co.*, 48 *Am. & Eng. R. Cas.* 503, 92 *Ala.* 258, 9 *So. Rep.* 405.—**DISTINGUISHING** *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358, 49 *Am. Rep.* 752. **QUOTING** *St. Louis, A. & T. R. Co. v. Hoover*, 53 *Ark.* 377, 13 *S. W. Rep.* 1092.—**PENINSULAR R. CO. V. GARY**, 22 *Fla.* 356.—**DISAPPROVING** *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358.—*St. Louis & K. C. R. Co. v. Olive*, 40 *Ill. App.* 82.

But an emergency may arise vesting such authority in the conductor. *Terre Haute & I. R. Co. v. McMurray*, 22 *Am. & Eng. R. Cas.* 371, 98 *Ind.* 358, 49 *Am. Rep.* 752.

A conductor has authority, when one of the brakemen on his train is injured, to employ a competent surgeon to attend the injured man, and the railroad company will be bound thereby. He has no authority, however, to employ additional surgeons;

and if he does so, the railroad company cannot be made to pay for their services. *Louisville, N. A. & C. R. Co. v. Smith*, 121 *Ind.* 353, 22 *N. E. Rep.* 775, 6 *L. R. A.* 320.

Where a brakeman is injured at a distance from the general offices of the company, and needs immediate medical attention, in the absence of any superior officer or agent of the company, the conductor may bind the company by employing a physician. (*Zollars, C. J., dissenting.*) *Terre Haute & I. R. Co. v. McMurray*, 22 *Am. & Eng. R. Cas.* 371, 98 *Ind.* 358, 49 *Am. Rep.* 752.—**DISTINGUISHING** *Tucker v. St. Louis, K. C. & N. R. Co.*, 54 *Mo.* 177; *Brown v. Missouri, K. & T. R. Co.*, 67 *Mo.* 122; *Mayberry v. Chicago, R. I. & P. R. Co.*, 75 *Mo.* 492. **QUOTING** *Marquette & O. R. Co. v. Taft*, 28 *Mich.* 289; *Atlantic & P. R. Co. v. Reisner*, 18 *Kan.* 458. **REVIEWING** *Northern C. R. Co. v. State*, 29 *Md.* 420; *Walker v. Great Western R. Co.*, *L. R.* 2 *Ex.* 228; *Swazey v. Union Mfg. Co.*, 42 *Conn.* 556; *Atchison & N. R. Co. v. Reecher*, 24 *Kan.* 228.—**DISAPPROVED IN** *Peninsular R. Co. v. Gary*, 22 *Fla.* 356. **DISTINGUISHED IN** *Sevier v. Birmingham, S. & T. R. R. Co.*, 92 *Ala.* 258. **FOLLOWED IN** *Evansville & R. R. Co. v. Freeland*, 4 *Ind. App.* 207.

Where there was an accident on the defendant company's road, and an imperious necessity for the preservation of life, and to prevent great bodily suffering the conductor of the train which ran off the track—the highest agent of the company on the ground—employed a physician with the concurrence of the local surgeon of the company to attend to one of the injured persons, an employé of the company, and it was agreed by the said physician and the local surgeon that an amputation was necessary, which operation was performed by said physician, the local surgeon being unable by reason of the extraordinary service devolved upon him by the injury of so many persons to give the immediate aid and attention to said employé required by the emergency and necessity growing out of the accident, the railroad company was bound by the employment of said physician, and liable for the payment of his professional services in performing said operation. The company would not be liable, however, for any services rendered by said physician after the emergency had ceased. *Evansville & R. R. Co. v. Freeland*, 4 *Ind.*

App. 207, 30 *N. E. Rep.* 803.—**FOLLOWING** *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358.

7. — engineer.—Where the action is to recover for medical services rendered an employé, evidence that the engineer of the train telegraphed ahead to a station agent to have a doctor at the station for an injured man is not sufficient to show employment by the company, in the absence of evidence that the engineer was authorized to make the employment. *Cooper v. New York C. & H. R. R. Co.*, 6 *Hun (N. Y.)* 276.

8. — general manager.—A general manager has authority to contract on behalf of the company for medical attendance upon a person injured by an accident on the line. *Walker v. Great Western R. Co.*, 15 *W. R.* 769, 16 *L. T.* 327, *L. R.* 2 *Ex.* 228, 36 *L. J. Ex.* 123.

Where the general manager of a railroad employs a physician to attend an employé who is injured, and the company denies his authority to employ the physician, the question of his authority must be determined from the by-laws, the vote appointing him, the acquiescence of the company in former acts like this, and the prevailing custom of the authority of such managers; and the question as to whether the manager had reasonable grounds for believing that the employé had been injured through negligence, making the company liable in damages, and that the amount was small, had nothing to do in determining the extent of his authority. *Swasey v. Union Mfg. Co.*, 42 *Conn.* 556.—**REVIEWED** in *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358.

9. — president.—A physician cannot enforce a promise made by the president of a railroad company to an injured person that the company would pay his doctor's bill, when such promise was not made in the presence of the physician, but conveyed to him afterwards by the party to whom it was made. *Canney v. South Pac. Coast R. Co.*, 12 *Am. & Eng. R. Cas.* 310, 63 *Cal.* 501.

10. — road master.—Where the evidence showed that the road master who employed the physician to attend an employé, injured by the road, was an official whose duties were limited to a superintendence of the roadbed, track, etc., and to see that the road was kept in safe repair and condition; and where it was further shown that the superintendents and general officers of

the road were alone authorized to employ physicians in such cases—**held**, that the road master acted beyond the scope of his authority and agency, and therefore could not bind the road. *Houston & T. C. R. Co. v. Watkins*, 1 *Tex. App. (Civ. Cas.)* 147.

11. — station agent.—Station agents and conductors are not authorized merely by virtue of their positions to employ a physician to attend an injured brakeman so as to charge the company. *Tucker v. St. Louis K. C. & N. R. Co.*, 54 *Mo.* 177, 12 *Am. Ry. Rep.* 364.—**DISTINGUISHED** in *Terre Haute & I. R. Co. v. McMurray*, 98 *Ind.* 358. **REVIEWED** in *Louisville, E. & St. L. R. Co. v. McVay*, 98 *Ind.* 391.—*Cox v. Midland Counties R. Co.*, 3 *Ex.* 268, 13 *Jur.* 65, 18 *L. J. Ex.* 65.—**CONSIDERED** in *Walker v. Great Western R. Co.*, *L. R.* 2 *Ex.* 228, 36 *L. J. Ex.* 123, 15 *W. R.* 769.

12. — superintendent.—The general superintendent of a railroad may, in the exercise of his general powers as such, bind the company by a promise to pay the cost of medical attendance rendered an injured employé. *Toledo, W. & W. R. Co. v. Rodriguez*, 47 *Ill.* 188.—**FOLLOWED** in *Toledo, W. & W. R. Co. v. Prince*, 50 *Ill.* 26.—*Texas & St. L. R. Co. v. Myers*, 1 *Tex. App. (Civ. Cas.)* 168.

A surgeon employed by that officer is not bound to institute an inquiry for the purpose of determining whether the injured man was hurt under such circumstances as rendered the company liable. *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 44 *Am. & Eng. R. Cas.* 459, 126 *Ind.* 99, 25 *N. E. Rep.* 878.—**FOLLOWING** *New Albany & S. R. Co. v. Haskell*, 11 *Ind.* 301.

And in an action by a surgeon so employed evidence is not admissible on behalf of the company to prove that it had in its employment a chief physician and surgeon, whose duty it was to employ surgeons to give attention to persons injured. *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 44 *Am. & Eng. R. Cas.* 459, 126 *Ind.* 99, 25 *N. E. Rep.* 878.

It will be presumed in the absence of anything to the contrary that the general superintendent of a railroad company has authority to employ a physician and surgeon to attend an employé; and that the division superintendent has the sole power within his division as the general superintendent has; and that where an officer or agent of a railroad company has the power in the first

instance to employ a physician and surgeon and make the company responsible for his services, such officer or agent would also have the power to ratify a previous unauthorized employment of such physician and surgeon, and thereby make the company responsible for his services. *Pacific R. Co. v. Thomas*, 19 Kan. 256, 17 Am. Ry. Rep. 483. —DISTINGUISHED IN *Union Pac. R. Co. v. Beatty*, 26 Am. & Eng. R. Cas. 84, 35 Kan. 265. REVIEWED IN Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391.

The assistant superintendent of a railroad who has general authority over the road has authority to employ nurses for an injured employé. *Bigham v. Chicago, M. & St. P. R. Co.*, 79 Iowa 534, 44 N. W. Rep. 805.

There is no implied authority on the part of a division superintendent to bind the company by employing a physician to attend a passenger injured by an inevitable accident. *Union Pac. R. Co. v. Beatty*, 26 Am. & Eng. R. Cas. 84, 35 Kan. 265, 10 Pac. Rep. 845. —DISTINGUISHING *Pacific R. Co. v. Thomas*, 19 Kan. 256; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458. REVIEWING *Cox v. Midland Counties R. Co.*, 3 Ex. 268.

The supreme court of Michigan was equally divided as to whether the general superintendent of a railroad, in the absence of express authority, could bind the company by employing a surgeon to attend an injured employé. *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, 12 Am. Ry. Rep. 279. —QUOTED IN *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358. REVIEWED IN Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391.

It is fair to infer that a superintendent of a corporation who, acting within the scope of his general authority as shown by his previous acts, ratified by the corporation, directs a physician to attend a person injured by the company's machinery acts as the agent of the corporation, and not on his own behalf. *McCarthy v. Missouri R. Co.*, 15 Mo. App. 385.

Evidence that the superintendent of a railroad had control of everything connected with the running of the road and paid conductors and other employés, but that he had no connection with or direction over the treasury, and no power in the direction of the company's affairs, is not sufficient to show authority in him to bind the

company by employing a physician to attend a child which had been injured by a train. *Stephenson v. New York & H. R. Co.*, 2 Duer (N. Y.) 341. —DISTINGUISHING *Perkins v. Washington Ins. Co.*, 4 Cow. 645; *Lightbody v. North American Ins. Co.*, 23 Wend. 18.

13. — yard master.—A yard master whose business is to have charge of the yard, make up trains in the yard, and who has a right to employ men for all purposes they are required for in the yard and to do his part of the business, and to discharge them, to employ brakemen for himself and also for the road trains, and whose authority consists in employing men in his department, has no authority by virtue of his office alone to bind the company in the employment of a surgeon to attend one of the men under him in the service of the company who had been run over and injured by the cars. *Marquette & O. R. Co. v. Taft*, 28 Mich. 289, 12 Am. Ry. Rep. 279.

14. Ratification of unauthorized employment.—A railroad company is not bound to pay a physician's bill for attending an injured employé at the instance of another employé unless the services were subsequently ratified, or the employé had authority to employ the physician. *St. Louis M. B. T. R. Co. v. Wiggins*, 47 Ill. App. 474.

Where a surgeon has been employed by a station agent to attend an employé injured in the service of the company, although he may not have express authority to do so, yet slight acts of ratification by the company will authorize a jury in finding the employment was the act of the company. *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73. —REVIEWED IN Louisville, E. & St. L. R. Co. v. McVay, 98 Ind. 391.

Where a conductor, claiming to act as the agent of the railroad company, employs a physician to render professional aid to a stranger injured by collision with his train, telling the physician that he will leave the injured person in his care for treatment, and for him to send his bill to the superintendent of the road, and the company is notified of the employment, and permits the physician to go on and render services thereunder, it thereby ratifies the conductor's act, and is liable for services rendered until the patient is convalescent. *Terre*

Haute & I. R. Co. v. Stockwell, 37 *Am. & Eng. R. Cas.* 278, 118 *Ind.* 98, 20 *N. E. Rep.* 650.

15. Physician's right to recover compensation.*—The habit of a railroad company to pay for medical services rendered to injured employés does not establish a custom so as to bind the company, unless it is shown to have been so generally known as to raise the presumption that the services were rendered in reference to the custom. *Mobile & M. R. Co. v. Jay*, 61 *Ala.* 247.

In an action against a company to recover for services rendered as a physician, where it is alleged that such services were rendered at the special instance and request of the defendant, the plaintiff must show that the defendant employed him, or directed him to be employed, to perform the services for which he seeks to recover. *Evansville & I. R. Co. v. Spellöring*, 1 *Ind. App.* 167, 27 *N. E. Rep.* 239.

The surgeon called in to assist one previously called was bound to know that when the agent, who possessed limited special authority, had procured the services of a competent surgeon his authority was exhausted, and if, with this knowledge, he continued to give the injured man attention, he could not compel the agent's principal to compensate him for such services. *Louisville, N. A. & C. R. Co. v. Smith*, 121 *Ind.* 353, 22 *N. E. Rep.* 775, 6 *L. R. A.* 320.

Under an agreement that one shall be paid such sum for services "as is mentioned in the annexed fee bill," such bill specifying in some instances a minimum and maximum sum as a fee for services performed, "less fifty per cent. on the whole sum for such services as are rendered, and the actual cost at wholesale prices and cost of compounding medicines used, etc., subject to the approval of the superintendent of the road and surgeon of the division," such entire claim must be submitted for approval, and the right to recover the same depends upon such approval, it not appearing that the parties whose approval was necessary refused to act or acted fraudulently. *Union Pac. R. Co. v. Anderson*, 11 *Colo.* 293, 18 *Pac. Rep.* 24.

The plaintiff, a physician, was, at the in-

* Liability of railroad company for surgeon's attendance on injured employés, see note, 1 *AM. ST. REP.* 199.

stance and request of certain parties wounded by a railroad accident, attending them when the president of the company (though not in the presence of the physician) told the wounded persons to employ whatever physician they chose, and the company would pay the bills. This was conveyed to the plaintiff; but he testified that he attended the wounded until their recovery, in pursuance of the original calling. *Held*, in an action against the company upon contract for services performed, that there was no mutuality of contract by consent between them, and no liability attached to the railroad company for the services performed by the plaintiff to the persons who employed him. *Canney v. South Pac. Coast R. Co.*, 12 *Am. & Eng. R. Cas.* 310, 63 *Cal.* 501.

16. — from agent employing him.—A boy, by the negligence of some of the crew of a steamboat, had his leg broken. The captain took him to the office of a physician, and requested that surgical attention be given him. It was given. He has his cause of action against the captain of the boat for the value of his services. *Berry v. Pusey*, 80 *Ky.* 166.

A boy was injured in railroad yards, and an officer of the company told a physician to "go ahead and do what you can for the boy." Before the boy had received more than temporary attention his father appeared and took charge of him, but the physician continued, dressed his wounds, and made some twenty-five subsequent visits. *Held*, that the question whether the employment extended beyond the time when the boy's father appeared was for the jury. *Raoul v. Newman*, 59 *Ga.* 408.

In such case the charge was made against the officer individually, and after the company had refused to pay the bill suit was brought against him. *Held*, that it was a question for the jury, under all the circumstances, whether the plaintiff believed, or had a right to believe, that the defendant offered his own credit. *Raoul v. Newman*, 59 *Ga.* 408.

A tramp was run over by a locomotive in a railway yard. A surgeon being summoned to help him, telephoned the railway superintendent and asked if he should do so. The superintendent answered, "Yes." Nothing was said about pay, and in fact the superintendent had no authority to bind the railway company to pay for surgical aid.

Held, that there was no contract upon which he was personally liable for it. *Michigan College v. Charlesworth*, 54 Mich. 522, 20 N. W. Rep. 366.

17. Pleading in action for compensation.—A petition in an action to recover from a company for medical services rendered to injured employes of the company must state a promise of the company to pay, or facts from which the law will imply a promise. A mere averment that the services were rendered at the request of an agent of the company is not sufficient. *Wells v. Pacific R. Co.*, 35 Mo. 164.

18. — evidence.—In a suit by a surgeon against a railway company for treating an injured employe, it is proper to prove by parol the fact of the injury to the servant, and that the station agent notified the superintendent of that fact by telegram. *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73.

Where a company defends an action against it to recover for medical services rendered at the instance of the conductor on the ground that plaintiff is not authorized to practise his profession, slight evidence of plaintiff's right is sufficient. Thus evidence that plaintiff had practised for several years, had a certificate from the state board, and that his name appeared on the register of physicians in the county clerk's office is sufficient. *Chicago & A. R. Co. v. Smith*, 21 Ill. App. 202.

In an action by a physician and surgeon to recover for the value of his professional services upon persons wounded in a railroad collision and placed in a private hospital, evidence on behalf of the defendant of the usual and customary charge in this state for all necessary medical and other attendance upon patients in hospitals received for treatment for wounds is irrelevant. *Trenor v. Central Pac. R. Co.*, 50 Cal. 222.

In an action by a physician to recover the value of professional services rendered at the request of a conductor of the company, on the authority of the general superintendent, to a person injured by one of its trains, evidence that the company had in its employment a chief physician and surgeon, whose duty it was to employ surgeons to give attention to persons injured by its trains, is inadmissible. *Cincinnati, I., St. L. & C. R. Co. v. Davis*, 44 Am. & Eng. R. Cas. 459, 126 Ind. 99, 25 N. E. Rep. 878.

It is error to admit the declarations of another physician, made at the time of the alleged employment, to the effect that the company would pay the plaintiff, unless it is first shown that such physician had authority to bind the company. *Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. Rep. 239.

Where a physician sues to recover for medical services rendered to an injured person at the request of two agents of the company, and the authority of such agents is denied, evidence offered by plaintiff that the company had paid for other services previously rendered to other parties is properly rejected where there is nothing to show that the employment was by the same agents. *Cooper v. New York C. & H. R. R. Co.*, 6 Hun (N. Y.) 276.

Plaintiff was permitted to testify that the person who employed him to render the services had stated that he was the agent of the company and was authorized to make such employment. There was other evidence which tended strongly, if not conclusively, to establish such agency. *Held*, that while the declaration of the agent as to his agency was not in itself sufficient to establish the agency, it was competent evidence in connection with the other proofs. *Missouri Pac. R. Co. v. Rountree*, 2 Tex. App. (Civ. Cas.) 339.

Plaintiff was permitted to prove that an agent of the company wrote to him refusing to settle the claim because it was excessive. *Held*, that the evidence tended to prove that the claim had been presented and that no objection was made to it except that it was excessive, and therefore it was not irrelevant, but the letter itself was the best evidence of what was stated, and it was improper to prove its contents without proof showing why the letter itself was not introduced. *Missouri Pac. R. Co. v. Rountree*, 2 Tex. App. (Civ. Cas.) 339.

Plaintiff was permitted to testify that a certain stock and damage agent of the company had stated to him that the other person who had employed plaintiff to render the services was the agent of the company and was authorized to make the employment. *Held*, that this was not objectionable as hearsay evidence, it appearing that such stock and damage agent had authority to supervise cases like this and to adjust claims. His statements and admissions, within the scope of his authority, were, in

law, the statements and admissions of the company. *Missouri Pac. R. Co. v. Rountree*, 2 *Tex. App. (Civ. Cas.)* 339.

19. Medical services under Ala. Act 1886, relating to color blindness.*—The act approved February 28, 1887, requiring the examination of certain railroad employes for color blindness and other defects of vision (Sess. Acts 1886-87, p. 87), expressly provides that the fee of the medical examiner shall be paid by the railroad company; and he cannot refuse to make the necessary examination, or to issue his certificate to the applicant if found duly qualified, because the railroad company contests and denies its liability to pay the fee. *Baldwin v. Kouns*, 31 *Am. & Eng. R. Cas.* 347, 81 *Ala.* 272, 2 *So. Rep.* 638.

The applicant for examination and the medical examiner each claiming and asserting rights under the said statute, neither can be heard to assail its constitutionality. *Baldwin v. Kouns*, 31 *Am. & Eng. R. Cas.* 347, 81 *Ala.* 272, 2 *So. Rep.* 638.

MEETINGS.

Of arbitrators in Canadian expropriation proceedings, see EMINENT DOMAIN, 1258.

- commissioners to assess damages, time and place of, see EMINENT DOMAIN, 505.
- directors, see DIRECTORS, ETC., 18-26.
- — and stockholders to effect consolidation, see CONSOLIDATION, 10.
- stockholders, see STOCKHOLDERS, 9-13.

MEMORANDA.

For refreshing the memory as evidence, see EVIDENCE, 232.

In margin of bill of lading, effect of, see BILLS OF LADING, 46.

Left by decedent, as evidence, see EVIDENCE, 228.

Of agreement, as evidence, see EVIDENCE, 16.

— transactions, when deemed best evidence, see EVIDENCE, 157.

Using, to refresh memory, see WITNESSES, 81.

MEMPHIS.

Decisions particularly applicable to, see MUNICIPAL CORPORATIONS, 45.

* Constitutionality of Alabama Act requiring railroad employes to be examined at the expense of the company, see 38 *AM. & ENG. R. CAS.* 5, *abstr.* See also EMPLOYÉS, 3.

MEMPHIS & CHARLESTON R. CO.

1. Is three corporations in one.—

The Memphis & Charleston R. Co., incorporated by legislative acts in Alabama, Tennessee, and Mississippi, though under the same name, owned by the same stockholders, invested with like franchises, and operated under the same management, is composed of three separate legal entities; and the averment that it "is a unit as a corporation" is the mere statement of a legal conclusion, unsupported by the facts. *Kahl v. Memphis & C. R. Co.*, 95 *Ala.* 337, 10 *So. Rep.* 661.

MENTAL ANGUISH.

As an element of damages, see CARRIAGE OF PASSENGERS, 619; CHILDREN, INJURIES TO, 185; DEATH BY WRONGFUL ACT, 402; EMPLOYÉS, INJURIES TO, 757.

Averments as to, see DAMAGES, 81; DEATH BY WRONGFUL ACT, 134.

Excessive damages for, see CARRIAGE OF PASSENGERS, 649.

Measure of damages for, see DAMAGES, 63, 71; TELEGRAPH, ETC., LINES, 10.

Of ejected passenger, damages for, see EJECTION OF PASSENGERS, 106.

— parents, damages for, in action for death of child, see DEATH BY WRONGFUL ACT, 408.

Prospective damages for, see DAMAGES, 46.

Sufficiency of evidence to prove, see CARRIAGE OF PASSENGERS, 579; DAMAGES, 89.

When may be considered in assessing damages, see CARRIAGE OF MERCHANDISE, 798.

MERCHANDISE.

Obstruction of sidewalks with, see EXPRESS COMPANIES, 3.

When may be carried as baggage, see BAGGAGE, 37, 38.

See also CARRIAGE OF MERCHANDISE.

MERGER.

Of cause of action in judgment, see ANIMALS, INJURIES TO, 304; JUDGMENT, 13.

— easement in fee, see EASEMENTS, 10.

— mortgage in fee, see MORTGAGES, 307.

— oral agreement in written contract, see CARRIAGE OF MERCHANDISE, 400; EVIDENCE, 180.

— previous negotiations in bill of lading, see BILLS OF LADING, 44.

MEXICAN GRANTS.

Exception of land included in, from land grant, see LAND GRANTS, 49, 86; PUBLIC LANDS, 35.

MICHIGAN.

Assessment and levy of taxes in, see TAXATION, 266.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 37.

— — — relative to condemnation of land, see EMINENT DOMAIN, 34.

— — tax laws of, see TAXATION, 33.

Constitutional provisions in, relative to condemnation of land, see EMINENT DOMAIN, 13.

Doctrine of comparative negligence denied in, see COMPARATIVE NEGLIGENCE, 28.

Double damages for killing stock in, see ANIMALS, INJURIES TO, 600.

Duty of traveler at crossing to stop, look, and listen in, see CROSSINGS, INJURIES, ETC., AT, 236.

Federal grants to, see LAND GRANTS, 32.

Grants by, to railroads, see LAND GRANTS, 119.

Homesteads in public lands in, see PUBLIC LANDS, 7.

Laying out streets across railways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 46.

Liability of carrier as warehouseman in, see CARRIAGE OF MERCHANDISE, 345, 346.

— — company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 91.

Local assessment upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 349.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 24.

Plaintiff's pleadings must negative contributory negligence, see CONTRIBUTORY NEGLIGENCE, 55.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 13.

Statute of, as to flagmen at crossings, see CROSSINGS, INJURIES, ETC., AT, 71.

— — regulating liability for injuries caused by fire, see FIRES, 10.

— — relative to intersection of railways, see CROSSING OF RAILWAYS, 9.

Statutory duty of company in construction of street crossing railway, see CROSSING OF STREETS AND HIGHWAYS, 59.

— — to fence in, see FENCES, 27.

Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 416.

MICHIGAN CENTRAL R. CO.

1. Owns its road and need not fence it.—The company is the legal owner of its road, by purchase and grant from the state, and by the express terms of charter has the entire and exclusive right of its possession and control. *Williams v. Michigan C. R. Co.*, 2 Mich. 259.

The company is not bound by its charter, or the principles of the common law, to fence its road. *Williams v. Michigan C. R. Co.*, 2 Mich. 259.

The state acquired the right to the land for the purpose of the road, which right passed to the company under its charter, and the company's agents were protected in building fences on the land for the use of the road. *Smith v. McAdam*, 3 Mich. 506. —FOLLOWING People ex rel. v. Michigan Southern R. Co., 3 Mich. 496.

2. What roads may be built near it. —Section 5 of the charter—construed as to what roads near it shall be built; and the rights of the corporation thereunder—determined. *Michigan C. R. Co. v. Michigan Southern R. Co.*, 4 Mich. 361.

MILEAGE TICKETS.

See TICKETS AND FARES, 96-101.

MILLS.

Condemnation of, for railway purposes, see EMINENT DOMAIN, 126.

Injuries to, in condemnation proceedings, see EMINENT DOMAIN, 176, 610, 712.

License to erect, see LICENSE, 6.

Rights of owners, see WATERS AND WATERCOURSES, 19, 20.

MINERAL LANDS.

Appropriation of, see MINES, ETC., 1.

Exception of, in grants, see LAND GRANTS, 48, 66, 80; PUBLIC LANDS, 34.

MINERALS.

Instructions as to, on assessment of damages by jury, see EMINENT DOMAIN, 585.

Under land condemned, title to, see EMINENT DOMAIN, 146, 1092.

MINES AND MINING.

Measure of damages for injuries to mines, see EMINENT DOMAIN, 664.

Power of mining company to condemn lands,
see EMINENT DOMAIN, 82.

Right of owner or lessee of, to compensation in England, see EMINENT DOMAIN, 1158.

1. Appropriation of mineral lands — Damages.*—In making roads over unopened mines, it is not a subject of damages that the owner will be thereby put to expense and inconvenience when he begins to work his mines. *Searle v. Lackawanna & B. R. Co.*, 33 Pa. St. 57.

Where a party leases coal lands beneath a railroad track with knowledge of the track, he cannot require the company to remove it. If he has any remedy, it is for statutory damages. *Philadelphia & R. R. Co. v. Lawrence*, 10 Phila. (Pa.) 604.

2. Compelling purchase of minerals.—Where a railway company has purchased a right of way, so as to preclude the landowner from working minerals in a way injurious to its property, such landowner cannot, in the absence of a statutory provision to that effect, compel the company to purchase those minerals. *North-Eastern R. Co. v. Crosland*, 11 W. R. 83, 32 L. J. Ch. 353, 4 De G., F. & J. 550.

3. Right of landowner to work mines, generally.—Where a landowner grants to a railway company the right to make a tunnel through his land, he has the same right to work mines, under the seventy-seventh and seventy-eighth sections of the Railways Clauses Act, as if the company had actually purchased the land. *London & N. W. R. Co. v. Ackroyd*, 8 Jur. N. S. 911, 31 L. J. Ch. 588, 10 W. R. 367.

A grantor of lands conveyed to a railway company is not entitled to work mines even under his own land in any manner calculated to endanger the railway, although in the conveyance minerals are reserved. *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Cas. 449, 2 Jur. N. S. 623.

The owner of mines subjacent or adjacent to lands taken by a railway company under the Lands Clauses Act 1845, and the Railways Clauses Act 1845, is entitled to work them without making compensation, al-

though such mines and minerals are necessary for the support of the railway. The company, if it refuses to make compensation, can only compel him to work the mines in a proper manner. *Great Western R. Co. v. Bennett*, 36 L. J. Q. B. 133, 15 W. R. 647, 16 L. T. 186, L. R. 2 H. L. Cas. 27. *Fletcher v. Great Western R. Co.*, 6 Jur. N. S. 961, 29 L. J. Ex. 253, 8 W. R. 501.

Although a railway company has a right to restrain a landowner from working mines underneath its railway so as to cause injury, it cannot require the mine to be filled with water, to the exclusion of any future working. *Elliot v. North-Eastern R. Co.*, 10 H. L. Cas. 333, 9 Jur. N. S. 555, 32 L. J. Ch. 402, 11 W. R. 604, 8 L. T. 337.—FOLLOWED IN *Popplewell v. Hodgkinson*, L. R. 4 Ex. 248.—See also *Midland R. Co. v. Miles*, 24 Am. & Eng. R. Cas. 137, L. R. 30 Ch. D. 634. *Midland R. Co. v. Miles*, L. R. 33 Ch. D. 632.

4. Notice of intention to work.—To justify an owner in giving a notice of intention to work mines it is not necessary he should intend to work the minerals himself but there must be a real and bona fide desire to work by himself or by his lessees or licensees. *Midland R. Co. v. Robinson*, 43 Am. & Eng. R. Cas. 557, L. R. 15 App. Cas. 19; affirming L. R. 37 Ch. D. 386.

Such notice is not invalid or unreasonable merely because it includes the minerals under a long extent of railway. *Midland R. Co. v. Robinson*, L. R. 37 Ch. D. 386.

5. Counter notice to leave mine unworked.—Under 8 & 9 Vict. c. 20 and c. 33, a railway company is not bound to fix any period after the notice by a mine owner of his intention to work the minerals within which it must give counter notice of its desire to have such mines left unworked. The company can stop the working whenever it fears danger by notice that it will pay compensation. *Dixon v. Caledonian R. Co.*, L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249.

6. Right to work from the surface.—The word "mines" in the seventy-seventh section of the Railways Clauses Act 1845 includes minerals whether got by underground or by open workings; and therefore a bed of clay on which the railway had been made was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company was willing to make compensation to the landowner, be

* Appropriation of mineral lands, see note, 17 AM. & ENG. R. CAS. 116.

Minerals under right of way; compensation of landowners; right of landowners to work mines; surface support, see note, 24 AM. & ENG. R. CAS. 142.

Mines and minerals under public highways, see note, 14 AM. & ENG. R. CAS. 486.

dug and worked by him. *Midland R. Co. v. Haunckwood B. & T. Co.*, 6 Am. & Eng. R. Cas. 555, L. R. 20 Ch. D. 552.—DISTINGUISHING *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Cas. 449; *Elliot v. North-Eastern R. Co.*, 10 H. L. Cas. 333. QUOTING *Great Western R. Co. v. Bennett*, L. R. 2 H. L. Cas. 38; *Great Western R. Co. v. Fletcher*, 5 H. & N. 689. REVIEWING *Jamieson v. North British R. Co.*, 6 Scot. Law Rep. 188; *Dixon v. Caledonian R. Co.*, L. R. 5 App. Cas. 820.—*Ruabon B. & T. C. Co. v. Great Western R. Co.*, 54 Am. & Eng. R. Cas. 600, [1893] 1 Ch. 427.—APPROVING *Great Western R. Co. v. Bennett*, L. R. 2 H. L. Cas. 27; *Midland R. Co. v. Robinson*, L. R. 15 App. Cas. 19.

The "mines of coal, ironstone, slate, and other minerals" which section 77 of the Railways Clauses Act 1845 excepts out of the conveyance to the railway company, and the "mines or minerals" under the railway, or within the specified distance, which section 78 empowers the owner to give notice of his intention to work, include not only beds and seams of minerals got by underground working, but also such as can only be worked, and according to the custom of the district would be properly worked, by open or surface operations. (Lord Macnaghten dissenting.) *Midland R. Co. v. Robinson*, 43 Am. & Eng. R. Cas. 557, L. R. 15 App. Cas. 19; *affirming L. R. 37 Ch. D. 386*.—DISTINGUISHING *Dixon v. Caledonian R. Co.*, L. R. 5 App. Cas. 823. QUOTING *Errington v. Metropolitan D. R. Co.*, L. R. 19 Ch. D. 559; *Pountney v. Clayton*, 11 Q. B. D. 820; *Great Western R. Co. v. Bennett*, L. R. 2 H. L. Cas. 27.—APPROVED IN *Ruabon B. & T. C. Co. v. Great Western R. Co.*, 54 Am. & Eng. R. Cas. 600, [1893] 1 Ch. 427.

Limestone is a mineral within the meaning of the above sections. *Midland R. Co. v. Robinson*, 43 Am. & Eng. R. Cas. 557, L. R. 15 App. Cas. 19; *affirming L. R. 37 Ch. D. 386*.—FOLLOWING *Provost v. Farie*, L. R. 13 App. Cas. 657.

7. Right to tunnel under railway.

—Under section 80 of the Railways Clauses Consolidation Act 1845, the owner of minerals whose access is cut off by reason of a railway company having purchased the minerals lying under its line or within forty yards from it may, for the purpose of working his minerals which are on the other side of the railway, tunnel under the line. This

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power extends to a bed of clay. *Midland R. Co. v. Miles*, L. R. 30 Ch. D. 634, 53 L. T. 381, 34 W. R. 136.

Under section 81 of said act, 1845, the owner of minerals is entitled to be compensated by a railway company for additional expense caused by reason of his having to work the minerals by means of a tunnel under the railway. *Midland R. Co. v. Miles*, L. R. 30 Ch. D. 634, 53 L. T. 381, 34 W. R. 136.

8. Enjoining excavation beneath right of way.

—A company is entitled to a perpetual injunction against the working of mines adjoining a railway if compensation for not working such mines has been agreed on and obtained or tendered under the Railways Clauses Act 1845. *Smith v. Great Western R. Co.*, L. R. 3 App. Cas. 165, 47 L. J. Ch. D. 97, 37 L. T. 645; *affirming L. R. 2 Ch. D. 235*, 34 L. T. 267.—DISSENTED FROM IN *Dixon v. Caledonian R. Co.*, L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249.

Where a company compensates the lessee of mines whose lease is of sufficient length to enable him to exhaust the coal, it becomes the owner and is entitled to a perpetual injunction to restrain the working of the mines. *Smith v. Great Western R. Co.*, L. R. 3 App. Cas. 165, 47 L. J. Ch. D. 97, 37 L. T. 645; *affirming L. R. 2 Ch. D. 235*, 34 L. T. 267.—DISSENTED FROM IN *Dixon v. Caledonian R. Co.*, L. R. 5 App. Cas. 820, 43 L. T. 513, 29 W. R. 249.

In such a case the company may enjoin a subsequent purchaser of the mines from working the subjacent minerals, but without prejudice to the question of the right of such purchaser, as claiming under the reversioners, to compensation for his interest in the mines. *Great Western R. Co. v. Smith*, 26 W. R. 130; *affirming L. R. 2 Ch. D. 235*, 45 L. J. Ch. D. 235, 34 L. T. 267, 24 W. R. 443.

9. Right to lateral support.

—A railway company is entitled to the subjacent and lateral support necessary for the maintenance of its road on land granted to it by a person who reserved mineral rights and the right to work mines, so long as the same be done without entering upon or breaking the surface of the land. *Caledonian R. Co. v. Belhaven*, 3 Macq. H. L. Cas. 56, 3 Jur. N. S. 573. But see *Pountney v. Clayton*, 14 Am. & Eng. R. Cas. 476, L. R. 11 Q. B. D. 820.—DISTINGUISHING *Great*

Western R. Co. v. Bennett, L. R. 2 H. L. Cas. 27. QUOTING Dixon v. Caledonian R. Co., 5 App. Cas. 820; Great Western R. Co. v. Fletcher, 5 H. & N. 689, 29 L. J. Ex. 253.

The right to adjacent support attaches to land sold for the purposes of a railway, and the vendor cannot work minerals, although this right has been reserved, in such manner as to prejudice the use of the land for the railway. *Elliot v. North-Eastern R. Co.*, 10 H. L. Cas. 333, 9 Jur. N. S. 555, 32 L. J. Ch. 402, 11 W. R. 604, 8 L. T. 337.—FOLLOWED IN *Popplewell v. Hodkinson*, L. R. 4 Ex. 248.—*North-Eastern R. Co. v. Crosland*, 11 W. R. 83, 32 L. J. Ch. 353, 4 DeG., F. & J. 550.

Where a person sells land to be used as the foundation of a bridge for a railway constructed under an act expressly excepting all mines from the operation of the conveyance, declaring the landowner entitled to work the mines under the land not purchased doing no damage to the railway, but giving the directors the power to compel a sale, and requiring him on approaching within twenty yards of the masonry to give notice to the directors, and then giving them the right to compel a sale of his interest in the mines within twenty yards, but allowing him to work the mines doing no avoidable damage, in the event that the directors should decline to purchase, the directors are not excluded from the benefit, beyond the twenty yards, of the common law right to adjacent support. *Elliot v. North-Eastern R. Co.*, 10 H. L. Cas. 333, 9 Jur. N. S. 555, 32 L. J. Ch. 402, 8 L. T. 337, 11 W. R. 604.—FOLLOWED IN *Popplewell v. Hodkinson*, L. R. 4 Ex. 248.

10. Construction of leases—Rights of lessees.—A demise of land "excepting and reserving the mines under the same, with power to dig, win, and carry away the mines, with free ingress, egress, and regress, way-leave and passage to and from the same, or to and from any other mines, lands, and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, conveniences, privileges, and powers whatsoever, for the purposes aforesaid, and particularly of laying, making, and granting wagon ways in and over the premises, or any part thereof," should be construed as giving not a general power of making ways and granting way-leaves for all purposes, but for the limited one of getting the ex-

cepted minerals. *Durham & S. R. Co. v. Walker*, 2 G. & D. 326, 3 Railw. Cas. 36, 2 Q. B. 940.—DISTINGUISHED IN *Bidder v. North Staffordshire R. Co.*, L. R. 4 Q. B. D. 412, 48 L. J. Q. B. D. 248, 40 L. T. 801, 27 W. R. 540.

A lessee of mines authorized to take and use "full and sufficient rail and other ways, paths, and passages to and for the said lessees and their agents, servants, and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron, and ironstone, and produce of the mines thereby demised, or any other mines," may lay down a railway for the carriage of coal from adjoining collieries, and is not restricted to using the railway for the carriage of the coal of the mines demised by the lease. *Bidder v. North Staffordshire R. Co.*, L. R. 4 Q. B. D. 412, 48 L. J. Q. B. D. 248, 40 L. T. 801, 27 W. R. 540.

11. Liability for personal injuries caused by negligence.—When a company is both a railroad and mining company, it cannot be compelled to answer as the proprietor of a railroad, under Ky. Gen. St. ch. 57, § 1, for injury caused by negligence in its mining operations. But the company, as a mining company, may be liable, under section 3 of said chapter, for punitive damages for the loss or destruction of life by the wilful neglect of the company, its agents or servants, in the management of a tramway, etc., attached to its coal mines. *Claxton v. Lexington & B. S. R. Co.*, 13 Bush (Ky.) 636, 17 Am. Ry. Rep. 12.

12. Liability for breaking into adjoining mine.—Although it is *ultra vires* for a railway company to work mines, yet where the statute implies that the company is to have this power until the mines are sold, a company with which it is amalgamated is liable for its wrongful acts in breaking into an adjoining mine. *Ecclesiastical Com'rs for England v. North-Eastern R. Co.*, L. R. 4 Ch. D. 845, 36 L. T. 174.

13. Liability for flooding mines.—A railway company is responsible where water escapes from a stream in flood time, or collects from rain falling on the railway, and flows along a cutting and percolates through the substratum into mines beneath, although such mines had not been worked at the time of the formation of the railway. *Bagnall v. London & N. W. R. Co.*, 7 H.

30 N. 423, 31 L. J. Ex. 121; affirmed in 31 L. J. Ex. 480.

14. Railway connection with coal mines.—Where there are several railroads passing near a coal mine, the same constitutional obligation rests upon all of them to permit connections with their several tracks. Under such circumstances a common track to be used by all the roads for receiving coal into their cars becomes a necessity, and the owner of the mine will not be compelled to have a separate coal chute or a separate entrance to his mine for the switch of each railroad company. *Chicago & A. R. Co. v. Suffern*, 38 Am. & Eng. R. Cas. 508, 129 Ill. 274, 21 N. E. Rep. 824; affirming 27 Ill. App. 404.

MINNEAPOLIS & C. V. R. CO.

1. Construction of charter.—Under the act of March 10, 1862, entitled "An act to facilitate the construction of the Minneapolis and Cedar Valley railroad, and to amend and continue certain acts in relation thereto," transferring to certain persons therein named all the rights, benefits, privileges, property, franchises, and interests of the Minneapolis & Cedar Valley R. Co. acquired by the state, the corporation organized by the grantees is not the same corporation as the Minneapolis & Cedar Valley R. Co., nor liable for its debts. *Fitz v. Minnesota C. R. Co.*, 11 Minn. 414 (Gil. 304).

2. Liability of stockholders.—There is no statutory provision making stockholders in the Minneapolis & Cedar Valley R. Co. liable for its debts. *Robertson v. Sibley*, 10 Minn. 323 (Gil. 253).

MINNESOTA.

Aid to railways by the state, see STATE AID, 24.

Assessment and levy of taxes in, see TAXATION, 267.

Constitutionality of statute of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 38.

— — — — — **removal of causes**, see REMOVAL OF CAUSES, 2.

— — — — — **relative to condemnation of land**, see EMINENT DOMAIN, 35.

— — — — — **tax laws of**, see TAXATION, 34.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 740.

Double damages for killing stock in, see ANIMALS, INJURIES TO, 601.

Federal grants to, see LAND GRANTS, 33-39.

Grants by, to railroads, see LAND GRANTS, 120.

— **of swamp lands in**, see LAND GRANTS, 132.

Homesteads in public lands in, see PUBLIC LANDS, 8.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, 270.

Local assessment upon steam railways in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 350.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 40.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 14.

Statutes of, regulating liability to servant for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, 186-188.

— — — — — **relative to intersection of railways**, see CROSSING OF RAILROADS, 10.

Statutory duty of company in construction of street crossing railway, see CROSSING OF STREETS AND HIGHWAYS, 60.

— — — — — **to fence in**, see FENCES, 28.

— **regulation of grade crossings in**, see CROSSING OF STREETS AND HIGHWAYS, 80.

Taking land for streets and laying out roads in, see STREETS AND HIGHWAYS, 22.

Taxation of land grants in, see TAXATION, 119.

When negligence of parent is imputable to child in, see CHILDREN, INJURIES TO, 123.

MISCONDUCT.

Evidence of wilful, see CARRIAGE OF PASSENGERS, 562, 573.

Forfeiture of compensation by receiver for, see RECEIVERS, 162.

Liability of agent to principal for, see AGENCY, 31, 32.

Of arbitrators, impeachment of award for, see ARBITRATION AND AWARD, 32.

— **commissioners, setting aside report for**, see EMINENT DOMAIN, 805.

— **employees, excepting liability for**, see BILLS OF LADING, 60.

— — — — — **protection of passengers against**, see CARRIAGE OF PASSENGERS, 302-312.

— **jurors, as ground for new trial**, see NEW TRIAL, 11-13, 199.

— **officers, no defense against innocent purchasers of bonds**, see MUNICIPAL AND LOCAL AID, 353.

- Of passengers, see CARRIAGE OF PASSENGERS, 36.
 — receiver, removal for, see RECEIVERS, 167.

MISDELIVERY.

- By carrier, of goods, see CARRIAGE OF MERCHANDISE, 273-288; EXPRESS COMPANIES, 48.
 — final carrier, liability for, see CARRIAGE OF MERCHANDISE, 651.
 Of cattle, by carrier, see CARRIAGE OF LIVE STOCK, 57-59.

MISJOINDER.

- Of causes of action, see ANIMALS, INJURIES TO, 336; ELEVATED RAILWAYS, 99; EMPLOYÉS, INJURIES TO, 504; PLEADING, 66.
 — complainant in equity, see PARTIES TO ACTIONS, 20.
 — defendants, see PARTIES TO ACTIONS, 12.
 — husband or wife as parties, see HUSBAND AND WIFE, 35.

MISLEADING INSTRUCTIONS.

- When ground for reversal, see ANIMALS, INJURIES TO, 571; APPEAL AND ERROR, 50; CARRIAGE OF PASSENGERS, 598; CHILDREN, INJURIES TO, 175; COMPARATIVE NEGLIGENCE, 18; CONTRIBUTORY NEGLIGENCE, 116; DEATH BY WRONGFUL ACT, 336, 356; EMINENT DOMAIN, 587, 588; EMPLOYÉS, INJURIES TO, 649; FELLOW-SERVANTS, 504; FIRES, 301; NEGLIGENCE, 111; TRESPASSERS, INJURIES TO, 124; TRIAL, 122, 145.

MISNOMER.

- In actions against carriers, see CARRIAGE OF MERCHANDISE, 73.
 Nonsuit in cases of, see TRIAL, 69.
 Of corporation, and its effect, see NAME OF RAILROAD, 2-4.
 — parties, in process, see PROCESS, 5, 6.

MISSISSIPPI.

- Aid to railways by the state, see STATE AID, 25.
 Assessment and levy of taxes in, see TAXATION, 268.
 Civil rights acts of, see COLORED PERSONS, 3.
 Conditions exempting carrier from liability to person riding on free pass in, see PASSES, 30.

- Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 39.

- — — relative to condemnation of land, see EMINENT DOMAIN, 36.
 — — — tax laws of, see TAXATION, 35.
 Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 741.
 Injuries to animals running at large in, see ANIMALS, INJURIES TO, 250.
 License taxes in, see TAXATION, 397.
 Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 15.
 Statutes of, regulating liability for injuries caused by fire, see FIRES, 11.
 — — — to servant for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, 189, 190.
 — — — relative to condemning right of way through streets, see STREETS AND HIGHWAYS, 117.
 Statutory provisions in, relative to abandonment of station, see STATIONS AND DEPOTS, 53.
 Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 417.

MISSOURI.

- Aid to railways by the state, see STATE AID, 26.
 Assessment and levy of taxes in, see TAXATION, 269.
 Condition exempting carrier from liability to person riding on free pass in, see PASSES, 31.
 Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 40.
 — — — granting remedy for causing death, see DEATH BY WRONGFUL ACT, 9.
 — — — relative to condemnation of land, see EMINENT DOMAIN, 37.
 — — — tax laws of, see TAXATION, 36.
 Constitutional provisions in, relative to condemnation of land, see EMINENT DOMAIN, 14.
 Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 742.
 Doctrine of comparative negligence denied in, see COMPARATIVE NEGLIGENCE, 29.
 Double damages for killing stock in, see ANIMALS, INJURIES TO, 602-604.
 — liability of stockholders to creditors in, see STOCKHOLDERS, 42, 43.
 Federal grants to, see LAND GRANTS, 40-44.
 Grants by, to railroads, see LAND GRANTS, 121.
 — of swamp lands in, see LAND GRANTS, 133.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, 251.

Jurisdiction of supreme court of see JURISDICTION, 21.

Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 92.

Measure of damages for injury to employee under Damage Act of, see EMPLOYÉS, INJURIES TO, 761.

Mechanics' Lien Law of, see LIENS, 10.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 50.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 25.

Penalties for overcharges in, see CHARGES, 54.

Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 59.

Raising money by lotteries under statutes of, see LOTTERIES, 1, 2.

Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 449.

Right of action for killing stock under statutes of, see ANIMALS, INJURIES TO, 299, 300.

— to sue in, for causing death in foreign state, see DEATH BY WRONGFUL ACT, 120.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 16.

Statutes of, as to defective crossings, see CROSSINGS, INJURIES, ETC., AT, 32.

— — regulating liability to servant for injuries caused by negligence of fellow-servants, see FELLOW-SERVANTS, 191.

— — relating to Texas cattle, see INTERSTATE COMMERCE, 219.

— — relative to distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 62.

— — — drains, see DRAINS, 3.

— — — intersection of railways, see CROSSING OF RAILROADS, 11.

Statutory duty of company in construction of street crossing railway, see CROSSING OF STREETS AND HIGHWAYS, 61.

— to fence in, see FENCES, 29.

— provisions in, limiting amount recoverable for causing death, see DEATH BY WRONGFUL ACT, 368.

Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 418.

— of land grants in, see TAXATION, 120.

Transportation of diseased cattle in, see CARRIAGE OF LIVE STOCK, 113.

When negligence of parent is imputable to child in, see CHILDREN, INJURIES TO, 124.

MISSOURI PACIFIC R. CO.

1. Status in Nebraska.—The company is a domestic corporation under the laws of Nebraska, and does not owe its corporate existence therein to the laws of the United States or of any other state. *State v. Missouri Pac. R. Co.*, 25 Neb. 164, 41 N. W. Rep. 127.—FOLLOWING *State v. Chicago, B. & Q. R. Co.*, 25 Neb. 156.—FOLLOWED IN *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

2. — in Texas.—The Missouri Pacific R. Co., though a resident of Missouri, transacts business in Texas, and where it has business offices and agents. It is subject to the local jurisdiction of the courts of this state. *Missouri Pac. R. Co. v. Cullers*, 81 Tex. 382, 17 S. W. Rep. 19.

MISTAKE.

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MORRIS CANAL & BANKING CO.

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The charter is irrevocable, and created a contract which is incapable of alteration or repeal by the legislature, except by mutual consent, and is, therefore, unaffected by the constitution of 1844, which forbids the taking of property by private corporations for public use without compensation first made. The company's charter, and the powers and privileges therein granted, continue, notwithstanding the change of policy adopted by the constitution of 1844, and possess equal vitality with respect to acts done by the company under it after the constitution of 1844 became the fundamental law as if done before the adoption of that instrument. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *reversing* 30 N. J. Eq. 180.

2. When title vests. — The title to lands taken, and the right to waters and streams appropriated, do not finally vest in the company until compensation be made;

but, nevertheless, the occupation and use thereof by the company are made lawful, though compensation therefor has not been ascertained or paid, *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *reversing* 30 N. J. Eq. 180.—EXPLAINED IN Mayor, etc., of *Jersey City v. Gardner*, 33 N. J. Eq. 622.

3. Remedy of landowner.—The twentieth section of the charter construed in connection with the twenty-seventh section gives to persons injured a right of action against the company for damages to water rights as well as to lands, tenements, and hereditaments, whether the damages sustained be direct or consequential, and whether they arose from the construction of the canal in the first instance, or from the subsequent operations of the company. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *reversing* 30 N. J. Eq. 180.

The only redress for the owner of lands or water rights which are taken or injuriously affected by the construction or operation of the canal without compensation having been made is by action for damages. He cannot remove the company from the premises by ejectment, or abate the company's works as a nuisance, though compensation has not been made for his injuries. *Lehigh Valley R. Co. v. McFarlan*, 31 N. J. Eq. 706; *reversing* 30 N. J. Eq. 180.

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— — — redemption or payment of, by company, see EMINENT DOMAIN, 141.

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— parties to, to land damages, see EMINENT DOMAIN, 436, 437.

— to interest on, see INTEREST, 6.

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I. POWER TO MORTGAGE PROPERTY OR FRANCHISE.	
1. <i>Necessity of Legislative Authority.</i>	

1. Implied power to borrow money and mortgage property to secure it.*

—A railroad corporation, unless restrained by statute, has the implied power to borrow money to construct its road, and to secure the debt thus created by mortgage on its property. *Savannah & M. R. Co. v. Lancaster*, 62 Ala. 555. *Allen v. Montgomery R. Co.*, 11 Ala. 437. *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472. *Kelly v. Ala-*

* Power of corporation to mortgage property, see note, 9 L. R. A. 142.

Power of company to mortgage railroad property and franchise, see 46 AM. & ENG. R. CAS. 292, *abstr.*

Power of railroad company to borrow money, and secure it by mortgage. Rights of a state that has subscribed to the stock thereof, see 26 AM. & ENG. R. CAS. 661, *abstr.*

bama & C. R. Co., 58 Ala. 489, 21 Am. Ry. Rep. 138.

A mortgage by a railroad company to secure money borrowed for the construction of its road is not opposed to the public policy of the state. This is indicated by the general course of legislation upon the subject. *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199.

That a railroad company voluntarily mortgaged its property to secure the money which it was expressly authorized by its charter to borrow, and that its bondholders invested their money upon the faith of the mortgage, relieves the case from the operation of the decision in *Winchester & L. Turnpike Road Co. v. Vimont*, 5 B. Mon. (Ky.) 1. If that decision can be regarded as denying that property or franchises in the use of which the public has an interest can be assigned, the court would hesitate to follow it in view of other decisions. *Bardstown & L. R. Co. v. Metcalfe*, 4 Metc. (Ky.) 199.

The power of a railroad corporation to borrow money and mortgage its property is not limited by the usual clause in its charter, providing that shares shall not be assessed over \$100, and that, if more money is necessary, it shall be raised by creating new shares. *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127.

If the power otherwise exists in a corporation to issue bonds and secure them by a mortgage on its property, no suit to restrain such action will lie by a common stockholder, and holders of preferred stock stand in no better condition. *Thompson v. Erie R. Co.*, 11 Abb. Pr. N. S. (N. Y.) 188, 42 How. Pr. 68.

The Texas Constitution of 1866 does not prevent a railway corporation from mortgaging its franchise, or a sale under a foreclosure decree, or by a mortgage trustee authorized to sell. *Houston & T. C. R. Co. v. Shirley*, 4 Am. & Eng. R. Cas. 443, 54 Tex. 125.

2. Necessity of statutory authority.

—A railway corporation cannot mortgage its franchise without legislative authority. *Com. v. Smith*, 10 Allen (Mass.) 448. *State v. Morgan*, 28 La. Ann. 482. *Atkinson v. Marietta & C. R. Co.*, 15 Ohio St. 21. *Frazier v. East Tenn., V. & G. R. Co.*, 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.

A street-railway company cannot mort-

gage its franchise, road, or property without legislative authority; and under Mass. Gen. St. ch. 229, concerning street railways, a mortgage by said company of all its property is void, and will not pass title to such property as the company might under other circumstances mortgage. *Richardson v. Sibley*, 11 Allen (Mass.) 65.—QUOTED IN *Naglee v. Alexandria & F. R. Co.*, 32 Am. & Eng. R. Cas. 401, 83 Va. 707.

Special authority is necessary for a railroad company to borrow money and mortgage its franchises and property to secure it, because not incident to its charter. *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

A mortgage of the property of a corporation is an increase of its indebtedness, and can be effected only in compliance with art. xvi., section 7, of the constitution of Pennsylvania, and the act of April 18, 1874. Otherwise the mortgage is void. *Pittsburgh & S. L. R. Co. v. Rothschild*, (Pa.) 26 Am. & Eng. R. Cas. 50, 4 Atl. Rep. 385.

3. — or legislative ratification.—Where a railroad company has made a mortgage or sale of its corporate franchise without authority in its charter, the same may be ratified and rendered valid by subsequent legislative enactment. *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477. *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395.—REVIEWED IN *Sacramento & P. R. Co. v. San Francisco Superior Court*, 55 Cal. 453.—*Daniels v. Hart*, 118 Mass. 543.

An act of the legislature authorizing the trustees under a railroad mortgage to sell the road is a ratification of the mortgage, so far as the state and public are concerned. *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127.

4. How the rule is applied in England.—Where a railway company is given power to sue and be sued, and pay borrowed money upon instruments which on their face import a covenant for repayment, if money is so borrowed and so secured, and not duly repaid, an action may be maintained against the company on a breach of the covenant, although there are no specific statutory provisions enabling the company to bind itself by such a covenant and giving a right of action against it. *Eastern Union R. Co. v. Hart*, 8 Ex. 116, 17 Jur. 89, 22 L. J. Ex. 20.

Where money is advanced to a railway company upon bond and mortgage before

the borrowing powers of the company are in operation, although the money is admittedly expended in the construction of the railway, the creditors will not be allowed to come in in equal priority with other *bona fide* debenture and mortgage creditors. *In re Bagnallstown & W. R. Co.*, 4 Ir. Eq. 172.

2. Validity and Interpretation of Statutes.

5. Constitutionality of statutes.—The legislature has the constitutional power to authorize a corporation created by it to borrow money by mortgaging its property and franchises, or by issuing preferred stock and pledging its revenues for the payment of the dividends thereon, where such course is necessary to carry into effect the object for which the corporation was created. *Covington v. Covington & C. Bridge Co.*, 10 Bush (Ky.) 69.

The Oregon Act of Oct., 1882 (known as "the Mortgage Tax Law"), § 3, providing that "all mortgages, deeds of trust, contracts, or other obligations hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void," is not in conflict with the state constitution, art. 4, section 20, declaring that every act shall embrace but one subject, which must be expressed in the title; and a railroad mortgage, executed in violation of the statute, is void. *Farmers' L. & T. Co. v. Oregon & C. R. Co.*, 11 Sawy. (U. S.) 115, 24 Fed. Rep. 407.

6. What amounts to an authority to mortgage, generally.—A railroad corporation, under California Act of 1861, § 15, as amended by the act of May 14, 1862, § 1, has power, by a majority vote of its board of directors, to issue bonds to pay debts contracted, or contracts made for iron for constructing and completing its road, and to execute a mortgage on its corporate property to secure the payment of the same. *McLane v. Placer-ville & S. V. R. Co.*, 26 Am. & Eng. R. Cas. 404, 66 Cal. 606, 6 Pac. Rep. 748.

A company authorized by its charter to borrow money on its credit necessary to complete the road, but not expressly authorized to make a mortgage upon its property or franchises to secure the bonds issued therefor, has an implied power to do so, though it cannot mortgage its corporate existence, or any prerogative franchise con-

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ferred upon it. But the right to build and use a railroad is not a prerogative franchise. A purchaser under its mortgage would take the road, subject to the terms of the charter designed to protect the public, and would be bound thereby as fully as the corporation. *Bardstown & L. R. Co. v. Metcalfe*, 4 *Metc.* (Ky.) 199.

7. Power to sell includes power to mortgage.—If a company has the power to sell, it has the power to mortgage, which is the lesser power, and included in the greater, except as to the franchises of the company. *Branch v. Atlantic & G. R. Co.*, 3 *Woods* (U. S.) 481.

An alienation of a franchise, either in whole or in part, may be made whenever there is legislative authority for it, either expressed or implied. So authority to a company to transfer "all its property, rights, privileges, and franchises" to another company includes the right to mortgage it to the other company. *East Boston Freight R. Co. v. Eastern R. Co.*, 13 *Allen* (Mass.) 422.

A company authorized by a provision in its charter "to acquire, alien, transfer, and dispose of property of every kind" may mortgage its property. The power to sell always includes the power to mortgage. *McAllister v. Plant*, 54 *Miss.* 106, 17 *Am. Ry. Rep.* 389.

The statutory power to borrow money and secure loans cannot be considered as implying that a company's powers to mortgage are to be limited to that object; and therefore a mortgage executed by a company on a portion of its road in favor of a trustee, being given within the scope of the powers conferred upon the company to "alienate, sell, or dispose" of lands for the purpose of constructing and working a railway, was not *ultra vires*. *Bickford v. Grand Junction R. Co.*, 1 *Can. Sup. Ct.* 696.

8. Statutory power must be strictly pursued.—A provision in a charter that a company might mortgage its property to complete its road gives no power to mortgage the road after its completion for other purposes. *East Tenn., V. & G. R. Co. v. Frazier*, 139 *U. S.* 288, 11 *Sup. Ct. Rep.* 517; *affirming* 40 *Am. & Eng. R. Cas.* 338, 88 *Tenn.* 138, 12 *S. W. Rep.* 537.

A provision in a charter authorizing a company to mortgage its real estate will not be construed as granting the implied power to mortgage its franchise. *Randolph*

v. Wilmington & R. R. Co., 11 *Phila. (Pa.)* 502.

Railway and other corporations can only mortgage their personal property by conforming strictly to the statute in reference to chattel mortgages, and for the same length of time. *Hunt v. Bullock*, 23 *Ill.* 320.

9. What corporate acts are within the power.—A company having a general power to mortgage the whole of its road may mortgage any part of it. *Pulian v. Cincinnati & C. A. L. R. Co.*, 4 *Biss.* (U. S.) 35.—*REVIEWING* *Williamson v. New Albany & S. R. Co.*, 1 *Biss.* 198.

Under a statute requiring the concurrence of the holders of two thirds of the stock of a corporation to mortgaging the corporate property for a loan of money, to be expressed at a meeting of the stockholders called by the directors for that purpose, a meeting of the directors, who are the only stockholders except one, at which all assent to the proposition, is in effect a meeting of the stockholders, and the act of the directors that of the stockholders. The requirement of the concurrence of the holders of two thirds of the stock is intended for the protection of the stockholder, and is a matter in which the public has no interest. *Thomas v. Citizens' Horse R. Co.*, 11 *Am. & Eng. R. Cas.* 306, 104 *Ill.* 462.—*FOLLOWED IN* *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 *Fed. Rep.* 440.

A corporation which is authorized to hold lands for depots and storehouses, as well as for railroad purposes, and to allow other railroad corporations to establish depots upon its premises and sell or lease the land necessary therefor, may lawfully mortgage lands held by it, and not required for railroad purposes, to secure bonds issued by said corporation. *Hendee v. Pinkerton*, 14 *Allen* (Mass.) 381.

Where a statute gives every railroad corporation the power to borrow money for completing, furnishing, and operating its road, to issue bonds for any amount so borrowed, and to mortgage its corporate property and franchises to secure such bonds, or any debt contracted for such purposes, a railroad company may issue bonds, secured by a mortgage, "to consolidate its funded debt, obtain the money and material necessary for perfecting its line of railway, enlarging its capacities, and extending the facilities thereof." *Thompson v. Erie R. Co.*, 42 *How. Pr.* (N. Y.) 68.

Under such a statute a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified. *Duncomb v. New York, H. & N. R. Co.*, 4 Am. & Eng. R. Cas. 293, 84 N. Y. 190; reversing 23 Hun 291.—QUOTED IN *Atwood v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 534, 85 Va. 966.

Where a statute gives a railway company power to borrow money and to make bonds or debentures for securing repayment, the securities on which the company has power to borrow are not restricted to bonds or debentures. *Commercial Bank v. Great Western R. Co.*, 13 L. T. 105, 3 Moore P. C. C., N. S. 295.

10. What corporate acts are in excess of the powers conferred.—The grant to a railroad company of the general power to borrow money and to issue bonds below par will not authorize it to issue irredeemable bonds at a rate below par, entitling the holder to a contingent share in the profits, nor to execute a mortgage to secure such bonds. *Taylor v. Philadelphia & R. R. Co.*, 3 Am. & Eng. R. Cas. 163, 7 Fed. Rep. 386.—QUOTING *Thomas v. West Jersey R. Co.*, 101 U. S. 82.

The primary object in granting authority to construct a railroad being the benefit to be derived by the public from the use of the road, a power to mortgage will not be construed to authorize the mortgagee to take up and sell the material of which the road is made, so as to interfere with its beneficial use by the public. *Palmer v. Forbes*, 23 Ill. 301.

By the charter of a railroad it was empowered to borrow money necessary to complete, maintain, and work the road, and "to hypothecate, mortgage, or pledge the lands, tolls, revenues, and other property of the company for the due payment of said sums, and the interest thereon." The company executed a mortgage on its property to secure collaterally notes given by its contractor for iron used in constructing the road. *Held*, that the mortgage was *ultra vires* and void. *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (U. C.) 302.

11. Limitation of amount of indebtedness to be secured.—The power of a railroad company incorporated under the Pa. Act of April 4, 1868 (P. L. 62), to borrow money upon a mortgage of its prop-

erty and franchises for the construction and equipment of its road is limited in section 8 of said act, in the clearest manner, to twice the amount of its paid-up capital stock. Such a mortgage, given for a greater amount than that specified, is unauthorized, and might be held inoperative and void as to parties having the right to complain; but as between *bona fide* holders of the mortgage bonds and the company the mortgage is a lien upon the mortgaged property. *Fidelity I., T. & S. D. Co. v. Western Pa. & S. C. R. Co.*, 138 Pa. St. 494, 21 Atl. Rep. 21.

Subsequent creditors of the company, who became such with notice of the mortgage while the negotiation of the bonds was in progress, occupy no better position than the company itself, and cannot set up its fraud in exceeding the authority conferred as a defense against the victims of that fraud. *Fidelity I., T. & S. D. Co. v. Western Pa. & S. C. R. Co.*, 138 Pa. St. 494, 21 Atl. Rep. 21.

The provision of section 7, article xvi., of the constitution, prohibiting the fictitious increase of corporate indebtedness, will not apply to the sale of mortgage bonds of a railroad company, for which it receives the money from innocent purchasers at par, for construction and equipment; the debt is not fictitious, though the securities may turn out to be largely so. *Fidelity I., T. & S. D. Co. v. Western Pa. & S. C. R. Co.*, 138 Pa. St. 494, 21 Atl. Rep. 21.

II. WHAT PROPERTY MAY BE MORTGAGED OR COVERED BY A MORTGAGE.

1. In General.

12. Franchises, generally.—Chapter 43 of the Iowa Code of 1851 conferred upon railroad corporations organized under its provisions the power to encumber their real and personal property, such as lands held for right of way, depot buildings, rolling stock, revenues, and the like, including the future earnings, accessions, and acquisitions of their respective roads. *Quare*, whether the franchise of a railroad corporation may be pledged by mortgage? *Dunham v. Iselt*, 15 Iowa 284.

The mortgage of a "railroad," with all its rights and privileges, was authorized under a resolution of its board of directors, which authorized a mortgage of the road and "its property, etc." As there was nothing to

which the phrase "etc." could have been designed to apply except the franchises, it must be regarded as having been used to embrace them. *Bardstown & L. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199.*

If a railroad, authorized expressly by its charter to mortgage its road and other property, but without express authority to mortgage its corporate franchises, makes a mortgage covering both its railroad and franchises, the validity of the mortgage, as to the railroad, is unaffected by the inclusion of the corporate franchises therein, even if unauthorized. *Gloninger v. Pittsburgh & C. R. Co., 46 Am. & Eng. R. Cas. 276, 139 Pa. St. 13, 21 Atl. Rep. 211.*

A company may pledge its credit for the procurement of rails for its road, and secure the same by mortgage of its road and franchise; and its power to do so is not affected by the fact that its title to the whole of the road is not perfect. A purchaser at a foreclosure would take the road according to the rights of the company at the time of the foreclosure. *Miller v. Rutland & W. R. Co., 36 Vt. 452.*—QUOTING *Holroyd v. Marshall, 9 Jur. N. S. 213.*—QUOTED IN *Vermont & C. R. Co. v. Vermont C. R. Co., 50 Vt. 500.*

A corporation had power to borrow money not exceeding its capital stock, and to execute bonds therefor, secured by a pledge of the property and income of the company. A subsequent grant of a like power, and the authority to pledge, was expressed to be by "mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof." *Held:* (1) that the company could not mortgage the franchise to be a corporation, appertaining to the individual members of the corporation, but could mortgage the franchise to maintain a railroad, and receive compensation for the transportation of persons and property, and the property connected with the railroad and the use of its franchise, whether real or personal, to be subsequently acquired; (2) that the power of eminent domain was not transferable, and that the mortgage of the company could give no right to the exercise of such a power which the provisions of the general law on the subject did not authorize; (3) that the execution of a mortgage by the company, under such special power, could give no exemption of its personal property from a liability which might be otherwise

created by its own act or a judicial proceeding that the execution of a like mortgage upon personal property by an individual would not create. *Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372.*—QUOTING *Platt v. New York & B. R. Co., 26 Conn. 544.*

13. Franchise to be a corporation.—The mortgage by a railroad company of its road and franchise, as a security for debt, does not convey its corporate existence or its general corporate powers, but only the franchise necessary to make the conveyance beneficial to the grantees, to maintain and manage the railroad, and receive the profits thereof for their own benefit. *Eldridge v. Smith, 34 Vt. 484.*—REVIEWED IN *Meyer v. Johnston, 53 Ala. 237.*—*Meyer v. Johnston, 53 Ala. 237, 15 Am. Ry. Rep. 467.*

The charter authorized the company to pledge "its property and profits." The deed of mortgage conveyed "all the present and future-to-be-acquired property of the company, and all its estates and franchises, that is to say," and then followed an enumeration of the property and rights intended to be conveyed. *Held:* (1) that this enumeration limited and explained the previous words, and brought the terms of the deed within the limits of the legislative authority; (2) that, if it were construed otherwise, as intending to convey the franchise to be a corporation, while in that respect it would be inoperative, it would not, for that reason, be entirely void, but would operate to convey the property of the company. *Butler v. Rahm, 46 Md. 541, 18 Am. Ry. Rep. 86.*

14. Real property, generally.—A railroad mortgage conveyed several classes of property, mostly real estate, specifically describing each, and "all other property" owned by the company in certain states. *Held,* that the words "all other property" did not operate to include in the mortgage lands not specifically described. *Alabama v. Montague, 117 U. S. 602, 6 Sup. Ct. Rep. 911.*—FOLLOWED IN *Alabama v. Montague, 117 U. S. 611.*

A mortgage executed by a railway company assigning "to A., his executors, administrators, and assigns, the undertaking, and all and singular the rates, tolls, and all the estate, right, title, and interest of, in, and to the same," does not pass any of the company's lands. *Myatt v. St. Helen's & R. G. R. Co., 1 G. & D. 663, 2 Railw. Cas. 756, 2 Q. B. 364, 6 Jur. 641.*

15. Right of way.—The right of way of a horse railroad company in a public street is an incorporeal hereditament, and may be mortgaged by the company. *Hovelman v. Kansas City Horse R. Co.*, 20 *Am. & Eng. R. Cas.* 17, 79 *Mo.* 632.

Where a landowner conveys a right of way to a company in consideration that it will locate and construct a road thereon, such grant constitutes an easement which may be assigned or conveyed by mortgage; and it will pass to a purchaser under a foreclosure sale, and embrace all the rights of the original company, although the road has not been built. *Columbus, H. & G. R. Co. v. Braden*, 110 *Ind.* 558, 9 *West. Rep.* 193, 11 *N. E. Rep.* 357.—REVIEWING *Ingalls v. Byers*, 94 *Ind.* 134.

16. Track, and materials therefor.—A provision in a railroad mortgage conveying all the company's real and personal property "used, or intended to be used, in connection with, or for, the purpose of such railroad" includes rails, fishplates, and bolts purchased for the road, but not yet actually used in its structure, and is included in a decree directing a sale of the mortgaged property. *Farmers' L. & T. Co. v. San Diego Street-Car Co.*, 49 *Fed. Rep.* 188.

Neither the mortgagee of a railroad, nor the purchaser under a foreclosure of the mortgage, acquires any lien upon or title to a side track built by the company upon adjoining land under an agreement that it is to become the property of the landowner. *Spoon v. Chicago & W. M. R. Co.*, 86 *Mich.* 309, 49 *N. W. Rep.* 35.

A company has no right to take up its mortgaged track, though the road be not self-sustaining, and the object be to sell the materials and appropriate the proceeds towards liquidating the mortgage debt. *Watt v. Hestonville, M. & F. Pass. R. Co.*, 1 *Brews. (Pa.)* 418.

17. Terminal facilities.—A company incorporated to construct a railroad between two cities named as its *termini* gave a mortgage upon its line of road constructed, or to be constructed, between the named *termini*, together with all the stations, depot grounds, engine houses, machine shops, buildings, and erections appertaining to said railroad, or which might thereafter appertain thereto. *Held*, that the mortgage created a lien upon the terminal facilities of the railroad in the cities named as its *termini*, and was not limited to so much of the road

as was found between the city limits of those places. *Central Trust Co. v. Kneeland*, 46 *Am. & Eng. R. Cas.* 268, 138 *U. S.* 414, 11 *Sup. Ct. Rep.* 357.—DISTINGUISHING *Williamson v. New Jersey Southern R. Co.*, 28 *N. J. Eq.* 277, 29 *N. J. Eq.* 316. FOLLOWING *Pennock v. Coe*, 23 *How. (U. S.)* 117; *Dunham v. Cincinnati, P. & C. R. Co.*, 1 *Wall. (U. S.)* 254; *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall.* 459; *Thompson v. White Water Valley R. Co.*, 132 *U. S.* 68; *Toledo, D. & B. R. Co. v. Hamilton*, 134 *U. S.* 296.

18. Property lying in two or more counties.—It is competent for a state legislature to pass an act providing that mortgages of lands in more than one county shall be void. *Farmers' L. & T. Co. v. Oregon & C. R. Co.*, 11 *Sawyer. (U. S.)* 115, 24 *Fed. Rep.* 407.

19. Property in foreign jurisdiction.—Where real estate conveyed to a foreign railroad company is attached in *W. Va.* for the debts of said company, and a defendant claims the property under a deed ordered to be made under proceedings in a foreign court to foreclose a mortgage on the "railroad," and the pleadings in said cause do not assert that the mortgage covers the property in this state, but the court without passing on that question orders the trustee to sell "all the right, title, and interest of the railroad in West Virginia which passed under said mortgage," and a deed was ordered to be made for such interest, the courts of this state, without reference to any conflict of jurisdiction, are left free to decide whether anything passed under said mortgage. *Chapman v. Pittsburg & S. R. Co.*, 26 *W. Va.* 299.

A mortgage by a Pennsylvania company chartered to build a road from near *Pittsburg*, in the direction of *Steubenville, Ohio*, to the Pennsylvania state line, of "the whole of its railroad together with the lands, depots, depot grounds, and buildings situated thereon between and at the *termini* of its railroads at the city of *Pittsburg* and the boundary line of the state of *West Virginia*"—*held*, to convey no property in *West Virginia*. *Chapman v. Pittsburg & S. R. Co.*, 26 *W. Va.* 299.

Nor would the clause "all the interest of said railroad in property held in trust for it or its benefit," other clauses showing that real property was meant. *Chapman v. Pittsburg & S. R. Co.*, 26 *W. Va.* 299; *adhered to*

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on reargument in 26 W. Va. 328.—REVIEWING Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. (U. S.) 367; Coleman v. Manhattan Beach Imp. Co., 94 N. Y. 229.

20. Property not necessary or not used for purposes of road.—Where a railroad mortgage, which conveys, in general terms, all of its property now owned and which may hereafter be acquired, is qualified by expressions such as, "that may be included in the location of said railroad," or, "used as part of said railroad," and "necessary for the construction, operation, or security thereof" it does not include lands not necessary to the construction and operation of the road, but purchased for the purpose of procuring a cheaper right of way, and with the intention of selling again the portion not needed. *Boston & N. Y. A. L. R. Co. v. Coffin*, 12 Am. & Eng. R. Cas. 375, 50 Conn. 150.

And lands which lie outside of the company's right of way and are not needed for the use of the road, and which have been omitted by mistake from a deed conveying lands to a third party, will not be covered by the mortgage, but may be decreed to be conveyed to said third party. *Boston & N. Y. A. L. R. Co. v. Coffin*, 12 Am. & Eng. R. Cas. 375, 50 Conn. 150.

But the above mortgage will cover lands purchased after it is made, and needed for, and used in connection with, the road, though the legal title is in the president and treasurer of the company in trust for the company, such as lands used for depots, etc. *Boston & N. Y. A. L. R. Co. v. Coffin*, 12 Am. & Eng. R. Cas. 375, 50 Conn. 150.

The power to mortgage conferred by Ind. Act of 1851 (Local Laws 1851, p. 43) has reference only to such lands and property as the company can lawfully acquire, and cannot therefore include such as are not necessary to the purposes of the road. *Taber v. Cincinnati, L. & C. R. Co.*, 15 Ind. 459.

In construing a mortgage given by a corporation upon its railroad which minutely designates the line of road, specifies all the lands, of an average width of sixty feet, upon which the road is located necessary for the use and operation of the road, its rolling stock, superstructures of every kind, and then adds, "and all rights, privileges, franchises, and property whatsoever now belonging or hereafter to belong to or to be acquired by said party of the first part"—*held*, that it should be construed as con-

veying only such property as was or would be employed and be useful or necessary in the construction, maintenance, operation, preservation, or security of the railroad mortgaged, and that it did not include other property owned by the corporation not used, or to be used, in connection with the railroad, in promotion of the direct and proximate purpose of its construction. *State v. Glenn*, 18 Nev. 34, 1 Pac. Rep. 186.

A mortgage executed by a railroad company on "the road" of the company, "whether made or to be made, acquired or to be acquired, and all property, real or personal," of the company, "whether now owned or hereafter to be acquired, used, or appropriated for the operating or maintaining the said road," is not a lien upon real estate of the company, then owned or afterwards acquired, which has not been used or appropriated for operating or maintaining the road. *Walsh v. Barton*, 24 Ohio St. 28.

A railroad holding town lots adjoining its roadbed, ostensibly for a basin to connect with river navigation, having mortgaged the entire road with its "corporate privileges and appurtenances," but without specific mention of the lots, became embarrassed, and the mortgaged property was sold. The lots were again sold under execution against the company and bought by plaintiffs therein. In ejectment by them against the purchasers under the mortgage, the jury were instructed that if the lots were not appurtenant to the road, and essential and indispensably necessary to the enjoyment of its franchises, and as such included in the mortgage, plaintiffs were entitled to recover, referring the question of appurtenance and necessity to them as matters of fact. *Held*, not error, *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465.

A company was authorized to hold so much land, not above five acres in any one place, and improvements necessary for water stations, etc. It purchased land which was not used for the road, and mortgaged all its property and franchises, with the right to maintain possession "according to the effect and meaning" of the acts of incorporation. *Held*, that the land purchased was not included in the mortgage. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

The Vermont Cent. R. Co., for the purpose of securing the payment of its bonds, conveyed in trust and mortgage to certain

persons its "railroad and franchise, and also all the station houses, engine houses, etc., and other appendages, with all the lands thereto belonging and intended for the use and accommodation of said road."

Held: (1) that only such land of the company passed by this conveyance, as was so connected with, and used by the company for, the railroad that it would have been authorized to take it compulsorily under the provisions of its charter, and that, if it was so connected and used, it was immaterial whether it actually was taken by proceedings *in invitum* or purchased by the company; (2) that the words in the conveyance, "intended for the use and accommodation of said road," applied to the intention of the company in respect to the use of the land at the time the mortgage was executed, and not the original design of the company when it made the purchase; (3) that such mortgage conveyed the full and entire surveyed line of the railroad to its whole extent. *Eldridge v. Smith*, 34 Vt. 484.—QUOTING *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. (N. Y.) 284. REVIEWING *Vermont C. R. Co. v. Burlington*, 28 Vt. 193.

21. Canal boats.—A railroad mortgage which conveys its real estate, railroad, bridges, ferries, locomotives, engines, cars, tenders, shops, tools, and machinery, and "all other personal property whatever in any way belonging or appertaining to the said railroad," does not include canal boats purchased with the corporate funds, and run in connection with the railroad, but beyond its terminus. *Parish v. Wheeler*, 22 N. Y. 494.—REVIEWED IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 164.

22. Elevator.—Where a horse railroad entered upon land with the consent of the owner (the land being subject to a mortgage), and constructed thereon, at great expense, an elevator to raise its cars from the bottom to the top of a hill—*held*, that the elevator was subject to the encumbrance of the mortgage, and that the company would not be entitled to redeem the land on which it had constructed the elevator by paying to the mortgagee the value of the land at the time when the company took possession. And the company having taken, *pendente lite*, proceedings to condemn the land under its charter, and having caused the commissioners

to appraise only the value of the land without the improvements, such condemnation, being *pendente lite*, could not avail the company, as against the right of the mortgagee to the land and the improvements. *Booraem v. Wood*, 27 N. J. Eq. 371; *reversed in* 28 N. J. Eq. 450, 14 Am. Ry. Rep. 202.—FOLLOWED ON OTHER POINT IN *Mutual Life Ins. Co. v. Easton & A. R. Co.*, 38 N. J. Eq. 401.

23. Guaranties, rent charges, etc.

—An agreement of one company to make good the net earnings of another so as to meet interest on its bonds is not covered by a mortgage of the property of the indebted company given to secure its bonds. *Metropolitan Trust Co. v. New York, L. E. & W. R. Co.*, 45 Hun 84, 9 N. Y. S. R. 415.

Two railroad companies entered into an agreement which was called a lease, but which the courts construed to give the lessee the ownership of the entire line subject to the right of the lessor to re-enter upon default of payment of the rent, and subject to certain rights and interests of the mortgage bondholders. Subsequently the roads consolidated, and issued bonds secured by a mortgage on the road. *Held*, that the mortgage, as to the lessor company, was only on the rent charge reserved on the road, and it had a right to change the security and issue bonds and execute a new mortgage. *Hazard v. Vermont & C. R. Co.*, 12 Am. & Eng. R. Cas. 388, 17 Fed. Rep. 753.—FOLLOWING *Vermont & C. R. Co. v. Vermont C. R. Co.*, 34 Vt. 1; *Langdon v. Vermont & C. R. Co.*, 54 Vt. 593.

24. Municipal aid bonds.—Under the rule that the whole of an instrument should be construed together, and not detached parts, a clause of a mortgage conveying all the "property" of a railroad, the word "property" being followed by the qualifying phrase "that is to say," accompanied by a detailed description of specific things such as enter into the construction of a railroad—*held*, not to pass county bonds previously granted to the road to aid in its construction. *Smith v. McCullough*, 3 Am. & Eng. R. Cas. 159, 104 U. S. 25.—REVIEWED IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364.

25. Office furniture, and other personal property.—Office furniture, suitable in kind and of a necessary amount, provided for the use of the employés of the

company in the performance of their daily duties, as well as for the directors to transact their business, is covered by a mortgage of the property of the company; and at the instance of the trustee will be protected by injunction against the attempts of a judgment creditor who has levied thereon, and threatens to sell it, when it appears that the other mortgaged property would be insufficient to pay in full the mortgage debt. *Ludlow v. Hurd*, 1 *Disney (Ohio)* 552.

A provision in a railroad mortgage which describes the property conveyed as "all and singular the railways, rails, bridges, station houses, depots, shops, buildings, tools, cars, engines, equipments, machinery, fuel, materials, privileges, and property, real or personal, belonging, or which may hereafter belong, to the grantors and be used as a part of said railroad, or appertain thereto, or necessary for the construction, operation, or security thereof, and all the rights and franchises of said company, with the tolls, incomes, issues, and profits thereof," includes a quantity of office furniture in one of the company's offices. *Raymond v. Clark*, 46 *Conn.* 129.—QUOTING *Hudson v. Whiting*, 17 *Conn.* 487; *Meyrick v. Meyrick*, 2 *C. & J.* 223; *Ringer v. Cann*, 3 *M. & W.* 343; *Jackson v. Stevens*, 16 *Johns. (N. Y.)* 110.

A mortgage on the roadbed of the Omaha Horse R. Co. "now or hereafter to be constructed, including all the ties, iron, side tracks, turntables, and other appurtenances belonging to or connected therewith; also all one-horse cars of the said company, either now owned or hereafter to be acquired by said company; also the franchise of said company, with all the rights, privileges, and property pertaining thereto"—construed not to include certain personal property. *Millard v. Burley*, 13 *Neb.* 259, 13 *N. W. Rep.* 279.

26. Property of consolidating road.—It seems that a consolidated railroad company may assume debts owed by one of the companies, and secure it by mortgage. *Wright v. Bundy*, 11 *Ind.* 398. See also *Meyer v. Johnston*, 8 *Am. & Eng. R. Cas.* 584, 64 *Ala.* 603.

27. Subscriptions to stock.—An unpaid balance of a subscription to the capital stock of a railroad corporation is not covered by a mortgage of a railroad constructed and to be constructed, and of its right of way, machinery, implements, and

other property, chattels, and things pertaining to the railroad, and of its charter rights, privileges, and franchises, and also of all its estate, right, title, interest, property and possession, claims and demands whatsoever. *Dean v. Biggs*, 25 *Hun (N. Y.)* 122.

28. Interest of mortgagor as stockholder in another road.—A railroad company which owns stock in a corporation promoted by several railroad companies to construct an elevator to be connected with their respective roads has no specific interest in the elevator constructed by such corporation which it can mortgage. The interest of the railroad company in the elevator is that of a mere stockholder of the company which constructed it. Ownership of stock in a corporation should not be confounded with ownership of its property. *Humphreys v. McKissock*, 46 *Am. & Eng. R. Cas.* 261, 140 *U. S.* 304, 11 *Sup. Ct. Rep.* 779.

Where a railroad company mortgages its road and the "appurtenances" thereunto belonging, such mortgage does not pass an interest of the railroad company as a stockholder of a corporation owning an elevator constructed on land not belonging to the railroad company, and situated at some distance from its road; nor does the stock of the elevator company pass to the mortgagee under such mortgage. *Humphreys v. McKissock*, 46 *Am. & Eng. R. Cas.* 261, 140 *U. S.* 304, 11 *Sup. Ct. Rep.* 779.—DISTINGUISHED IN *Omaha & St. L. R. Co. v. Wabash, St. L. & P. R. Co.*, 50 *Am. & Eng. R. Cas.* 700, 108 *Mo.* 298. REVIEWED IN *New Orleans Pac. R. Co. v. Parker*, 143 *U. S.* 42, 12 *Sup. Ct. Rep.* 364.

2. Tolls and Income.

29. Income, generally.—A railroad mortgage which describes the property conveyed as "the entire works and effects of the company, including all its tolls, income, rents, issues and profits, and alienable franchises," only includes the net income of the road after payment of all expenses, interest on debt while the company remains in possession, and creation of a sinking fund. *Parkhurst v. Northern C. R. Co.*, 19 *Md.* 472.

The general rule is that the mortgagor has a right to the earnings and profits of the mortgaged property until he is interfered with by the mortgagee; but it is competent for the parties to provide in the

mortgage that future earnings shall be held in equity by the mortgagee, in which case the party receiving it will hold it for whoever is entitled thereto. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 Biss. (U. S.) 237.

A mortgagor is chargeable with the income from the mortgaged property so long as he remains in possession and operates it; and an offer in open court to surrender the property to the mortgagee will not avoid such liability. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 Biss. (U. S.) 237.

A railroad company which has paid a higher rate of interest than necessary upon prior encumbrances cannot, in an accounting in favor of income bondholders, charge the difference against the income, when the mortgage securing the bonds contains express provisions against such application. *Barry v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 332, 34 Fed. Rep. 829.—DISTINGUISHING *Ames v. New Orleans, M. & T. R. Co.*, 2 Woods (U. S.) 206. QUOTING *Claffin v. South Carolina R. Co.*, 4 Hughes (U. S.) 12, 8 Fed. Rep. 118.

30. Tolls.—A mortgage by a railroad company does not necessarily convey with it the tolls made by the company in the use of it before possession taken by the mortgagee. *Grats v. Redd*, 4 B. Mon. (Ky.) 178.

The mortgage of the state on the railroad in this case did not embrace either the stock paid in by the stockholders, or the tolls collected by the company in the possession and use of the company. *Grats v. Redd*, 4 B. Mon. (Ky.) 178.

A mortgage of the entire line of a railroad, with all the tolls and revenue thereof, covers not only the line of the road, but all the rolling stock and fixtures, whether movable or immovable, essential to the production of tolls and revenue. *State v. Northern C. R. Co.*, 18 Md. 193.—REVIEWING *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. (N. Y.) 309; *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484.—RECONCILED IN *Morgan v. Donovan*, 58 Ala. 241.

Whether the rights of a corporation to take lands, operating the railway, taking tolls, etc., are susceptible of alienation by mortgage in Canada, *quære*. *Bickford v. Grand Junction R. Co.*, 1 Can. Sup. Ct. 696.

31. Net earnings.—A railroad company may mortgage its future net earnings to secure the prompt payment of interest

accruing on its construction bonds. *Jes-sup v. Bridge*, 11 Iowa 572.

A mortgage of the road, and of the present and subsequently acquired property of a railroad company, executed to secure the payment of its bonds, is, while it retains possession, a prior lien upon the net earnings of the road. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

But where the road is in the control of the court, and operated by a receiver, such earnings are at the disposal of the chancellor, and may be used in paying such claims as are deemed to have superior equities. *Hale v. Frost*, 99 U. S. 389.—DISTINGUISHED IN *American L. & T. Co. v. East & W. R. Co.*, 46 Fed. Rep. 101.

32. Claims for carrying the mails.

—A company mortgaged "all its railroad, with its superstructure, track, and all other appurtenances made, or to be made, with all its rights of way, including depots, etc., and the lands on which they were built," and "all the franchises, privileges, and rights of the railroad company in or to the same," it being stipulated that nothing therein should prevent the company from collecting money due it for stock, subscriptions, or otherwise, "provided no default should have been made in the payment of the principal or interest of the bonds secured by such mortgages." Afterwards the directors voted that the future income should be applied to pay the running expenses and repairs of the road, and next to the payment of a portion of the bonds. Afterwards, default having been made on the payment of the interest on the bonds, the company surrendered to the mortgagees, describing the property as in the mortgage, the mortgagees agreeing to apply the income to the payment of the operatives, and then to taxes and lien taking precedence of the mortgage bonds, and to advance money to complete the road up to a certain point, and to postpone the interest on the bonds until the advances so made should be refunded. At a still later date the road assigned to C., for services rendered by him before the date of the surrender, the amount then due under a contract for carrying the United States mail. *Held*, that neither the mortgage nor the deed of surrender passed the claim assigned to C. *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110.—FOLLOWING *Farmers' L. & T. Co. v. Com-*

mercial Bank, 11 Wis. 207; *Dinsmore v. Racine & M. R. Co.*, 12 Wis. 649.

33. Money earned under contract with express company.—A mortgage by a railroad company of "all its right, title, and interest in and to all and singular its property, real and personal, of whatever nature and description, now possessed or to be hereafter acquired, including all its rights, privileges, franchises, and easements," cannot be regarded at law as including money earned by the road in carrying freight for an express company, under a contract entered into by the express company after the mortgage was made. Nor does it make any difference that the mortgagees took possession of the road and demanded the money of the express company while unpaid. *Emerson v. European & N. A. R. Co.*, 67 Me. 387.

The mortgagees would be entitled to so much as was earned under the contract after they took possession of the road; and possession having been taken after the services were commenced and before they were completed, for which an instalment would be due from the express company, the payments afterwards due could be apportioned between the railroad corporation and its mortgagees. *Emerson v. European & N. A. R. Co.*, 67 Me. 387.

34. Steps requisite to entitle mortgagee to tolls, income, etc.—Mortgagees having the right to take possession of and operate a railroad in default of payment of interest, and to receive the tolls, incomes, and earnings, must take the necessary steps as prescribed in the mortgage to entitle themselves to such tolls, incomes, and earnings by virtue of the mere fact that they are mortgagees. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

The mortgagee of a railroad can demand the rents, profits, etc., as a legal right only in virtue of an express contract, and this he must do in the mode and manner provided by such contract. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.—QUOTING *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.

A mortgagee of a railroad who has no specific pledge of the rents and profits of the mortgaged premises cannot claim them as a legal incident to, or a legal right growing out of, his mortgage. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.

Where a railroad mortgage covers in-

come, the mortgagor is not bound to account to the mortgagee for earnings while the property is in his possession until a demand is made therefor, or for a surrender of possession under the mortgage; but the commencement of a suit in equity to enforce a surrender of possession to the trustees under the mortgage in accordance with its terms is a demand for possession, and if the trustees are then entitled to possession the company must account from that time. *Dow v. Memphis & L. R. R. Co.*, 33 Am. & Eng. R. Cas. 12, 124 U. S. 652, 8 Sup. Ct. Rep. 673; reversing 20 Fed. Rep. 768.—FOLLOWED IN *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 259, 36 Fed. Rep. 221.

Under Minn. Gen. St. of 1878, ch. 34, § 70, a railway company may, in a mortgage executed by it, pledge the income of the property, and to make such pledge effectual may stipulate in the mortgage that upon default the trustee named in the mortgage may take possession, operate the railway, and receive its earnings. Gen. St. 1878, ch. 75, § 29, does not apply to such a mortgage. *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 246, 53 N. W. Rep. 1151.

Under such a stipulation the trustee may upon default, without bringing an action to foreclose, take possession, and if he be prevented may have an action to be put in possession. *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 246, 53 N. W. Rep. 1151.

Where the trustee in the junior of a series of such mortgages, each containing such a pledge and stipulation, brings an action to foreclose, making the prior mortgagees parties defendant, and obtains the appointment of a receiver to take possession of and operate the railroad and receive its earnings, the senior mortgagees may apply to the court to have the receiver hold for and pay to them so much of the net earnings as is covered by their mortgages, and are thereupon entitled to receive the same. *Seibert v. Minneapolis & St. L. R. Co.*, 52 Minn. 246, 53 N. W. Rep. 1151.

3. After-acquired Property.

35. Power to mortgage after-acquired property, generally.—In the absence of a charter restriction, a railroad corporation may take and hold real estate not actually used for the construction of the road, either by grant or subscription to the capital

stock, to be utilized by a sale, or mortgage, or otherwise, as the interest of the company may require; and where a company issues its mortgaged bonds to raise money to construct its road, it may use part of the bonds in acquiring lands, including the lands in the mortgage as further security for all the bonds. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525.

Where a company is authorized to borrow money and mortgage the whole or any part of its road, property, or income then existing, or thereafter to be acquired, the company may not only mortgage its present property and rights, but such as it may thereafter acquire, and such after-acquired property will be subject to be sold on foreclosure; and this seems to be the rule, independent of the authority given in the charter. *Quincy v. Chicago, B. & Q. R. Co.*, 94 Ill 537. *Parker v. New Orleans, B. R. & V. R. Co.*, 33 *Fed. Rep.* 693; reversed in 143 U. S. 42, 12 *Sup. Ct. Rep.* 364. *Ludlow v. Hurd*, 1 *Disney (Ohio)* 552. *Pierce v. Milwaukee & St. P. R. Co.*, 24 *Wis.* 551.

The New Jersey Southern R. Co. (formerly the Raritan & Delaware Bay R. Co.), under the chartered powers of the latter company (N. J. Pamph. Laws 1854, 530), to which it succeeded, had power to mortgage after-acquired property. Such mortgage covers railroad stock (of another railroad company) subsequently purchased by the mortgagors. And it is not necessary to its validity, as to the stock, that it should have been filed in accordance with the provisions of the "act concerning chattel mortgages." Such mortgage, even if the stock is within the act concerning chattel mortgages, is, as to the stock, good as against everybody but those who are hindered or defeated. *Williamson v. New Jersey Southern R. Co.*, 26 *N. J. Eq.* 398.

Where a mortgage is executed under the authority of N. Y. Gen. Railroad Act, § 28, subd. 10, authorizing railroad companies to borrow money and to mortgage their corporate property and franchises, and embraces all of the company's property, franchises, rights, and interests, acquired and to be acquired, the validity of the mortgage is not affected by the fact that all of the right of way had not been acquired when the mortgage was recorded, or that the entire road had not been located, or, if located, it was afterwards changed. *Seymour v.*

Canandaigua & N. F. R. Co., 14 *How. Pr.* (N. Y.) 531, 25 *Barb.* 284.

A supplement to an act incorporating a railroad company authorized it to mortgage its road, and any real or personal property belonging to it, "for the purpose of carrying out the privileges granted by the act and the several supplements thereto incorporating the same." Said supplements, and later ones, authorized various extensions of the railroad. *Held*, that the power to mortgage extended to future extensions of the railroad subsequently authorized, and all other real and personal estate of the company, without regard to the time of acquisition; it was not exhausted when the railroad, as authorized at the date of the supplement, was completed, but justified a mortgage to carry out any power then or afterwards granted to the company. *Gloninger v. Pittsburgh & C. R. Co.*, 46 *Am. & Eng. R. Cas.* 276, 139 *Pa. St.* 13, 21 *Atl. Rep.* 211.

A charter provided that "the directors of the company may, from time to time, by deed, subject and charge, in such manner as they think fit, the said railroad and the future lands, goods, and other property and effects, tolls, income, and profits whatsoever of the company." *Held*, that this provision authorized the directors to mortgage, from time to time, property after it was acquired, but not to mortgage by one instrument both existing and after-acquired property. *Lloyd v. European & N. A. R. Co.*, 18 *New Brun.* 194.

36. What after-acquired property will pass.*—(1) *In general*.—Where a company mortgages its road, as constructed, and to be constructed, with all of its property now owned, or that may be hereafter owned, the mortgage becomes a valid lien upon all of the property described therein now owned or subsequently acquired by the company. *Seymour v. Canandaigua & N. F. R. Co.*, 14 *How. Pr.* (N. Y.) 531, 25 *Barb.* 284. *Meyer v. Johnston*, 53 *Ala.* 237, 15 *Am. Ry. Rep.* 467.—REVIEWED IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 *Sup. Ct. Rep.* 364.

Where a mortgage given by a railroad company contains the "after-acquired property" clause, such mortgage is made there-

* Property that may be included in railway mortgage, including after-acquired property, see notes, 4 *AM. & ENG. R. CAS.* 511; 9 *L. R. A.* 140.

by to cover not only property then owned by the company and described in it, but also property coming within the words of the description, and subsequently acquired, whether by legal title or by a full equitable title; and there are no equities to set aside this rule. *Central Trust Co. v. Kneeland*, 46 *Am. & Eng. R. Cas.* 268, 138 *U. S.* 414, 11 *Sup. Ct. Rep.* 357.—FOLLOWED IN *Augusta, T. & G. R. Co. v. Kittel*, 52 *Fed. Rep.* 63, 2 *U. S. App.* 409, 2 *C. C. A.* 615; *Brady v. Johnson*, 75 *Md.* 445.

Obviously it would be difficult, if not impracticable, for a railway company to specifically describe future property that it might acquire. When such property is mortgaged, the mortgage attaches to property subsequently acquired as if it had been described specifically in the act; it is entitled to the same effect in law as if it had been a judicial mortgage. *Parker v. New Orleans, B. R. & V. R. Co.*, 33 *Fed. Rep.* 693; *reversed in* 143 *U. S.* 42, 12 *Sup. Ct. Rep.* 364.

Mortgages of railroad companies executed under statutory provisions authorizing them to pledge their "entire roads, franchises, fixtures, and equipments, with the income and resources thereof, together with the capital stock," and declaring that such mortgages shall be "a good and substantial lien, as well upon the personal as real property of the company," where they contain apt language to that effect, attach to and cover future acquisitions of property for the uses of the road. *Coopers v. Wolf*, 15 *Ohio St.* 523.—FOLLOWING *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.

The cast-off articles, fragments, and old materials once forming part of a road, or used in its operation, still continue under a mortgage of the road, if a proper and judicious management of the road requires that they should be recast or exchanged for new articles for the uses of the road. *Coopers v. Wolf*, 15 *Ohio St.* 523.

(2) *Illustrations.*—A company executed a mortgage covering its road "as said road is or may be hereafter constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars, and other appurtenances thereto belonging." Subsequently by consolidation the road passed into the hands of another company, and the consolidated company bought a lot on the

line of the road, and built a hotel thereon, and insured it for the benefit "of the parties interested," and subsequently it was destroyed by fire. *Held*, that the hotel was appurtenant to the railroad, and that the insurance thereon was payable to the receiver of the original road for the benefit of the mortgagees. *United States Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 *Fed. Rep.* 480.

Where a charter authorizes a company to mortgage its property to raise money for the construction, equipment, and operation of its road, and it executes a mortgage of certain specific property, "and all property, real or personal, now belonging, or that may at any time hereafter belong, to said company, and to be used as a part of said railroad, and be appurtenant thereto, and necessary for the construction or operation thereof," the description of after-acquired property is sufficiently definite, and the mortgage creates a lien upon such property as the company may thereafter acquire for the use of the road. *Buck v. Seymour*, 46 *Conn.* 156.—QUOTING *Rowan v. Sharps' Rifle Mfg. Co.*, 29 *Conn.* 283. REVIEWING *Walker v. Vaughn*, 33 *Conn.* 577.

Such company purchased personal property to be used for five years on a leased road, and then on its own road. The company was authorized to lease "any connecting road," but at the time of the lease a short space was open between the two tracks, which was afterwards closed. *Held*, that this did not prevent the mortgage lien from attaching to such property at the time of the purchase. *Buck v. Seymour*, 46 *Conn.* 156.

In pursuance of the statute the mortgage trustees took possession of the road, and the railroad directors surrendered without reserve the mortgaged property to the company by a written declaration that they surrendered all the mortgaged property. *Held*, that the surrender was a constructive delivery of the after-acquired property, and created a lien thereon in favor of the bondholders, even if the mortgage itself was not sufficient to create a lien. *Buck v. Seymour*, 46 *Conn.* 156.

If an act of the legislature gives a railroad corporation authority to issue bonds for a loan of money, and for security to make a mortgage to trustees of all the property, and all the rights, franchises, powers, and privileges of the corporation, and in the

mortgage to give the trustees power, on breach of the condition, to sell the real and personal estate, and all the rights, franchises, powers, and privileges named in the mortgage, by a deed which should convey to the purchasers all the rights, franchises, powers, and privileges which the corporation possessed, and the use of the railroad, with all its property and rights of property, for the same purposes and to the same extent that the corporation could use the same if the deeds had not been made, subject to the same liability as to the use of the road that the corporation would have been under if the deed had not been made, and the corporation issues bonds and make such a mortgage, the trustees will hold under it property afterwards acquired by the road against other creditors who claim same property by virtue of later mortgages. *Pierce v. Emery*, 32 N. H. 484.—DISAPPROVED IN *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 2 Am. & Eng. R. Cas. 414, 58 Miss. 896. REVIEWED AND DISTINGUISHED IN *Dinsmore v. Racine & M. R. Co.*, 12 Wis. 649.

Such a mortgage is in substance and effect a conveyance under the act of the road and corporation as an entire thing, and subsequently acquired property becomes part of the original subject of the mortgage by accession. *Pierce v. Emery*, 32 N. H. 484.—REVIEWING *Willink v. Morris C. & B. Co.*, 4 N. J. Eq. 377.

A statutory railroad mortgage described the property conveyed as the intended railroad, its real property, carriages, engines, and other property. *Held*, that the words "other property" would include both chattels and real property, and would include iron subsequently purchased, the mortgage covering both present and after-acquired property. *Lanark v. Cameron*, 9 U. C. C. P. 109.

37. What after-acquired property will not pass.—A mortgage of property which purports to act *in presenti* is void as to property that the mortgagor does not then own; but a mortgage of "all present and future-to-be-acquired property" of a railroad is valid, and the mortgage will attach to the after-acquired property. *Pennock v. Coe*, 23 How. (U. S.) 117.—FOLLOWED IN *Central Trust Co. v. Kneeland*, 46 Am. & Eng. R. Cas. 268, 138 U. S. 414; *Scott v. Clinton & S. R. Co.*, 6 Biss. (U. S.) 529.

A mortgage of the property of a railroad

company then owned and such as might be thereafter acquired will not include as part of its realty telegraph poles and wires subsequently placed on the right of way by a telegraph company under a contract with the railroad company. *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 3 McCrary (U. S.) 130, 11 Fed. Rep. 1.

Where a company executes mortgages on two divisions of its road to raise money to complete it, and neither of the mortgages purports to convey materials subsequently acquired, except when they become a part of the road, or were used in operating it, such materials will not be included. *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424.

After such company had executed the first mortgage it acquired certain chairs for the use of the railroad, which it had in possession, but had not yet put in place, when it executed a second mortgage to other parties, which declared it to be subject to the lien of the first mortgage. *Held*, that the company was not estopped from denying that the chairs were included in the first mortgage as after-acquired property. *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424.

A company mortgaged all the property which it then possessed, or should thereafter acquire, to secure its bonds, and afterwards executed a lease, to which the mortgagee was not a party, in which the lessee agreed to pay interest on the bonds as it matured, if the net earnings of the road should not be sufficient for that purpose. *Held*, that the lease was not "after-acquired property" so as to pass under a foreclosure sale. *Moran v. Pittsburgh, C. & St. L. R. Co.*, 32 Fed. Rep. 878.—DISTINGUISHING *Pittsburg, C. & St. L. R. Co. v. Columbus, C. & I. C. R. Co.*, 8 Biss. (U. S.) 456.

Where a railroad company by virtue of an act of the legislature mortgaged all of the property then owned by both the new and the old portions of the road—*held*, that wood subsequently purchased with the earnings and for the use of the whole road would not pass by the mortgage, and might therefore be attached. *Bath v. Miller*, 53 Me. 308.

Certain persons were "created a body corporate, with succession, with power to acquire and convey all such real and personal estate as may be necessary and convenient to the objects of the incorporation."

The corporation was authorized to construct and maintain a railroad between certain *termini*, and to appropriate, by proper proceedings, lands necessary for its railroad track. *Held*: (1) that under these general powers the corporation had no power to alienate the franchise to be a corporation, or the franchise to construct and maintain a railroad, and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held solely and exclusively for the purpose of the exercise of such franchise; (2) that after the railroad had been constructed and prepared for use things requisite for that use, such as locomotives, cars, and the like, not affixed to the land, being acquired by the corporation, are to be regarded as personal property, subject to alienation and liable for debts; (3) that the corporation could not make a mortgage of any property, such as the above described, to be subsequently acquired, so as to give it validity, in other manner, or to a greater extent, than an individual owner of personal property. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372. —QUOTED IN *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436.

38. When after-acquired land will pass.—A railroad company may convey by mortgage property to be afterwards acquired, and if it convey land to which it has only an equitable title, but to which it afterwards acquires the legal title, that title at once enures to the grantee or mortgagee, both by the express words of the instrument, and by the statutory words of warranty, grant, bargain, sell, and convey. *Swann v. Gaston*, 87 Ala. 569, 6 So. Rep. 386. *Boston & N. Y. A. L. R. Co. v. Coffin*, 12 Am. & Eng. R. Cas. 375, 50 Conn. 150. *Hamlin v. European & N. A. R. Co.*, 4 Am. & Eng. R. Cas. 503, 72 Me. 83.

A mortgage executed by a railroad company on its entire line of road, "as said railroad now is, or may be hereafter, constructed, maintained, operated, or acquired, together with all the privileges, rights, franchises, real estate, right of way, depots, depot grounds, side tracks, water tanks, engines, cars, and other appurtenances thereto belonging," covers land subsequently purchased by the company near one of its depots, and a hotel erected thereon for the purpose of an eating house and hotel, to accommodate the company's employes and passengers, and other persons. *Omaha &*

St. L. R. Co. v. Wabash, St. L. & P. R. Co., 50 Am. & Eng. R. Cas. 700, 108 Mo. 298, 18 S. W. Rep. 1101. —DISTINGUISHING *Humphreys v. McKissock*, 46 Am. & Eng. R. Cas. 261, 140 U. S. 304.

Where a company mortgages its right of way then owned or afterwards acquired, and all stations and station lands, together with its franchise and personal property, and subsequently two individuals purchase certain lands for the use of the company for depot grounds, and assign their contract of sale to the company, which takes possession and pays a part of the purchase money, the lien of the mortgage attaches to such lands as soon as the interest of the company is acquired, and such lien cannot be impaired by subsequent alienation. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114.

And in such case, where the mortgagee took possession of the property under the mortgage upon payment of the balance of the purchase money, he might compel the execution of the conveyance by the vendor to the company. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114.

And where such deed has been executed and left in the hands of a third party, as an escrow, to be delivered on payment of the balance of the purchase money, such mortgagee in possession is entitled to have the deed delivered on full payment, and may record same. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114.

Where a company mortgages its road and all of its right of way, franchises, rolling stock, and other personal property then owned or thereafter to be acquired, and all interest thereto and interest therein, and also all future right thereto and interest therein, with a covenant for further conveyances that might be necessary, the mortgage becomes a valid lien upon any real or personal property subsequently acquired for the use of the road, and superior to a vendor's lien thereon for the purchase money. *Pierce v. Milwaukee & St. P. R. Co.*, 24 Wis. 551. —DISTINGUISHED IN *White v. Nashville & N. W. R. Co.*, 7 Heisk. (Tenn.) 518.

39. When after-acquired realty will not pass.*—A railroad mortgage which purports to cover the right of way,

* As to when a railroad mortgage does not include after-acquired property, or property not directly connected with railroading, see note, 38 AM. REP. 353.

and "also all other property, real and personal, of every kind and description whatever, and wherever situated, which is now owned or which shall hereafter be acquired by the said company, and which shall be appurtenant to, or necessary, or used for the operation of said main line of railroad or any of said branches," does not cover a grant of lands subsequently made by congress to aid in the construction of the road. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 Sup. Ct. Rep. 364; *reversing* 33 Fed. Rep. 693.—QUOTING *Boston & N. Y. A. L. R. Co. v. Coffin*, 50 Conn. 150. REVIEWING *Parish v. Wheeler*, 22 N. Y. 494; *Meyer v. Johnston*, 53 Ala. 237; *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 58 Miss. 846.—DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.*, 143 U. S. 596, 12 Sup. Ct. Rep. 479.—*New Orleans & P. R. Co. v. Union Trust Co.*, 43 Am. & Eng. R. Cas. 458, 41 Fed. Rep. 717.—REVIEWING *Bell v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 785.—*Meyer v. Johnston*, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.

Where a railroad mortgage enumerates certain property as conveyed, and then specifies "all other corporate property, real and personal, of said railroad company, belonging or appurtenant to said railroad, whether it is held and owned or thereafter to be acquired," does not include a tract of land subsequently acquired in consideration of the location of a station thereon, and to be laid off into town lots. *Calhoun v. Memphis & P. R. Co.*, 2 Flipp. (U. S.) 442.

A company mortgaged "all its railroad, with its superstructure, track, and all other appurtenances made or to be made" in, etc., between, etc., and all its right and title "to the land on which said railroad is and may be constructed, together with all rights of way now acquired and obtained, or hereafter to be acquired or obtained, by, etc., and including the engine houses, depots, etc., at, etc., and the lots, etc., of land on which the same are or may be erected, and all the pieces of land which shall be used for depot and station purposes, and all embankments, bridges, etc., and structures thereon, and appurtenances thereto, and all franchises, privileges, and rights of mortgagors in, of, and to, or concerning the same," etc. *Held*, that, as against subsequent mortgage creditors, a lot of woodland, lying seven miles from the road-track, subsequently purchased by the company,

and used by it to supply wood and timber for use on its road, was not covered by this mortgage. *Dinsmore v. Racine & M. R. Co.*, 12 Wis. 649.—QUOTING *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372. REVIEWING *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207. REVIEWING AND APPROVING *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410; *Sangamon & M. R. Co. v. Morgan County*, 14 Ill. 163. REVIEWING AND DISTINGUISHING *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Willink v. Morris C. & B. Co.*, 4 N. J. Eq. 377; *Pierce v. Emery*, 32 N. H. 484; *Seymour v. Canandaigua & N. F. R. Co.*, 25 Barb. 284.—FOLLOWED IN *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110. REVIEWED IN *Morgan v. Donovan*, 58 Ala. 241.

40. After-acquired property not necessary or used for purposes of road.—A railroad mortgage which in general terms includes future acquisitions will not affect any property of the company subsequently acquired except such as is appurtenant to and necessary for building and operating the road and carrying out the purposes for which it was created. *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 2 Am. & Eng. R. Cas. 414, 58 Miss. 896.—APPROVING *Calhoun v. Paducah & M. R. Co.*, 2 Flipp. (U. S.) 442. DISAPPROVING *Pierce v. Emery*, 32 N. H. 484.

So railroad chairs subsequently purchased by the company, but never used in connection with the road, are not included in the mortgage. *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207.—FOLLOWED IN *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110.

A general mortgage of a railroad will not include after-acquired lands unless they are actually used as part of the road in operating it. *Calhoun v. Memphis & P. R. Co.*, 2 Flipp. (U. S.) 442.

And such property as a farm, a hotel, vacant lots, and storehouses subsequently acquired are not included in the mortgage, and may be taken in execution against the company. *Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co.*, 2 Am. & Eng. R. Cas. 414, 58 Miss. 896.

Where a company is authorized to hold such lands as are necessary for depots, stations, warehouses, wood yards, shops, and other legitimate railroad purposes, all such lands, with the buildings erected thereon, will pass by a mortgage of its property; but

not other lands acquired by the company and not needed for railroad purposes. *Seymour v. Canandaigua & N. F. R. Co.*, 14 How. Pr. (N. Y.) 531, 25 Barb. 284.

Where a mortgage conveys all of the property of a railroad company which belongs to the company, or may thereafter be acquired, to be used as a part of the road or appurtenant thereto, "or necessary for the construction or operation thereof," after-acquired property will be regarded as necessary for the road, when it is such as the company, in the reasonable exercise of its discretion, considers it best to procure, though the road might have been operated without it. *Buck v. Seymour*, 46 Conn. 156.

41. When the mortgage lien attaches.*—The lien of a mortgage attaches to after-acquired property the instant it is acquired. *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13.

42. Mortgages of after-acquired property do not displace existing liens.†—A mortgage upon after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If it is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior in point of time. It only attaches to such interest as the mortgagor acquires. *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277, 14 Am. Ry. Rep. 34; reversed in 29 N. J. Eq. 311.

If the company purchase property subject to a lien for the purchase money, such lien is not displaced by the general mortgage. *United States v. New Orleans & O. R. Co.*, 12 Wall. (U. S.) 362.—FOLLOWED IN *Hardesty v. Pyle*, 15 Fed. Rep. 778. QUOTED IN *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 868, 2 U. S. App. 95, 1 C. C. A. 133.

This rule fails when the property purchased is annexed to a subject already covered by the general mortgage and becomes a part thereof, as when iron rails are laid down and become part of the railroad. *United States v. New Orleans & O. R. Co.*, 12 Wall. (U. S.) 362.

Such mortgage does not exempt personal property of the company, in its possession,

* Rights of mortgagees in after-acquired property, see 51 AM. & ENG. R. CAS. 62, *abstr.*

† Mortgage covering after-acquired property does not displace lien on such property, see note, 30 AM. & ENG. R. CAS. 498.

from the levy of execution sued out by judgment creditors of the company. *Coe v. Peacock*, 14 Ohio St. 187.—FOLLOWING *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; *Coe v. Knox County Bank*, 10 Ohio St. 412.

A mortgage with the "after-acquired property" clause in it embraces and creates a charge upon all property subsequently acquired by the corporation mortgagor which comes within the description within the mortgage; and this, not only as to property to which the mortgagor acquires the legal title, but also as to that to which it acquires only an equitable title. The mortgage lien, however, upon the subsequently acquired property only attaches from the time of acquisition by the mortgagor, and subject to all pre-existing liens thereon. *Brady v. Johnson*, 75 Md. 445, 26 Atl. Rep. 49.—FOLLOWING *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296.

A mortgage of after-acquired property attaches to the property in the condition in which it comes into the hands of the mortgagor, subject to such liens and encumbrances as are then on it; and when the legal title is in another, and the property is made subject to such a mortgage by a decree in chancery, by reason of equities of the mortgagor in the premises, the mortgagee takes subject to the rights of third persons acquired before the property was subjected by such a decree to the lien of the mortgage. *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. Ry. Rep. 572; reversing 28 N. J. Eq. 277.

If a company executes a mortgage on its road, franchises, etc., and afterwards occupies land for its uses, and damages are assessed, it has no interest in such land on which the mortgage can operate, and a sale under the mortgage will not convey the title nor extinguish the lien for the damages. *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290.—DISTINGUISHED IN *Fries v. Southern Pa. R. & M. Co.*, 85 Pa. St. 73; *Campbell v. Pittsburgh & W. R. Co.*, 137 Pa. St. 574.

Where a corporation, after making a mortgage covering after-acquired property, becomes owner of a cargo of railroad iron, subject to the lien of the United States for duties, the mortgage will attach to the iron immediately upon its becoming the property of the road, subject to the claim of the government; and if an agreement is made

b. road with certain individuals that they shall pay the duties, allow the road to lay the iron on its track, and retain a lien on the iron for the money so advanced, the lien, after the iron has been delivered to the road under this agreement, cannot be asserted against the mortgage to the trustees unless they had notice of the agreement, and gave their assent, express or implied. *Pierce v. Emery*, 32 N. H. 484.

The assent of the trustees would in such case be binding on the bondholders. *Pierce v. Emery*, 32 N. H. 484.

The trustees under such a mortgage would hold subsequently acquired property as incident to the franchise mortgaged, and as accession to the subject of the mortgage. *Pierce v. Emery*, 32 N. H. 484.

Under the mortgage the trustees were entitled to hold personal property, acquired by the road after the mortgage, against subsequent mortgages of the specific property so acquired. *Pierce v. Emery*, 32 N. H. 484.—APPROVED IN *Howe v. Freeman*, 14 Gray (Mass.) 566. DISTINGUISHED IN *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410. FOLLOWED IN *Hunt v. Bay State Iron Co.*, 97 Mass. 279. NOT FOLLOWED IN *Meyer v. Johnston*, 53 Ala. 237. QUOTED IN *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.

The railroad, before the mortgage to the trustees, owned a cargo of railroad iron, subject to the lien of the United States for duties, and agreed with the plaintiffs that they might pay the duties, that the railroad might lay the iron on its track, and that the plaintiffs, if the road did not repay them the money advanced for duties within a specified time, might take up the iron and hold it for security of the money advanced. *Held*, the iron having passed according to this bargain into the possession of the road, that the lien for the duties was gone, and could not be asserted by the plaintiffs against the mortgage to the trustees, but that the contract was valid between the parties to it, and that if the trustees had notice of it, and assented to it, the contract would be binding in equity on the trustees and bondholders. *Pierce v. Emery*, 32 N. H. 484.

43. New lines of railway purchased subsequent to the mortgage.—Prior to the purchase of a railroad the purchasing company had executed a mortgage upon all its railroad and property

acquired or to be acquired. *Held*, that, inasmuch as the road purchased was within its chartered limits, and might have been constructed if it had not been purchased, the mortgage extended to and covered the road when purchased the same as it would have done had the company itself constructed it. *Branch v. Jesup*, 9 Am. & Eng. R. Cas. 558, 106 U. S. 468, 1 Sup. Ct. Rep. 495. *Branch v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 481.

Where the granting clause of a railroad income mortgage subjecting to the lien the "line of railroad belonging or hereafter to belong" to the mortgagor is qualified by a description of the line which follows it, and the directors are required to set apart for payment of the interest on the income mortgage bonds the net income derived from the road after deducting operating expenses and betterments requisite to maintain the line of railroad in first-class condition, the mortgage security is limited to the roads then belonging or thereafter to belong to the railroad company within the termini specified, and the directors cannot deduct from the fund for the payment of the interest, operating and other expenses in connection with new lines acquired by the company. *Spies v. Chicago & E. I. R. Co.*, 40 Am. & Eng. R. Cas. 401, 40 Fed. Rep. 34.

44. Extensions and branch lines constructed after the mortgage.—

Where a company mortgages its main line between designated termini, and the lands of the main line, and franchises acquired and to be acquired, or pertaining thereto, the mortgage does not embrace lands and franchises acquired under a subsequent act of the legislature authorizing an extension of the road from its eastern terminus. *Randolph v. New Jersey W. L. R. Co.*, 28 N. J. Eq. 49, 14 Am. Ry. Rep. 11.—DISTINGUISHED IN *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

In an action to foreclose an equitable mortgage, where it appears that plaintiff's intestate conveyed a certain line of railway property to defendant, the purchase money to be secured by mortgage upon the line conveyed, and upon "such proposed extensions as the company owning and operating the same may elect to include in such mortgage," and that at a stockholders' meeting it was voted to issue bonds in the same character as those sued on, to be secured on

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all the property of the company from H. to P., both constructed and to be constructed, which included the only extension made by the company, the plaintiff's equitable mortgage extended to the part of the line subsequently constructed. *Texas Western R. Co. v. Gentry*, 33 *Am. & Eng. R. Cas.* 46, 69 *Tex.* 625, 8 *S. W. Rep.* 98.

Where a railroad mortgage conveys the road as constructed and to be constructed, with all other property, privileges, and rights, then owned or to be owned by the company, it covers a branch track which is projected and laid out after the mortgage is executed as appurtenant to the main track. *Seymour v. Canandaigua & N. F. R. Co.*, 14 *How. Pr. (N. Y.)* 531, 25 *Barb.* 280. *Coe v. Delaware, L. & W. R. Co.*, 4 *Am. & Eng. R. Cas.* 513, 34 *N. J. Eq.* 266; affirming 31 *N. J. Eq.* 105.

A mortgage of a railroad between designated *termini* which the company had then "located and resolved to construct" will not include ferry property subsequently acquired as an extension of a branch road. *Lloyd v. European & N. A. R. Co.*, 18 *New Brun.* 194.

45. Effect of change of route after the mortgage.—Where a railroad is mortgaged before it is completed, and the mortgage in terms conveys the railroad as then located, with its franchise and all after-acquired property, the lien of the mortgage is not avoided by changing the route after the mortgage is executed. *Eltwell v. Grand St. & N. R. Co.*, 67 *Barb. (N. Y.)* 83; affirmed in 67 *Barb.* 85 n.

46. Effect of mortgages of after-acquired property in equity.—Mortgages of future acquisitions of property by railroad companies are upheld in equity and liberally construed. Equity treats a mortgage of property to be afterwards acquired as a contract binding in conscience, to execute a mortgage upon it at the instant it comes into being, and will enforce specific performance. It does more: it considers it as already done if no specific performance be requested, and then binds everybody to respect the equitable lien, who knows of it, or without knowing of it, has got the property without valuable consideration. *Little Rock & Ft. S. R. Co. v. Page*, 7 *Am. & Eng. R. Cas.* 36, 35 *Ark.* 304. *Stevens v. Buffalo, C. & N. Y. R. Co.*, 45 *How. Pr. (N. Y.)* 104.

While it is well settled that a party can-

not convey subsequently to be acquired goods so as to give the mortgagee a legal title thereto, or a legal right of action against a party seizing them, yet such a conveyance creates in equity a valid lien upon property subsequently acquired. *Butler v. Rahm*, 46 *Md.* 541, 18 *Am. Ry. Rep.* 86.

Especially as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage, and against junior judgment creditors. *Stevens v. Watson*, 4 *Abb. App. Dec. (N. Y.)* 302.

So where a railroad mortgage covers a road not yet completed, it is valid in equity as to lands not yet acquired, and buildings not yet erected, if coming within the class of property conveyed. *Seymour v. Canandaigua & N. F. R. Co.*, 14 *How. Pr. (N. Y.)* 531, 25 *Barb.* 284.

This doctrine applies only where the contract of the mortgagor to transfer such after-acquired property to the mortgagee is such as under the circumstances would be the subject of a decree for specific performance. Where the property is acquired by the mortgagor by a fraudulent purchase, a court of equity will not give effect to the fraud of the mortgagor, and deprive the vendor of his right to rescind the contract of sale and reclaim the property, where no superior equities have intervened. *Williamson v. New Jersey Southern R. Co.*, 29 *N. J. Eq.* 311, 15 *Am. Ry. Rep.* 572; reversing 28 *N. J. Eq.* 278.

4. Rolling Stock.

a. In General.

47. Is personal property.—Engines, cars, and rolling stock of a railroad are chattels, which do not lose their distinctive character as personality by being affixed to the realty. *Williamson v. New Jersey Southern R. Co.*, 29 *N. J. Eq.* 311, 15 *Am. Ry. Rep.* 572; reversing 28 *N. J. Eq.* 277. *Hoyle v. Plattsburgh & M. R. Co.*, 54 *N. Y.* 314; reversing 51 *Barb.* 45, 47 *Barb.* 104.—FOLLOWING *Stevens v. Buffalo & N. Y. C. R. Co.*, 31 *Barb.* 590. NOT FOLLOWING *Farmers' L. & T. Co. v. Hendrickson*, 25 *Barb.* 484. REVIEWING *Minnesota Co. v. St. Paul Co.*, 2 *Wall. (U. S.)* 609.

The rolling stock of a railroad is personal property of the corporation and may be mortgaged and sold for its debts, but should be sold with such precautions, to prevent a sacrifice and produce the highest price, as

the court in its discretion may order. *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372. —QUOTING *Sangamon & M. R. Co. v. Morgan County*, 14 *Ill.* 163; *Pierce v. Emery*, 32 *N. H.* 484; *Boston, C. & M. R. Co. v. Gilmore*, 37 *N. H.* 410. —FOLLOWED IN *Neilson v. Iowa Eastern R. Co.*, 51 *Iowa* 184, 714; *Coopers v. Wolf*, 15 *Ohio St.* 523.

The rolling stock, materials, rails, ties, and other things on hand for running or repairing the road, the platform scales, tools, and implements, and all articles not constituting a part of the roadbed, or firmly affixed to the land, or some building which is itself a fixture, including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and which can be removed without detriment to the building, will not pass by a mortgage of a "railroad, real estate, chattels real, and franchises of the company," but are personal property, and subject to execution as such. *Beardsley v. Ontario Bank*, 31 *Barb. (N. Y.)* 619. —FOLLOWING *Stevens v. Buffalo & N. Y. C. R. Co.*, 31 *Barb.* 590. —FOLLOWED IN *Randall v. Elwell*, 52 *N. Y.* 521.

48. Is not personal, but part of the realty.—A railroad itself, including the ground and superstructure, as well as the depot grounds, buildings, and turntables, and the like, are real estate; and so are its rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company and designed to be attached to the realty. *Palmer v. Forbes*, 23 *Ill.* 301.

But fuel, oil, and the like, which are designed for consumption in the use, and which may be sold and carried away, and used as well for other purposes as in the operation of the road, and when taken away have no distinguishing marks to show that they were designed for railroad uses, are personal property. *Palmer v. Forbes*, 23 *Ill.* 301. —FOLLOWED IN *Hunt v. Bullock*, 23 *Ill.* 320.

As between a mortgagee and an execution creditor rolling stock of a railroad mortgaged with the railroad is part of the realty. *Williamson v. New Jersey Southern R. Co.*, 28 *N. J. Eq.* 277, 14 *Am. Ry. Rep.* 34; *reversed in* 29 *N. J. Eq.* 311. —DISTINGUISHED IN *Central Trust Co. v. Kneeland*, 46 *Am. & Eng. R. Cas.* 268, 138 *U. S.* 414. NOT FOLLOWED IN *Metropolitan Trust Co. v. Pennsylvania, S. & N. E. R. Co.*, 25 *Fed. Rep.* 760.

In Illinois rolling stock is a part of the

realty so as to pass by a conveyance or mortgage of the road. Independently of this the validity of the lien under the laws of Michigan upon the cars conveyed by the deeds of trust is directly averred in the answer, and its validity in that state will be assumed. If valid by the law of the place where created, it will be enforced here. *Michigan C. R. Co. v. Chicago & M. L. S. R. Co.*, 1 *Ill. App.* 399.

49. When a mortgage will include rolling stock.—Where a company executes a mortgage describing the property conveyed as "all the present and future-to-be-acquired property of the company, including right of way and land occupied, and all rails and other materials used therein or procured therefor," it includes rolling stock. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 *Biss. (U. S.)* 35. And see *Hamlin v. Jerrard*, 4 *Am. & Eng. R. Cas.* 488, 72 *Me.* 62.

50. Mortgaging rolling stock on a particular division.—A company owning a railroad and the rolling stock thereof may assign particular portions of the rolling stock to divisions of the road, and mortgage the divisions, with the rolling stock assigned thereto. In a given case, the question whether the company has so mortgaged its rolling stock is to be determined from its intention. *Minnesota Co. v. St. Paul Co.*, 2 *Wall. (U. S.)* 609.

Where the mortgagor of the rolling stock of a certain division of a railroad covenants to designate in a certain manner as belonging to that division such proportion of the whole rolling stock owned by it as the division bears to the entire railway, such mortgage only covers the rolling stock which is designated as belonging to the division named, although the mortgagor has failed to designate the quantity covenanted for. *United States Trust Co. v. Wabash Western R. Co.*, 40 *Am. & Eng. R. Cas.* 397, 38 *Fed. Rep.* 891.

Where rolling stock is purchased for, and designated as belonging to, a certain division of the railroad, the lien of a mortgage upon that division attaches to such rolling stock, if the rolling stock may otherwise be traced, although the designation is subsequently obliterated, as against the mortgagor, or purchasers at a sale under a subsequent mortgage of the entire railroad who take with notice of the first mortgage. *United States Trust Co. v. Wabash Western*

R. Co., 10 Am. & Eng. R. Cas. 397, 38 Fed. Rep. 891.

51. Necessity of recording or filing.—Rolling stock is personal property as between mortgagees and judgment creditors or purchasers, and will not pass as real estate or fixtures under a mortgage thereof executed by the company; nor will it pass as personalty unless the mortgage be filed as a chattel mortgage, according to the requirements of the statute. *Stevens v. Buffalo & N. Y. C. R. Co., 31 Barb. (N. Y.) 590.*—DISAPPROVING *Farmers' L. & T. Co. v. Hendrickson, 25 Barb. 484.* DISTINGUISHING *Mitchell v. Winslow, 2 Story (U. S.) 630; Seymour v. Canandaigua & N. F. R. Co., 25 Barb. 284.* QUOTING *Bishop v. Bishop, 11 N. Y. 126.* RECONCILING *Coe v. Hart, 6 Am. Law. Reg. 27.*—FOLLOWED IN *Randall v. Elwell, 52 N. Y. 521; Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314.*

And where such mortgage is given before the passage of New York Act of 1868, providing that railroad mortgages need not be filed as chattel mortgages if recorded as real estate mortgages, it is void as against a judgment creditor; and a purchaser at execution sale may hold the property as against the mortgagee. *Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314; reversing 51 Barb. 45, 47 Barb. 104.*

Cal. Civ. Code, § 2955, provides that chattel mortgages may be made upon locomotives, engines, and other stock of a railroad company. Section 2957 provides that a mortgage of personal property is void, as against creditors and subsequent purchasers, unless it is accompanied by an affidavit of all the parties that it is made in good faith, and without any design to hinder, delay, or defraud creditors; or acknowledged, proved, certified, and recorded as grants of real estate. *Held, that a mortgage of rolling stock is void, unless the statute is complied with, as against a subsequent attachment. Union L. & T. Co. v. Southern Cal. Motor Road Co., 51 Fed. Rep. 840.*

52. Priority between mortgages of rolling stock.—Where a company divides its road into two sections and mortgages each, but at different times, and both are foreclosed, the rolling stock will belong to the purchaser under the senior mortgage. *Milwaukee & M. R. Co. v. Milwaukee & St. P. R. Co., 6 Wall. (U. S.) 742.*

53. Mortgage of rolling stock is subject to pre-existing liens.—Rolling stock is a chattel personal, not converted into realty by being put upon the railroad, and liens existing upon it when delivered to the company will not thereby be displaced so as to subject the property first to the operation of prior mortgages given by the railroad company upon its road and equipments. *Meyer v. Johnston, 53 Ala. 237, 15 Am. Ry. Rep. 467.*—NOT FOLLOWING *Pierce v. Emery, 32 N. H. 484.*

54. When rolling stock will pass under mortgage of after-acquired property.—Rolling stock acquired by the company after the mortgage and after its consolidation with other companies, whether under its old or its new name, passed by the mortgage, but subject to any valid liens existing at the time of the acquisition; and the rolling stock acquired or used by one while operating the road under a contract with the company, and transferred by him to the New York Guaranty & Indemnity Co., title thereto never having vested in the railroad company, did not pass. *Meyer v. Johnston, 8 Am. & Eng. R. Cas. 584, 64 Ala. 603.*

The provision of the Illinois Constitution of 1870, declaring that rolling stock and other movable property of a railroad shall be personal property, does not change the rule in equity that whenever a mortgage is made by a company to secure bonds, and it includes all personal and after-acquired property, as soon as the property is acquired the mortgage operates upon it so as to prevent a lien by execution. *Scott v. Clinton & S. R. Co., 6 Biss. (U. S.) 529.*—FOLLOWING *Pennock v. Coe, 23 How. (U. S.) 117; Dunham v. Cincinnati, P. & C. R. Co., 1 Wall. (U. S.) 254; Galveston R. Co. v. Cowdrey, 11 Wall. 459.*—REVIEWED IN *Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 311.*

A railroad corporation empowered by law to mortgage its franchise and property, after making a mortgage of all its lands, franchise, and privileges, and "all the locomotive engines, cars, and other articles of personal property whatsoever now owned or used by the corporation, or which it may hereafter own or use," authorized its directors to issue bonds to the amount of \$1,200,000 to pay debts contracted in building and furnishing its road, and to secure such bonds by "an additional or second

mortgage of the road, franchise, and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Pursuant to this authority bonds were issued, and a second mortgage made of all the lands, franchise, and privileges of the corporation, "and the property and premises whatsoever, mentioned, specified, described, or referred unto in the first mortgage." *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage. *Henshaw v. Bank of Bellows Falls*, 10 *Gray* (Mass.) 568.

A railroad company under authority of law mortgaged "all its road, property, rights, liberties, privileges, corporate franchises, incomes, tolls, and receipts then held or thereafter to be acquired" "in trust for the use, benefit, and security of the holders" of certain bonds therein described. *Held*, that the mortgage was a lien upon engines, rolling stock, etc., in actual use by the company and required for the transaction of its business, whether owned at the date of the mortgage or afterwards acquired. *Philadelphia, W. & B. R. Co. v. Woelfper*, 64 *Pa. St.* 366.—EXPLAINED IN *Metropolitan Trust Co. v. New York, L. E. & W. R. Co.*, 45 *Hun* (N. Y.) 84.

55. Mortgages of after-acquired rolling stock.—The general rule is that property not *in esse* cannot be conveyed; but a railroad mortgage of all present and after-acquired property forms an exception to the rule, and such mortgage may include after-acquired rolling stock. *Morrill v. Noyes*, 56 *Me.* 458. *Shaw v. Bill*, 95 *U. S.* 10.

Such a mortgage, in equity at least, will convey subsequently acquired rolling stock as against judgment creditors. *Pennock v. Coe*, 23 *How.* (U. S.) 117.

A railroad mortgage which in terms conveys the road, lands, tracks, buildings, privileges, and franchises, "together with all locomotives, tenders, cars, carriages, tools, and machinery, owned or thereafter to be owned by the company, or in any way belonging to or appertaining to said road and to be used thereon," is a valid conveyance in equity as to property afterwards acquired; and a foreclosure decree declaring such property to be included, and directing a sale thereof, is conclusive as to all persons who are parties or privies to the suit. *Benjamin*

v. Elmira, J. & C. R. Co., 49 *Barb.* (N. Y.) 441; *affirmed* (?) in 54 *N. Y.* 675, *mem.*

The directors of a railroad authorized by a vote of its stockholders "to execute a mortgage of the road with all its franchises" made a mortgage which recited this vote, and in terms conveyed their road, houses, lands, and superstructures, and all their locomotives, cars, tools, and implements, "with all improvements made upon such property, and all additions thereto, by adding new locomotives, cars, and other things;" and the legislature afterwards ratified and confirmed "their proceedings whereby they conveyed, agreeably to the vote of the stockholders, their railroad and property in mortgage." *Held*, that cars subsequently purchased by the corporation were included in the mortgage, although the mortgagees had not taken possession for foreclosure. *Howe v. Freeman*, 14 *Gray* (Mass.) 566.—APPROVING *Pierce v. Emery*, 32 *N. H.* 485.

b. Relative Rights of Mortgagee and Conditional Vendor or Lessor.

56. Position of vendor who reserves title until payment.*—Cars were sold to a mortgaged railroad, and the title retained by the seller until paid for. The contract was not recorded, and the mortgagees claimed the cars were subject to the lien of their mortgage as after-acquired property, and they were sold in a foreclosure suit. *Held*, that, though it was decided that the cars were not subject to the lien of the mortgage, yet, having been sold under it, an order for payment of the price from the fund in court was correct. *Fosdick v. Southwestern Car Co.*, 99 *U. S.* 256.

Cars were sold a railroad on credit, the seller retaining the title until paid for. Subsequently a receiver of the road surrendered the cars to the seller, and the road was sold under a mortgage. The seller then presented a claim for the use of the cars. *Held*, that he occupied the position of a common creditor, and was not entitled to payment as against the claims of the mortgagees. *Huidekoper v. Hinckley Locomotive Works*, 99 *U. S.* 258.—FOLLOWING *Fosdick v. Schall*, 99 *U. S.* 235.—APPLIED IN *United States Trust Co. v. New York, W. S. & B.*

* Conditional sale or lease of rolling stock, see note, 57 *AM. & ENG. R. CAS.* 239.

R. Co., 25 Fed. Rep. 800. FOLLOWED IN *Burnham v. Bowen*, 111 U. S. 776.

The vendor of rolling stock to an improvement company by his contract of sale reserved title thereto until payment of the purchase money. The improvement company supplied the rolling stock to a railroad company in order to enable the latter to raise money on bonds secured by mortgage on its railroad and equipments. *Held*, in a suit to foreclose such mortgage, that the original vendor, having no notice of equities existing between the purchasers of the bonds of the railroad company and the improvement company, was entitled to the possession of the rolling stock, title to which he had retained. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 864, 2 U. S. App. 106, 1 C. C. A. 139.—FOLLOWING *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 850.

But where said improvement company has been the means of placing the bonds of the company secured by the mortgage, it is estopped from setting up title to the rolling stock as against the bondholders, and the car company cannot take title, or obtain any advantage, by a resale of the rolling stock by the improvement company back to the car company. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 864, 2 U. S. App. 106, 1 C. C. A. 139.

A railroad company executed a mortgage to secure the equipment of its road, conveying its present and after-acquired property. Subsequently an improvement company undertook to equip the road, and purchased rolling stock from a car company under a conditional sale by which the car company retained title until the price was fully paid. *Held*, that the car company might intervene in a foreclosure proceeding and claim the rolling stock. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 865, 2 U. S. App. 120, 1 C. C. A. 130.—FOLLOWED IN *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 875.

Where a vendor of rolling stock intervenes in a foreclosure proceeding and claims the rolling stock under a conditional sale by which he retained title until the property was paid for, and it appears that the rolling stock has increased ten per cent. in value since it was sold, in determining the amount that should be paid to the intervener to discharge his claim the ten per cent. should be added to the original cost

before deducting a certain annual percentage for wear and tear. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 875, 2 U. S. App. 113, 1 C. C. A. 140.—FOLLOWING *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 865.

The petitioner sold to a railroad company a locomotive upon the condition that it should be paid for on delivery. It was delivered, but was not paid for. The vendor, without asserting its right to repossess itself of the locomotive, sued to recover the price, and by garnishment and judgment secured partial satisfaction. *Held*, that the delivery, in the first instance conditional, became absolute by the conduct of the vendor, so that the latter had no reserved lien upon the locomotive. *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 9 L. R. A. 140, 46 N. W. Rep. 301.

More than six months after the sale the road was placed in the hands of a receiver at the suit of the holders of mortgage bonds to foreclose their mortgages, given long before the sale, and covering all the property of the company, present and prospective, including its earnings. Nearly a year after the appointment of the receiver the vendor applied to the court for an order requiring the payment of the balance of its debt out of the earnings of the receivership. *Held*, that the debt was more properly to be classed with the general debts of the corporation than with those incurred for current expenses proximately connected with the operation of the road by the receiver, and hence the court properly refused to allow this claim as one equitably entitled to preference over the claims of the bondholders secured by mortgage (antecedating the sale of the locomotive) upon the earnings of the road. *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115, 9 L. R. A. 140, 46 N. W. Rep. 301.

57. Priority between mortgage and rentals of rolling stock.—Under railroad mortgages, rentals of rolling stock under agreements by which the title to the stock is retained by the lessor and only acquired by the lessee upon the payment of certain sums by way of rental are, so far as concerns rentals accruing during the possession of the lessee, not entitled to any equitable priority over the lien of a mortgage in so far as such rentals accrued before the appointment of a receiver in proceedings to foreclose such mortgage. *Kneeland*

v. American L. & T. Co., 43 *Am. & Eng. R. Cas.* 519, 136 *U. S.* 89, 10 *Sup. Ct. Rep.* 950.—QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 *Am. & Eng. R. Cas.* 301, 46 *Fed. Rep.* 26.

Where a receiver of a railroad is appointed at the suit of a judgment creditor, and thereafter the possession of the railroad is transferred to a receiver subsequently appointed in proceedings to foreclose a mortgage, rental of rolling stock during the first receivership is not entitled to priority over the mortgage claim, when it appears that the receipts during the first receivership did not equal the operating expenses, and there was therefore no diversion of the current earnings, and the rolling stock was not sold upon sale under foreclosure proceedings, but was restored to the lessors. *Kneeland v. American L. & T. Co.*, 43 *Am. & Eng. R. Cas.* 519, 136 *U. S.* 89, 10 *Sup. Ct. Rep.* 950.—DISTINGUISHED IN *Kneeland v. Bass Foundry & M. Works*, 48 *Am. & Eng. R. Cas.* 675, 140 *U. S.* 592. QUOTED IN *Finance Co. v. Charleston, C. & C. R. Co.*, 52 *Fed. Rep.* 678. REFERRED TO IN *Union L. & T. Co. v. Southern Cal. Motor Road Co.*, 51 *Fed. Rep.* 106.

A railroad mortgage covering after-acquired property does not attach to rolling stock which a third person subsequently places on the road under a contract by which the company does not obtain title. *Hardesty v. Pyle*, 15 *Fed. Rep.* 778.—FOLLOWING *United States v. New Orleans R. Co.*, 12 *Wall. (U. S.)* 362. QUOTING *Fosdick v. Schall*, 99 *U. S.* 251.

Where the owner of rolling stock places it upon a railroad under a lease and is to bear all the loss and deterioration, and a foreclosure proceeding is referred to a master to ascertain a reasonable rent for the use of the rolling stock, eight per cent. will be deemed too low. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 *Biss. (U. S.)* 237.

58. Car-trust leases.*—Where a railroad company obtains rolling stock under its own contracts with car builders, the fact that certain car-trust certificates are issued under an alleged lease by which the company does not obtain title until the rolling stock is fully paid for, which certificates in fact are but mortgage bonds, the lien created thereby is inferior to a prior mortgage given by the company upon all of its present

and after-acquired property. *Central Trust Co. v. Ohio C. R. Co.*, 36 *Am. & Eng. R. Cas.* 299, 36 *Fed. Rep.* 520.—QUOTING *Frank v. Denver & R. G. R. Co.*, 23 *Fed. Rep.* 123.

The owner of cars, in the hands of a railroad company under a car-trust lease which reserved to the owner the right to reclaim its property upon default in the payment of rent, intervened in proceedings to foreclose a mortgage, and petitioned the court to direct the receiver to restore the cars within thirty days. The cars were not restored, but payments of rent were made to the owner from time to time by applying thereon amounts due to the receiver for freight transported in the same manner as had been done previous to his appointment. The use of the cars was, without objection by the bondholders or the trustee, in the receiver. Subsequently the owner of the cars presented another petition, praying that an order be entered directing the receiver to pay to it the amount due on the basis of the car-trust contract, and that such indebtedness be decreed a prior lien, or charged upon the earnings as well as the property embraced in the mortgages. *Held*, that the action of the receiver in continuing to use the cars, and the failure of the bondholders to object to such continued use, did not amount to a conversion of the property embraced in the car-trust agreement, and that the prayer of the petition must be refused. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 43 *Am. & Eng. R. Cas.* 436, 42 *Fed. Rep.* 6.—APPLYING *Union Trust Co. v. Illinois Midland R. Co.*, 117 *U. S.* 479, 6 *Sup. Ct. Rep.* 809. DISTINGUISHING *Burnham v. Bowen*, 111 *U. S.* 776, 4 *Sup. Ct. Rep.* 675; *Miltenberger v. Logansport C. & S. W. R. Co.*, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140.

59. Necessity of recording the conveyance.—Cars sold and delivered to a railroad company in Illinois under an unrecorded written agreement that the title shall remain in the seller until paid for are not subject to the lien of a prior mortgage given by the road on its then existing property, and on all after-acquired property. Such contract is valid between the parties thereto, and the mortgages of the road could obtain no better title than their mortgagor had. *Fosdick v. Schall*, 99 *U. S.* 235.—DISTINGUISHING *Hervey v. Rhode Island Locomotive Works*, 93 *U. S.* 664;

* See also CAR TRUST ASSOCIATIONS, 2.

Green v. Van Buskirk, 5 Wall. (U. S.) 307; *Murch v. Wright*, 46 Ill. 488. — DISTINGUISHED IN *American L. & T. Co. v. East & W. R. Co.*, 46 Fed. Rep. 101. FOLLOWED IN *Fosdick v. Southwestern Car Co.*, 99 U. S. 256; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258. REVIEWED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26.

In such case possession of the cars by a receiver of the road, pending a foreclosure, adds nothing to the title of the mortgagees, and does not affect an order of court directing the receiver to return the cars to the seller when it is adjudged that he is entitled thereto. *Fosdick v. Schall*, 99 U. S. 235. — FOLLOWED IN *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 42 Am. & Eng. R. Cas. 26, 41 Fed. Rep. 551; *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182. QUOTED IN *Quincy, M. & P. R. Co. v. Humphreys*, 28 Abb. N. Cas. (N. Y.) 332; *Hardesty v. Pyle*, 15 Fed. Rep. 778; *McIlhenny v. Binz*, 80 Tex. 1. RECOGNIZED IN *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 Fed. Rep. 800.

In such case, where the cars are returned to the seller, and the mortgage property sold, the seller only occupies the position of a general creditor in enforcing a balance due him for the use of the cars before their return, a part of which use was by the receiver, and is not entitled to payment from the fund arising from the foreclosure sale as against the mortgage creditors. *Fosdick v. Schall*, 99 U. S. 235. — DISTINGUISHED IN *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 312; *Finance Co. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 678. EXPLAINED IN *Finance Co. v. Charleston, C. & C. R. Co.*, 51 Am. & Eng. R. Cas. 55, 49 Fed. Rep. 693; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. Rep. 787. FOLLOWED IN *Burnham v. Bowen*, 111 U. S. 776. QUOTED IN *Williamson v. Washington City, V. M. & G. S. R. Co.*, 1 Am. & Eng. R. Cas. 498, 33 Gratt. (Va.) 624.

A contract purporting to be a lease of cars whereby the lessee is to pay a certain per cent. on the stock for ten years, at the end of which time they are to become the property of the lessee, is in fact a mortgage, and subject to the Colorado laws relating to recording mortgages. *Frank v. Denver & R. G. R. Co.*, 23 Fed. Rep. 123. — QUOTED

IN *Central Trust Co. v. Ohio C. R. Co.*, 36 Am. & Eng. R. Cas. 299, 36 Fed. Rep. 520.

A contract made in Missouri between a car manufacturer and a railroad whereby, among other things, the company was bound to pay the price of certain cars "loaned to it for hire," either by paying its notes executed for the amount, or by surrendering the cars to be sold to pay it—*held*, to be a mortgage which, under the laws of the state, must be recorded to protect the cars against the lien of an execution by a third party against the company. *Heryford v. Davis*, 2 Am. & Eng. R. Cas. 386, 102 U. S. 235.

A railroad company executed a mortgage to a trust company covering its present and after-acquired property, which was duly recorded. Subsequently the company bought certain cars under an agreement by which the builder retained title until they were fully paid for, but this contract was not recorded. The car builder intervened in a suit to foreclose the mortgage and claimed the cars. A statute of Georgia, where the property was situated, provides that in order to retain title to personal property as against third parties the title must be reserved in writing, and the writing duly executed and recorded as a chattel mortgage. *Held*, that the trust company was not a third party, within the meaning of this statute, and as the statute was only intended for the benefit of subsequent purchasers or creditors, it could not take advantage of the failure of the car builder to record the writing by which the cars were sold. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 868, 2 U. S. App. 95, 1 C. C. A. 133. — QUOTING *United States v. New Orleans R. Co.*, 12 Wall. (U. S.) 362.

A subsequent statute of the state passed in 1889 makes conditional sales of rolling stock valid, but requires that the reservation of title shall be in writing, and recorded within six months from its execution. *Held*, that the statute was intended for the benefit of third parties, and operated as a repeal of the former statute only so far as to provide a different method for the execution of contracts for the conditional sale of rolling stock. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 Fed. Rep. 868, 2 U. S. App. 95, 1 C. C. A. 133.

The above act of 1889 has no application to a contract made before its passage by two foreign corporations for the sale of roll-

ing stock to be used in the state, neither of the two corporations being the owner or operator of a railroad in the state. *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 *Fed. Rep.* 865, 2 *U. S. App.* 120, 1 *C. C. A.* 130.

Where a railroad mortgage covers after-acquired property, it attaches to such property subject to all existing liens and equities. So where cars are furnished before fully paid for, the seller is entitled to a prior lien thereon, whether the contract of sale is properly recorded or not. *Neugass v. Atlantic & D. R. Co.*, 56 *Fed. Rep.* 676.

A contract between the builders of cars and a company for the sale of cars in which it is stipulated that the title should remain in the builders until the cars were paid for, and that upon a failure to pay the builders might take possession and sell the property, is a contract in the nature of a mortgage, and creates a valid lien as between the parties; but where the cars are placed upon the railroad of the purchasers in another state, the lien is not good against creditors or innocent purchasers, unless the contract is recorded according to the laws of the state where the cars are. *Barney & S. Mfg. Co. v. Hart*, (Ky.) 1 *S. W. Rep.* 414.

60. Protection accorded the lien in foreclosure.—Although in proceedings to foreclose a railroad mortgage, and to adjust the claims of intervening creditors, leases of cars by a car company to the mortgagor company, both of which companies are dominated and controlled by substantially the same persons, may be rejected as a basis for ascertaining the amount due the car company for the use of the cars, or the nature of the obligations assumed by the railroad company, or by the receiver appointed, pending such foreclosure; yet the lessor company is entitled to such reasonable rent as it could obtain in the open market for similar cars to be used in the same manner. *Thomas v. Peoria & R. I. R. Co.*, 36 *Am. & Eng. R. Cas.* 381, 36 *Fed. Rep.* 808.—*Quoting Wardell v. Union Pac. R. Co.*, 103 *U. S.* 658.

Parties claiming an equitable lien upon rolling stock furnished to an insolvent corporation, by virtue and to the extent of advancements made on account of the same, will not be entitled to be heard upon petition pending foreclosure proceedings upon a mortgage covering the rolling stock and all other property of the corporation, upon

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which rolling stock other liens are set up by answer, claimed to be paramount to the mortgage of the complainants. *New Jersey Midland R. Co. v. Wortendyke*, 27 *N. J. Eq.* 658; *reversing* 27 *N. J. Eq.* 110.

The lien of a debt for rolling stock upon the foreclosure sale of a railroad will not be transferred from the *corpus* of the mortgaged premises where the payment under the sale is constructive merely. *Vilas v. Page*, 106 *N. Y.* 439, 13 *N. E. Rep.* 743, 12 *N. Y. S. R.* 864, 9 *Cent. Rep.* 466; *affirming* 11 *N. Y. S. R.* 416.

The order creating such a lien was duly made, with a direction that it be entered by the clerk. It was duly filed in the clerk's office and the date of filing indorsed thereon, but through mistake on his part it was not transcribed on the records. *Held*, that the order became effective as an authority to the receiver upon its being filed, and this authority was not affected by the failure of the clerk to enter it. *Vilas v. Page*, 106 *N. Y.* 439, 13 *N. E. Rep.* 743, 12 *N. Y. S. R.* 864, 9 *Cent. Rep.* 466; *affirming* 11 *N. Y. S. R.* 416.

After the beginning of a railroad foreclosure suit and the appointment of a receiver plaintiff intervened, claiming that certain rolling stock was only leased to the company, and praying (1) that the receiver be required to perform the covenants of the lease, (2) or that he redeliver the rolling stock; (3) that the receiver be required to file a statement showing the miles run and the amount received for the use of the cars; (4) and for a reference to ascertain the value of the use of the cars while in the hands of the receiver. The court directed the receiver to deliver the property to the petitioner, and referred the case with direction to the master to ascertain and report the matters generally prayed for, and to "determine and report upon all questions and matters between" the parties. *Held*, that this was not a final decree that would prevent the court from subsequently, on the master's report and answers, finding against the petitioner as to the ownership of the property. *McGourkey v. Toledo & O. C. R. Co.*, 146 *U. S.* 536, 13 *Sup. Ct. Rep.* 170.

III. EXECUTION; REGISTRATION; FILING.

61. Execution, generally.—A mortgage executed to a foreign trust company upon a railroad in Illinois to secure bonds made payable out of the state is not pro-

hibited or made invalid by the law of public policy of the state. *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

Where the assistant secretary of a railroad company who is acting as secretary attaches the seal of the company to mortgages executed by it, with the knowledge of its directors, in establishing the validity of the mortgage it is not necessary that the mortgagee show that he was assistant secretary *de jure*. *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615.

A general power given to a railway to mortgage its property, without specifying the mode of acknowledging or recording the same, or defining the effect of the same, must be exercised in accordance with the general laws relating to mortgages, and the mortgage, when given, will be governed in like manner by the general laws. *Palmer v. Forbes*, 23 Ill. 301.

62. Acknowledgment.—Under Ill. Rev. St. 1845, ch. 57, a *scire facias* does not lie to foreclose a mortgage not duly acknowledged. The statute only applies to mortgages "duly executed and recorded." *Kenosha & R. R. Co. v. Sperry*, 3 Biss. (U. S.) 309.

Defects in acknowledgments of mortgages cannot be cured nor supplied by evidence *aliunde*; and where a mortgage is not acknowledged or proved according to law, the defect is not cured by notice to subsequent purchasers or creditors. *Kenosha & R. R. Co. v. Sperry*, 3 Biss. (U. S.) 309.

Where a railroad company is organized under the laws of one state, and all its property is in that state, the president of the company may while in an adjoining state acknowledge a mortgage of its property. *Hodder v. Kentucky & G. E. R. Co.*, 7 Fed. Rep. 793.

A mortgage of the personal property of a railroad company is not invalid if sworn to by the agents who executed it because they did not sign the oath in behalf of the corporation. *Richards v. Merrimack & C. R. R. Co.*, 44 N. H. 127.

A mortgage or deed of trust by a railroad corporation, embracing all its real and personal property, with its franchise, made in pursuance of express authority in its charter, and recorded in each county through which the road passes, will create a valid and binding lien on its personal as well as its real property, notwithstanding it has not

been acknowledged in accordance with the requirements of the Chattel Mortgage Act. That act has no bearing whatever upon, and was never intended to apply to, railroad mortgages. *Cooper v. Corbin*, 13 Am. & Eng. R. Cas. 394, 105 Ill. 224.

63. Delivery.—Where a mortgage was duly executed, acknowledged, and recorded, and the corporation treated it as existing, this was sufficient evidence of its delivery, although never in the manual possession of the trustee. *McCurdy's Appeal*, 65 Pa. St. 291.

64. Ratification of mortgage executed without authority.—Where a corporation passes a resolution authorizing its president and secretary to execute a mortgage, but they execute one exceeding their authority, the purchase of the bonds secured by the mortgage in good faith, and the acceptance of the money by the company and expending it in the construction of its road, is a ratification of the mortgage so as to make it valid as executed. *Elwell v. Grand St. & N. R. Co.*, 67 Barb. (N. Y.) 83; *affirmed in 67 Barb. 85 n.*

Where bonds are issued by a railroad, secured by a mortgage, and the bonds negotiated, interest paid for several years, and the validity of the mortgage recognized in various other ways, this is a ratification of the power to execute it. *McCurdy's Appeal*, 65 Pa. St. 290.

65. Necessity of registration.—Rolling stock and other property strictly appurtenant to the road is part of the road and covered by a mortgage thereof, so that if the mortgage be registered as a real estate mortgage, it is sufficient; but a different rule would apply to fuel or other personal property which is used, or such as is commonly used, for other than railway purposes. Such property is liable to be taken in execution, if the mortgage is not properly recorded. *Farmers' L. & T. Co. v. St. Joseph & D. C. R. Co.*, 3 Dill. (U. S.) 412. —REVIEWED IN *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311.

A creditor cannot insist that a mortgage given by a company is void for the omission to register it, unless this ground is alleged in the bill; if alleged, the defendant has the right to reply notice to the creditor. *Allen v. Montgomery R. Co.*, 11 Ala. 437.

It is not necessary in Louisiana to the validity of a railway mortgage, given to raise money for construction purposes, that

it should be reinscribed. *Parker v. New Orleans, B. R. & V. R. Co.*, 33 *Fed. Rep.* 693; *reversed* in 143 *U. S.* 42, 12 *Sup. Ct. Rep.* 364.

In New Jersey railroad mortgages conveying personal property are not governed by the statute requiring chattel mortgages to be recorded in the county where the property is situate, but are governed by section 86 of the general act relating to railroads and canals. *Metropolitan Trust Co. v. Pennsylvania, S. & N. E. R. Co.*, 25 *Fed. Rep.* 760.—NOT FOLLOWING *Williamson v. New Jersey Southern R. Co.*, 28 *N. J. Eq.* 277, 29 *N. J. Eq.* 337.

66. Place of registration.—Where a railroad which runs through several counties is mortgaged, but the mortgage is only recorded in one county, it only constitutes a prior lien over subsequent judgments on that part of the road which lies in the county where it is recorded. *Ludlow v. Clinton Line R. Co.*, 1 *Flipp. (U. S.)* 25.

Montana St. of 1888, § 1555, providing that mortgages executed by a corporation shall be recorded in every county where any part of the property is situated, and be accompanied by the affidavit required by section 1538, does not repeal the special statute found in section 706 relating to mortgages made by railroad corporations, and providing for recording them in the office of the secretary of state. *Gilchrist v. Helena, H. S. & S. R. Co.*, 47 *Fed. Rep.* 593.

A Connecticut corporation executed a mortgage to secure its bonds, and default having occurred, the property was formally surrendered to plaintiff as trustee. A sheriff in New York held an attachment, issued in an action against the corporation, and levied upon certain of the personal property of the corporation, when the trustee brought an action to recover possession thereof. *Held*, that in the absence of proof to the contrary it must be assumed that the property was in Connecticut at the time the mortgage was executed, and being valid where executed, it was immaterial that it was not recorded in New York. *Nichols v. Mass*, 17 *Am. & Eng. R. Cas.* 230, 94 *N. Y.* 160.

67. Filing, when necessary.—The fact that the mortgagee of chattels has taken possession of them under his mortgage before judgment recovered will not give validity to a prior chattel mortgage,

as against an execution creditor, where the mortgage has not been filed as required by the act, and was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the property mortgaged. In this respect a distinction is made in the act between creditors of the mortgagor and subsequent purchasers or mortgagees. *Williamson v. New Jersey Southern R. Co.*, 29 *N. J. Eq.* 311, 15 *Am. Ry. Rep.* 572; *reversing* 28 *N. J. Eq.* 278.

An execution creditor, having, by a levy on goods and chattels covered by a prior chattel mortgage, acquired priority over such chattel mortgage by reason of the failure of the mortgagor to file his mortgage or take immediate possession of the property mortgaged, is not deprived of his priority by a subsequent act of the legislature making the filing unnecessary when the mortgage is registered as a conveyance of lands. *Williamson v. New Jersey Southern R. Co.*, 29 *N. J. Eq.* 311, 15 *Am. Ry. Rep.* 572; *reversing* 28 *N. J. Eq.* 278.

68. — when unnecessary.—The capital stock of a corporation is not "goods and chattels" within the meaning of the New Jersey act concerning chattel mortgages. Hence a mortgage of such stock need not be filed in accordance with the provisions of that act. *Williamson v. New Jersey Southern R. Co.*, 26 *N. J. Eq.* 398.

New Jersey Act of April 21, 1876, providing that a chattel mortgage executed by any railroad or canal company shall be valid without being filed as a chattel mortgage, applies to mortgages executed before its passage. *Kelly v. Boylan*, 32 *N. J. Eq.* 581.

A railroad company executed a mortgage on its property, when the statute 12 Vict. c. 74 was in force, which provided that every chattel mortgage, where possession was not delivered, should, to be valid as against creditors, be duly filed for registry, and refiled from year to year. This statute was complied with until the passage of 20 Vict. c. 3, which repealed the former statute, and provided that mortgages which were duly registered under the former statute should be as valid as if that statute had not been repealed. *Held*, that after the passage of the repealing statute refiled was not necessary to keep the mortgage valid. *Grand Trunk R. Co. v. Lees*, 9 *U. C. C. P.* 249.

69. Effect of registration.—The registration of a railroad mortgage not

properly executed so as to entitle it to be registered is not in itself notice to parties subsequently acquiring rights in the property; but where it is a deed of trust, and not strictly a mortgage, its execution and acknowledgment in the manner and form as required in the case of deeds is sufficient. *Branch v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 481.

A mortgage to secure a loan not made at the date of the mortgage is an obligation subject to a protestative condition on the part of the debtor. Such a mortgage does not take effect from the date of the registry. It has effect only from the date, and for the amount, of the loan. *Meeker v. Clinton & P. H. R. Co.*, 2 La. Ann. 971.—FOLLOWED IN *Langfitt v. Brown*, 5 La. Ann. 231.

Where a railroad corporation is authorized to mortgage, for stated purposes, its road, completed or not, a recorded mortgage will attach to after-acquired property, and the purchaser of such property under a foreclosure sale cannot be affected by a judgment obtained against the corporation after the recording of the mortgage. *Bell v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 785.—FOLLOWING *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254.—REVIEWED IN *New Orleans & P. R. Co. v. Union Trust Co.*, 43 Am. & Eng. R. Cas. 458, 41 Fed. Rep. 717.

70. Bona fide purchaser—Notice.—Where the judgment creditor of a railroad company has actual notice of a mortgage, executed by the company, before his judgment is rendered, it is immaterial that he has not received record notice, and his assignee takes subject to the same equity with respect to the prior mortgage creditors of the company. *Butler v. Rahm*, 46 Md. 541, 18 Am. Ry. Rep. 86.

Where, in an action to foreclose an unrecorded mortgage against a subsequent purchaser of the mortgaged premises, the defense is that of purchase for a valuable consideration without notice, it will not avail if the consideration consisted in merely giving credit for the amount of the purchase money on claims held by the purchaser against the vendor. *Zorn v. Savannah & C. R. Co.*, 5 So. Car. 90.

IV. VALIDITY, INTERPRETATION, AND EFFECT.

1. In General.

71. Validity, generally.—A mortgage of a railroad to secure bonds to be is-

sued to raise money to pay the debts of the corporation is not invalid as given to secure future advances. *Richards v. Merri-mack & C. R. R. Co.*, 44 N. H. 127.

Where a company is organized for the declared purpose of owning and completing a designated railroad, and the president and vice-president of the road become secret members of the new company, and execute a mortgage of the road thereto, it will be held fraudulent; but in a proceeding in bankruptcy the new company will be permitted to prove, as an unsecured debt, any advances which it has made to the other company. *Kappner v. St. Louis & St. J. R. Assoc.*, 3 Dill. (U. S.) 228.

72. What constitutes a mortgage.

—A railroad corporation made a contract with M. for the construction of its road, and gave him a conveyance of its property containing certain conditions and provisions. Held, that the conveyance was not a deed of trust, but a mortgage. *Mason v. York & C. R. Co.*, 52 Me. 82.

After a transfer by M. of any bonds of the corporation he held the legal title as mortgagee for his remaining interest, and in trust for the other bondholders. *Mason v. York & C. R. Co.*, 52 Me. 82.

An agreement (set forth in the opinion) between the plaintiff, a railroad corporation, and its individual stockholders, whereby certain rights were conferred upon the latter in respect to a portion of the lands (land grant) of the corporation, considered, and construed as not bearing upon its face the legal import of absolutely conferring upon the stockholders the legal or equitable title to the land, but rather as affording a security in the nature of a mortgage. *St. Paul & S. C. R. Co. v. McDonald*, 22 Am. & Eng. R. Cas. 208, 34 Minn. 182, 25 N. W. Rep. 57.

73. Consideration.—It is a sufficient consideration for a deed of mortgage by a railroad company that it is to secure bonds; and it can properly be made to third persons as trustees for whomsoever may become holders of the bonds. *Butler v. Rahm*, 46 Md. 541, 18 Am. Ry. Rep. 86.

74. How construed, generally.

The validity and effect of railroad mortgages must be determined by their respective charters so far as they supersede the general laws. But the general laws will be applied to the construction and enforcement of all lawful contracts unless they are superseded or suspended by special legislation. *Newport*

S. C. Bridge Co. v. Douglass, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

Where a company executes a mortgage to secure its bonds, and a bond is issued with a certificate thereon that it is secured by the mortgage, the mortgage, the bond, and the certificate will be construed together as parts of the same security. *Benjamin v. Elmira, J. & C. R. Co.*, 49 Barb. (N. Y.) 441; affirmed (P) in 54 N. Y. 675, mem.

Where a mortgage given by a company, in pursuance of a resolution of the directors to render effectual what was attempted to be done by a former one whose validity is doubted, contains no reference to the former mortgage, and neither the resolution nor the second mortgage expresses an intention that the latter shall cover the same property as the first, the description in the second cannot be aided by that in the first. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

B., the contractor for the construction of a road, being unable to obtain the iron necessary on his own credit, authorized the company to negotiate for its purchase, who contracted with C. to furnish it, the iron to be paid for as delivered on the wharf at Belleville by the notes of B., and a credit of six months to be given from the time of the several deliveries. B. also agreed to obtain from the company an irrevocable power of attorney enabling the Bank of Montreal, who advanced to C. the money to buy the iron, to receive the government and municipal bonuses, and to procure from the company a mortgage for \$200,000 on that portion of their road (forty-four miles) on which the iron was to be laid, the mortgage to be sufficient in law to create a lien on the forty-four miles of railroad, as security for the due payment of the notes of the said B., but not to contain a covenant for payment by the company. A power of attorney, upon which was indorsed by B. a written request to the company to give the said power of attorney, and a mortgage, upon which also was indorsed by B. a request to grant the said mortgage, were executed by the company to one D., then manager of the Bank of Montreal, as a trustee. The bank having made advances to C. to enable him to purchase the iron, it was all consigned to their order by the bills of lading, and, when delivered on the wharf at Belleville, was held by the wharfingers subject to

the order of the bank, the whole quantity stipulated for by the contract being so delivered, ready for laying on the track, as required. The bank and C. caused to be delivered from time to time to B. by the wharfingers all the iron required to lay on the track, being about 2000 tons, and about an equal quantity remained on the wharf unused. B. having failed to meet his promissory notes, C. recovered judgment at law against him to the amount of \$164,852.96. The bank then sold the iron remaining on the wharf for the purpose of realizing their lien, when C. became the purchaser and was removing the said iron when the company filed a bill asking injunction to restrain the removal of the iron. *Held*, that the proviso in the mortgage was in its terms wide enough for the mortgagee to claim the price of all the iron delivered on the wharf at Belleville, and that the memorandum indorsed by B. on the mortgage should not be construed as cutting down the terms of the proviso, but was intended as written evidence of B.'s consent to the mortgage, and to the loss of priority in respect of the mortgage bonds to be delivered to him under the contract. *Bickford v. Grand Junction R. Co.*, 1 Can. Sup. Ct. 696.

75. What title passes.—Where a company mortgages lands which have been granted to it by the state as swamp lands received from the general government, and the mortgage conveys "all and any interest" that the company may have in the land, the mortgage passes whatever title the company has; and if it has only an equitable title, that passes. *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615.—*FOLLOWING* Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. Rep. 546; Central Trust Co. v. Kneeland, 138 U. S. 414, 11 Sup. Ct. Rep. 357.

A mortgage deed to trustees for bondholders from which words of inheritance have been inadvertently omitted will be reformed as against subsequent encumbrancers and purchasers with notice. Whether a fee is intended to pass or not may be gathered from its provisions, in the absence of words of inheritance. *Randolph v. New Jersey W. L. R. Co.*, 28 N. J. Eq. 49, 14 Am. Ry. Rep. 11.

Where the mortgage has been recorded in full, and its provisions require that the trustees should have an estate in fee simple

in order to execute them, the record is notice that the mortgage was intended to pass a fee. *Randolph v. New Jersey W. L. R. Co.*, 28 N. J. Eq. 49, 14 Am. Ry. Rep. 11.

76. Rights of the parties, generally.—A railroad company has not the right to take up a part of the railroad mortgaged, even though it is not self-sustaining, but an expense to other roads of the company, or although the plaintiff has other and ample security, or although the object is to sell the rails and appropriate the proceeds in liquidation of the mortgage. *Watt v. Passenger R. Co.*, 6 Phila. (Pa.) 386.

If the mortgage cover the road, the company has no right to touch it save for proper repair and lawful use. *Watt v. Passenger R. Co.*, 6 Phila. (Pa.) 386.

The fact that the legislature authorizes a company to mortgage its road and franchises does not give the mortgagee any greater rights than the mortgagor had, nor take away the power of the legislature to alter or modify the franchises granted. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

41 Vict. c. 27, D. does not give the mortgagees, under the arrangement sanctioned thereby, any power to destroy a farm crossing given in consideration of the purchase of land by the railway, or authorize them to interfere with rights which the railway company are bound to respect. *Clouse v. Canada Southern R. Co.*, 14 Am. & Eng. R. Cas. 456, 4 Ont. 28.

77. Rights of bondholders.—Where a company is chartered with power to take private property and to construct and operate its road, the authority given is in the first instance permissive merely, and no obligation rests upon the company to exercise the powers granted. But where the company has taken private property and constructed its road, it has come under an obligation to carry into effect the objects of its charter, and its capital stock, franchises, and property stand charged primarily with this public trust. Where such a company is empowered to issue bonds and secure them by a mortgage of its franchise and all its property, the mortgagees take the mortgage subject to this trust. *Gates v. Boston & N. Y. A. L. R. Co.*, 24 Am. & Eng. R. Cas. 143, 53 Conn. 333, 5 Atl. Rep. 695.—QUOTED IN *State v. East Line & R. R. Co.*, (Tex.) 48 Am. & Eng. R. Cas. 656.

Where a railroad mortgage is given to

secure its bonds, and contains a provision that covenants therein shall enure to the benefit of successive bondholders, and the bonds are negotiable, a first holder of bonds cannot enter into any agreement with the company or its officers which will abrogate such covenants, so as to bind subsequent purchasers of the bonds before maturity. *Belden v. Burke*, 25 N. Y. Supp. 601, 72 Hun 51.

Where such mortgage recites that the trustee shall hold the property for the benefit of bondholders, and that the proceeds of a certain proportion of the bonds shall be used in the improvement of the property, the first or subsequent bondholders cannot waive these provisions so as to diminish the security of any subsequent holder. *Belden v. Burke*, 25 N. Y. Supp. 601, 72 Hun 51.

A mortgage made to secure the payment of certain bonds is made for the benefit of the bondholders only, and no one can have an interest in the mortgage except as a bondholder. *Rice v. Southern Pa. I. & R. Co.*, 9 Phila. (Pa.) 294.

78. Description of the property mortgaged.—Where a railroad mortgage first describes the property conveyed in general terms, and then describes each particular thing conveyed, the latter description will prevail, where there is a repugnancy between the two. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Biss. (U. S.) 35.

Where a company is authorized to take or hold lands for a right of way not exceeding six rods in width, a mortgage of its right of way then owned or thereafter acquired will be deemed as referring to a strip of the above width, and is a sufficient designation of the property. *Seymour v. Canandaigua & N. F. R. Co.*, 14 How. Pr. (N. Y.) 531, 25 Barb. 284.

A company advertised its bonds for sale of a proposed road "about fifty miles long." The mortgage given to secure these bonds described the road to be built between designated points "by the most practicable route not to exceed fifty miles in length." The road when built was but twenty-nine miles long. *Held*, in a suit by a bondholder for fraudulent representations in the advertisement as to the length of the road, that the description of the length of the road given in the mortgage must control. *Van Weel v. Winston*, 24 Am. & Eng. R. Cas. 179, 115 U. S. 228, 6 Sup. Ct. Rep. 22.

A mortgage after describing several pieces of land contained the following description: "Also all the real property of said party of the first part to which said party has any right, title, or interest, legal or equitable, in either of the counties of Saratoga * * * and particularly all lands immediately adjoining the line of said road, and which are designed or intended to be used in operating the said railroad, or in carrying on the business of said company, as land for depots, engine, car, or freight houses, or the like, and all buildings and structures placed or to be placed on the line of said railroad, on any such lands as aforesaid." *Held*, a description sufficient to enable a purchaser at a foreclosure sale to maintain ejectment for the lands. *Durant v. Kenyon*, 32 Hun (N. Y.) 634.

A deed describing the property conveyed as "the following articles of personal property, to wit, 300 railroad ties," to be delivered at a certain price, is not sufficiently definite to pass the title. *Stephenson v. Seaboard & R. R. Co.*, 11 Am. & Eng. R. Cas. 299, 86 N. Car. 455.

79. The debt secured.—A construction contract may be secured by a mortgage, and the bonds have priority in payment from the avails of the mortgaged property over the contract. *Mason v. York & C. R. Co.*, 52 Me. 82.

Bonds not "issued by the previous special vote of the directors," but afterwards ratified and approved by the corporation, and received and applied in accordance with the terms of the contract, are secured by the mortgage. *Mason v. York & C. R. Co.*, 52 Me. 82.

The claim of an indorser of company notes, the avails of which were applied in part payment of the contract, is not secured by the mortgage. *Mason v. York & C. R. Co.*, 52 Me. 82.

Mortgage bonds of a railroad company dated Oct. 1, 1871—*held*, to be embraced in a deed of mortgage dated Oct. 25, 1871, the bonds being in other respects clearly described in the deed, and there being nothing in the terms of the deed inconsistent with the fact that they had been before executed, and, furthermore, any doubt being removed by parol evidence that no other bonds were executed or issued by the company except those so dated. *Butler v. Rahm*, 46 Md. 541, 18 Am. Ry. Rep. 86.

Where the president of a railroad received

the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary, such a debt fairly and honestly incurred could be so secured; and he was entitled to prove such bonds. So also one to whom bonds were pledged as security for an indebtedness for rent of offices is entitled to prove them; a business office was essential and necessary, and was embraced within the authority to issue bonds. *Duncomb v. New York, H. & N. R. Co.*, 4 Am. & Eng. R. Cas. 293, 84 N. Y. 190; reversing 23 Hun 291.

A railroad contractor bought iron for the road, giving his notes therefor, which the company secured collaterally by a mortgage. *Held*, that the liability of the company under the mortgage was not limited to its liability to the contractor for work done. *Grand Junction R. Co. v. Bickford*, 23 Grant's Ch. (U. C.) 302.

80. Provisions as to time of payment or maturity.—Where a statute authorizes a railroad to issue bonds not to mature in less than thirty years, and to mortgage its road to secure them, a provision in the mortgage that on default in paying any interest coupon the whole of the principal should become due is void; but this does not affect the mortgage in other respects. *Howell v. Western R. Co.*, 94 U. S. 463.—APPROVED IN *Central Trust Co. v. New York, C. & N. R. Co.*, 33 Hun (N. Y.) 513.

When there is a discrepancy between the terms of the bond and of the mortgage, the bond being the principal thing containing the obligation of the company, and the mortgage a mere security to ensure the performance of that obligation, the terms of the bonds should control. *Indiana & I. C. R. Co. v. Sprague*, 2 Am. & Eng. R. Cas. 532, 103 U. S. 756.

Where the bond contains a statement that upon default in payment of interest for six months the principal shall become due upon demand, the presence of two past-due coupons upon the bond is not of itself sufficient evidence of the dishonor of the bonds to which they were attached. *Indiana & I. C. R. Co. v. Sprague*, 2 Am. & Eng. R. Cas. 532, 103 U. S. 756.

A mortgage given by a railroad provided that the principal should become due for the purposes of foreclosure upon a default in interest continuing for sixty days. *Held*, that the trustees might proceed for the collection of the whole amount of principal and

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interest by a bill in equity without a formal declaration of the maturity of the principal. *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 45 *Am. & Eng. R. Cas.* 631, 137 *U. S.* 171, 11 *Sup. Ct. Rep.* 61.—DISTINGUISHING *Chicago & V. R. Co. v. Fosdick*, 106 *U. S.* 47.

Powers given by the terms of a mortgage to the trustee, after default for a stated period in the payment of interest, to take possession of the mortgaged property and sell the same, and apply the proceeds to the payment of interest and principal, do not change the construction of the mortgage as to the time when the principal becomes due so as to authorize a foreclosure for the principal as well as interest. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 *N. J. Eq.* 176, 22 *Atl. Rep.* 932.

81. Covenants as to application of proceeds.—Where a railroad mortgage provides that a certain share of the proceeds of the bonds secured by a mortgage shall be used in laying a double track and otherwise improving the road, and in purchasing real estate and other property such as the company may require, it is a fraud on the bondholders for the stockholders or officers of the company to divert such proceeds to their individual use. *Belden v. Burke*, 25 *N. Y. Supp.* 601, 72 *Hun* 51.

Where a mortgage provides that the trustee is to hold for the benefit of the bondholders, and that he shall certify bonds, and deliver a specified portion to certain officers of the company, who shall apply the proceeds to the improvement of the property, such provisions become operative and binding on the company as soon as the bonds are so certified and delivered. *Belden v. Burke*, 25 *N. Y. Supp.* 601, 72 *Hun* 51.

And the provision to use the proceeds of such bonds for the improvement of the property creates a trust, which may be enforced against the company either by the trustee, or a bondholder, if the trustee refuses to act. *Belden v. Burke*, 25 *N. Y. Supp.* 601, 72 *Hun* 51.

The application of such proceeds by such officers to the repayment of a loan, and in acquiring stock of the company, is a breach of the covenant to use such proceeds in improving the property; and it is likewise a breach of such covenant for such officers to use such proceeds in paying for coal lands, which they had bought and sold to the company, where they were embraced in the

mortgage. *Belden v. Burke*, 25 *N. Y. Supp.* 601, 72 *Hun* 51.

The investment of a part of the proceeds in stock of a coal company is not the acquisition of "other property," within the meaning of the provisions of the mortgage. *Belden v. Burke*, 25 *N. Y. Supp.* 601, 72 *Hun* 51.

82. Stipulation relative to taxes.—The clause in a mortgage that the payment shall be "without any deduction, defalcation, or abatement for any taxes whatsoever" is a stipulation to pay the taxes on the land mortgaged, not on the debt secured. *Clifton v. Philadelphia & R. R. Co.*, 54 *Pa. St.* 356.

83. Reservations in favor of the mortgagor.—Where a company executes a mortgage which allows the company to receive the earnings of the road while it remains in possession, such possession gives the company the right to the whole fund received, and renders such fund liable to be taken by creditors as if the mortgage had not been made. *Gilman v. Illinois & M. Tel. Co.*, 91 *U. S.* 603.—APPROVING *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall. (U. S.)* 459.—DISTINGUISHED IN *Sunflower Oil Co. v. Wilson*, 48 *Am. & Eng. R. Cas.* 664, 142 *U. S.* 273. FOLLOWED IN *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 *Am. & Eng. R. Cas.* 259, 36 *Fed. Rep.* 221. QUOTED IN *Frayser v. Richmond & A. R. Co.*, 25 *Am. & Eng. R. Cas.* 597, 81 *Va.* 388; *Gibert v. Washington City, V. M. & G. S. R. Co.*, 33 *Gratt. (Va.)* 645; *Mississippi Valley & W. R. Co. v. United States Exp. Co.*, 81 *Ill.* 574.

A mortgage of the revenues and property of a railroad company contained the following proviso: "All of the rights of the bondholders or trustees are subject to the possession, control, and management of the directors of said company, until default," etc. *Held*, that this proviso did not give the creditors of the corporation under contracts made before default, but after the execution of the mortgage, a preference over the mortgage liens. *Dunham v. Iselt*, 15 *Iowa* 284.

A railroad mortgage contained the following provision: "But nothing herein contained shall prevent the said company, before default in the payment of any of the said bonds or the interest due thereon, from selling, hypothecating, or otherwise disposing of any of their said property, real or

personal, not necessary in their judgment for the use of the said road, nor from collecting and applying any money due to the said company from any source whatever, provided said application shall not be to the prejudice of any holder of any of the said bonds." *Held*, that, however suspicious the power here given might be in the case of a mortgage of ordinary goods, the very nature of the mortgagor's business, the means and power necessary to keep it up, the wear and tear of its iron, ties, and rolling stock, the constant necessity of replacing injured or worn-out appurtenances with new, forbade the inference of a fraudulent purpose, which might arise from such a provision under other circumstances. *Butler v. Rahm*, 46 Md. 541, 18 Am. Ry. Rep. 86.

A railroad corporation to secure its bonds made a mortgage by which it conveyed to the trustees all the property, the indenture being on the conditions that until default the use of the granted premises should remain with the corporation, and providing that on a default continuing for six months the trustees should operate the road, collect the income, and apply the receipts in carrying on the business. The trustees took possession under the provisions of the indenture. *Held*, that they were not bound by a contract, concerning the carrying of express matter, entered into by the railroad corporation after the making of the indenture with one who had notice thereof. *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.

84. Interpretation as affected by law of place.—When a mortgage is given upon a railroad, situate partly in two states other than Illinois, where the road is operated, but the proof does not show where the mortgage was executed, an Illinois court will not be bound by the law of comity to adopt the construction given by the courts of one of those states to a similar mortgage, as, that it includes the earnings of the road. *Mississippi Valley & W. R. Co. v. United States Exp. Co.*, 81 Ill. 534.

85. Defaults and forfeitures.—A mortgage to secure the payment of bonds issued and sold by the company cannot be called in question because of the subsequent default of the company in failing to construct a branch road with the proceeds of such bonds. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

Where a mortgage contains a condition that in default of payment of interest a majority of the bondholders are authorized to waive the default, and to instruct the mortgage trustees so to waive it, and it is expressly provided that no action on the part of the bondholders or trustees in case of default shall affect any subsequent default, or any right arising therefrom, the bondholders have no authority to anticipate and provide for a default before it accrues. *McClelland v. Norfolk Southern R. Co.*, 115 N. Y. 469, 18 N. E. Rep. 237, 18 N. Y. S. R. 344, 1 L. R. A. 299, 6 Am. St. Rep. 397, 38 Alb. L. J. 410; reversing 3 N. Y. S. R. 250.

86. Equitable mortgages.—Where railroad property is placed in the hands of receivers, and is under the control of the court, expenses of the management of the road and debts legitimately incurred constitute a lien in the nature of an equitable mortgage on the property which may be enforced by a foreclosure against the property and the franchises. *Langdon v. Vermont & C. R. Co.*, 11 Am. & Eng. R. Cas. 688, 54 Vt. 593.—QUOTING *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 146.—FOLLOWED IN *Hazard v. Vermont & C. R. Co.*, 12 Am. & Eng. R. Cas. 388, 17 Fed. Rep. 753.

Plaintiff, a bank, held certain railway coupons as security for a debt. The coupons were convertible into lands at the option of the holder, and the bank agreed that they might be so converted, and its debtor took the deed in his own name, which was not recorded, but was deposited with the bank as security in lieu of the coupons. *Held*, that this created an equitable mortgage, and gave the bank an equity in the lands superior to a lien of a general creditor. *First Nat. Bank v. Caldwell*, 4 Dill. (U. S.) 314.

J., being fully authorized in that behalf by the M. & C. P. R. Co., and A. and G. enter into a written agreement by which A. and G. engage to act as the agents of said company, and to purchase in England, pay for, insure, and ship to said company at Mobile a certain quantity of railroad iron, etc., and the said company, in consideration thereof, undertake to pay the said A. and G. for the same on its arrival at Mobile, etc., and to secure said payment "pledges the real and personal estate of said company" to the said A. and G. *Held*: (1) that the agreement constitutes an equitable mortgage in favor of A. and G. on all the real

and personal estate of said company, which a court of chancery will enforce against said company, and all persons claiming under it with notice; (2) that neither the fact that the agreement pledges the real and personal estate of said company, without specification, nor that the amount to be secured is not stated, nor that it is made to secure future advances, nor that no time of redemption is fixed, can, *per se*, render the agreement invalid. *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472.

A landowner conveyed to a railroad company, expressly reserving a vendor's lien to secure notes given for the purchase money, and took back a power of attorney authorizing the vendor or any holder of the notes to sell the land to secure payment of the notes or interest. A mortgage on the road was subsequently foreclosed, and the purchasers went into possession of the property, including the lands. *Held*, that the vendor and his transferees of the notes acquired an equitable mortgage on the land, and while the purchasers of the railroad property were lawfully in possession, they only acquired an equity of redemption in such lands, and were not liable for the mortgage debt or interest thereon. *Hall v. Mobile & M. R. Co.*, 58 Ala. 10.

Such purchasers were not liable for rents or for use and occupation, not exceeding interest maturing during the possession, prior to a demand upon them for possession, or its being taken from them by a receiver. *Hall v. Mobile & M. R. Co.*, 58 Ala. 10.

On May 1, 1871, three railroad companies that were associated together for the purpose of building and running their several roads as one continuous line executed a mortgage deed of their several roads and of all the personal property and income thereof, together with all their corporate rights, in trust, to secure the payment of their joint bonds to the amount of \$2,300,000. The bonds were executed, and sold or pledged. On April 1, 1874, the same companies executed a second mortgage of the same property to the same trustees to secure the payment of their joint bonds to the amount of \$1,770,000. Bonds to the amount of about \$125,000 were issued thereunder. On January 1, 1875, those companies, with others, executed a mortgage of all the property of their several roads, including the property conveyed by the previous mortgages, to other trustees,

in trust, to secure the payment of their joint bonds to the amount of \$9,500,000. Bonds to the amount of about \$80,000 were issued thereunder. On July 18, 1876, the proceeds of all the bonds so issued being expended, and the companies being insolvent and still in need of funds to complete their roads, the first-mentioned companies executed a fourth mortgage of the property conveyed by the first mortgage to one of the trustees in the first and second mortgages, in trust, to secure the payment of their joint bonds to the amount of \$500,000. That mortgage provided, among other things, that no bonds should be issued thereunder until holders of the first mortgage bonds to the amount of \$1,800,000 had first signed an agreement whereby they should severally agree that, for the purpose of completing the roads and paying the interest on certain debts, said companies might issue such bonds, "to be denominated preference bonds," which should constitute and be a lien "on the property conveyed by such mortgage prior to the bonds held by" the several signers thereof. Such an agreement was signed by holders of first mortgage bonds to the amount of about \$1,870,000. A bill was brought by the trustee under the last mortgage for a foreclosure thereon; and a cross-bill was brought by the trustees under the first mortgage for a foreclosure thereon. Both bills prayed for a settlement of priorities, and for general relief. *Held*, that the agreement operated as an equitable mortgage or pledge of the interest under the first mortgage of those who signed, as security for the payment of the preference bonds; but that it in no way affected the interest, or the priority of the lien, of those who did not sign. *Poland v. Lamoille Valley R. Co.*, 4 Am. & Eng. R. Cas. 408, 52 Vt. 144.

The defendants, being indebted to the plaintiff in the sum of £1,000, executed a bond to him declaring that for the purpose of securing the debt and interest, they granted to him, *inter alia*, the undertaking of the company, and all moneys to arise from the sale of their lands, with a condition, that on failure of payment on a certain day the plaintiff might, upon giving three months' notice, enter upon the receipt of the proceeds of the sales, tolls, etc., and upon the absolute possession of the railway, etc., and reimburse himself the amount due, provided that "nothing therein should be

held to limit the powers of sale or appropriation by the company of any of their lands, nor constitute a charge upon the same." *Held*, that this did not constitute an equitable mortgage on the lands of the company; and that judgment creditors of the company, without notice of the bond, could not be restrained by injunction from selling the lands under execution. *Wickham v. New Brunswick & C. R. & L. Co.*, 11 *New Brun.* 175.

2. Protection of Prior Liens.

87. In general.—All statutory liens are entitled to preference over mortgage bonds; but all equitable liens ordered payable out of the earnings of a road are subsequent to the mortgage bonds. *Blair v. St. Louis, H. & K. R. Co.*, 25 *Fed. Rep.* 232.

A court has the power to create claims, through a receiver in a suit to foreclose a railroad mortgage, which shall take precedence of the mortgage lien. It may provide, therefore, that the receiver pay the arrears for operating expenses for a past period of not more than ninety days, shall pay indebtedness not exceeding \$10,000 for materials and repairs, and for ticket and freight balances, a part of which had been incurred more than ninety days prior to his appointment, shall purchase rolling stock, build six miles of road and a bridge, and make all such expenditures prior to the mortgage lien. *Milttenberger v. Logansport, C. & S. W. R. Co.*, 12 *Am. & Eng. R. Cas.* 464, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140.—APPLIED IN *Bound v. South Carolina R. Co.*, 47 *Fed. Rep.* 30. FOLLOWED IN *Blair v. St. Louis, H. & K. R. Co.*, 22 *Fed. Rep.* 471. QUOTED IN *American L. & T. Co. v. East & W. R. Co.*, 46 *Fed. Rep.* 101.

In the foreclosure of railroad mortgages it often becomes necessary to provide for the payment of preferred claims, and to postpone all rights of ordinary creditors, and even of mortgagees, to these preferred classes, and this is sometimes done, from the circumstances of the case, without notice to all who may be affected thereby. *United States Trust Co. v. Wabash Western R. Co.*, 150 *U. S.* 287, 14 *Sup. Ct. Rep.* 86.—FOLLOWED IN *Seney v. Wabash Western R. Co.*, 150 *U. S.* 310.

Where a party intervenes in a foreclosure proceeding and presents a small claim, and the master reports that the claim has not been contested, and that it should be al-

lowed, and constitute a lien superior to that of the mortgage, and all parties interested consent, the report will be confirmed, and the claim allowed. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 24 *Fed. Rep.* 98.

A railroad company the fruits of whose labor and expenditures are about to be lost by the failure of its enterprise cannot, in order to raise money to complete it, create liens upon its property which will displace an older lien, and no prerogative of a court of equity arms it with power to do so. *Meyer v. Johnston*, 53 *Ala.* 237, 15 *Am. Ry. Rep.* 467.

The creditors of a corporation who are secured by mortgages of its property acquire therein rights of which they cannot be deprived even by an act of the legislature. *Montgomery & W. P. R. Co. v. Branch*, 59 *Ala.* 139.

An agreement by the creditors of a railway company consenting to give the exchequer loan commissioners advancing money to assist in completing the work a qualified priority for their mortgage over the creditors' claims is valid under 57 Geo. 3, c. 34. *South Eastern R. Co. v. Jortin*, 6 *H. L. Cas.* 425, 4 *Jur. N. S.* 467, 27 *L. J. Ch.* 145.

Where a railway act authorizes the company to borrow money on mortgage, with the provision that the interest of all debenture stock "at any time created by the company" is to rank *pari passu* with the interest of all mortgages "at any time granted" by the company, and shall have priority over all principal moneys secured by such mortgage, notwithstanding the words "at any time" the provision applies only to the mortgage debt and debenture stock for which provision is made by the act. *Harrison v. Cornwall Minerals R. Co.*, *L. R.* 18 *Ch. D.* 334, 51 *L. J. Ch. D.* 98, 45 *L. T.* 498; *varying L. R.* 16 *Ch. D.* 66, 49 *L. J. Ch. D.* 834, 43 *L. T.* 496.—DISTINGUISHED IN *Robinson v. Drakes*, *L. R.* 23 *Ch. D.* 98, 48 *L. T.* 740, 31 *W. R.* 871.

Under the mortgage executed by the Kentucky & Great Eastern R. Co., February 15, 1872, the Farmers' Loan & Trust Co., as mortgagee, took only such rights as the mortgagor had or subsequently obtained as against the vendors of the Maysville & Big Sandy R., and, the mortgagor never having obtained title to said road, the mortgagee was therefore bound by the forfeiture

under the conditional sale. *Wright v. Kentucky & G. E. R. Co.*, 24 *Am. & Eng. R. Cas.* 312, 117 *U. S.* 72, 6 *Sup. Ct. Rep.* 697.

A provision in a mortgage of the property and franchises of a railroad corporation to trustees, made to secure certain mortgage bonds to be issued thereunder for the purpose of providing for and retiring the then existing mortgage debt and prior liens on the railroad, and completing and equipping the road, that the expenditure of all sums realized from the sale of the bonds "shall be made with the approval of at least one of the trustees, whose assent in writing shall be necessary to all contracts made by the corporation," "before the same shall be a charge upon any of the sums received from said sales," does not create a charge upon the proceeds of the sales of the mortgage bonds in favor of one who afterwards built a portion of the road under a written contract with the corporation whose contract did not itself impose such charge. *Dillon v. Barnard*, 1 *Holmes (U. S.)* 386.

88. Senior and junior mortgages.

—(1) *In general.*—Subsequent mortgagees have implied notice of the contract rights and statutory remedies of the beneficiaries under the elder mortgages and deeds of trust, and their claims are subordinate to those elder and superior rights. *Newport & C. Bridge Co. v. Douglass*, 12 *Bush (Ky.)* 673, 18 *Am. Ry. Rep.* 221.

The exclusive right of a second mortgagee to the income of a receivership created under a bill filed by him is limited to a case where the first mortgagee is not a party to the suit. *Miltenberger v. Logansport, C. & S. W. R. Co.* 12 *Am. & Eng. R. Cas.* 464, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140.

A stock mortgage in the Clinton & Port Hudson R. Co. takes precedence of a mortgage stock loan made under the provisions of the charter of said company. *Langfitt v. Brown*, 5 *La. Ann.* 231.—FOLLOWING *Meeker v. Clinton & P. H. R. Co.*, 2 *La. Ann.* 971.

A decree of court declaring the mortgages executed by a railroad company to be the first lien on its property and franchises does not give them precedence over the prior lien of a party who had no notice of the proceedings and was not privy to the decree. *Pittsburgh, C. & St. L. R. Co. v. Marshall*, 85 *Pa. St.* 187, 18 *Am. Ry. Rep.* 388.

(2) *Illustrations.*—A railroad company of

Texas made four successive mortgages in 1853, 1855, 1857, and 1859, and issued bonds under each. The road and its appendages were sold under judgment in 1860. The purchasers operated the road until 1867 and realized large receipts therefrom. In 1857, after the making of the first three mortgages, the legislature passed a law subjecting the road and chartered rights of all railroad companies to sale for their debts, either under mortgages, deeds of trust, or judgments. *Held*: (1) that this law enured to the benefit of the first three mortgages as well as to that last made, and as to the judgment recovered, after its enactment, and in the order of priority due to each; (2) that the sale under the judgment did not disturb the priority of the mortgages; (3) that, although the first three mortgages covered and conveyed the tolls and profits, yet the purchasers under the judgment were not accountable for the tolls and income received by them from the road before they were notified to pay them over to the bondholders; (4) that, although part of the road was entirely built by the money raised on the fourth mortgage, yet that fact did not give it priority over the first three mortgages even on that portion of the road, provided it was a part of the chartered route; (5) a railroad mortgage as against the company and its privies, although given before the road was built, attaches itself thereto as fast as it is built, and to all property covered by its terms, as fast as it comes into existence as property of the company; (6) the principle applicable to maritime cases, which gives priority of lien to the last creditor furnishing supplies and repairs for the conservation of the ship or voyage, does not apply to railroads. As to them, the common law rule prevails: *Qui prior est in tempore, potior est in jure*. Mechanics' lien laws have not been extended to railroads in Texas. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall. (U. S.)* 459.—APPROVED IN *Gilman v. Illinois & M. Tel. Co.*, 91 *U. S.* 603. DISTINGUISHED IN *Sunflower Oil Co. v. Wilson*, 48 *Am. & Eng. R. Cas.* 664, 142 *U. S.* 313. FOLLOWED IN *Central Trust Co. v. Kneeland*, 46 *Am. & Eng. R. Cas.* 268, 138 *U. S.* 414; *Scott v. Clinton & S. R. Co.*, 6 *Biss. (U. S.)* 529; *Gilman v. Illinois & M. Tel. Co.*, 1 *McCrary (U. S.)* 170; *DeGraff v. Thompson*, 24 *Minn.* 452. QUOTED IN *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105.

By the terms of a first mortgage of a railroad the mortgagee had a right to take charge of the road and operate it, but a receiver was appointed on a bill filed by a second mortgagee, the first mortgagee being made a party and answering the bill. More than a year afterwards the first mortgagee filed a cross-bill, after the receiver had incurred heavy debts for improvements and otherwise, asserting a first lien on the property, and objecting to the payment of the receiver's debts as a first lien. *Held*, that it would be inequitable to allow the parties to lie by for such a lapse of time, with full knowledge of what the court and receiver were doing, and then allow such objections to be made. *Millenberger v. Logansport, C. & S. W. R. Co.*, 12 *Am. & Eng. R. Cas.* 464, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140.

Where a company has executed a mortgage of its railroad and all the right of way and land occupied thereby, with the superstructure, and all property, material, rights, and privileges then or thereafter appertaining to the road, and afterwards executes a lease of its road to another company which contracts, in consideration of such lease, to construct a section of the road which had not been completed, the mortgage so executed has priority over a mortgage subsequently executed by the lessee of the section constructed by it, although the lessor has joined the lessee in the execution of the latter mortgage. *Thompson v. White Water Valley R. Co.*, 40 *Am. & Eng. R. Cas.* 373, 132 *U. S.* 68, 10 *Sup. Ct. Rep.* 29.—FOLLOWED IN *Fogg v. Blair*, 133 *U. S.* 534, 10 *Sup. Ct. Rep.* 338; *Central Trust Co. v. Kneeland*, 46 *Am. & Eng. R. Cas.* 268, 138 *U. S.* 414.

A railroad charter made a certain debt a lien on the company's property, and it afterwards executed a first mortgage to secure bonds which were to be used largely in taking up the prior debt, but the amount of the bonds exceeded the amount of the debt. Afterwards a second mortgage was made to secure other obligations. *Held*, that the first mortgage was superior to the second as to the excess of the first bonds over the amount of the debt, whether issued before the second mortgage was given or not. *Clafin v. South Carolina R. Co.*, 4 *Am. & Eng. R. Cas.* 231, 4 *Hughes (U. S.)* 12, 8 *Fed. Rep.* 118.—QUOTED IN *Barry v. Missouri, K. & T. R. Co.*, 36 *Am. & Eng. R.*

Cas. 332, 34 *Fed. Rep.* 829; *Hand v. Savannah & C. R. Co.*, 17 *So. Car.* 219.

In such case bonds of the first mortgage unissued at the time the second mortgage was made, and bonds coming into the company's hands by purchase, without intention of retiring them, and issued thereafter in its business, were valid as against creditors claiming under the second mortgage. *Clafin v. South Carolina R. Co.*, 4 *Am. & Eng. R. Cas.* 231, 4 *Hughes (U. S.)* 12, 8 *Fed. Rep.* 118.

A chattel mortgage on the equipment of a railroad made by authority of the board of directors of an insolvent corporation for securing the claims of directors against the corporation—*held*, to be invalid as against prior mortgagees of the franchises and equipment, whose mortgages were not filed (the transactions being prior to the act of 1876, *N. J. Rev. p.* 924, § 86), because the directors, who were also stockholders, had notice of the prior mortgages. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; *reversed in* 34 *N. J. Eq.* 266.—APPLIED IN *RE North River Constr. Co.*, 38 *N. J. Eq.* 433.

Such prior mortgages, however—*held*, not to be valid against judgment creditors who, but for the receivership obtained in a suit to foreclose one of the mortgages, might have made a lawful valid levy on the equipment. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; *reversed in* 34 *N. J. Eq.* 266.

A company executed three mortgages upon its property and income, the property in possession and to be acquired. Two of these mortgages were properly executed and recorded, but the second in order of time, executed in New York, and acknowledged before an Ohio commissioner in that state, had but one witness. The third or subsequent mortgage was expressly made subject to the first and second. *Held*, that whether the second mortgage be regarded as creating a legal or equitable claim it was entitled to priority over the third. *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.—DISTINGUISHED IN *Ludlow v. Clinton Line R. Co.*, 1 *Flipp. (U. S.)* 25.

80. Advances to pay wages.*—Where railroad employes are threatening to strike unless their wages are paid, and certain stock and bond holders advance the money with the distinct understanding that

* See also *post*, 108.

it is to be paid to such employés, and repaid out of the first net earnings, but the road goes into the hands of a receiver before such payment, such advances will be ordered paid in preference to claims of mortgagees. *Atkins v. Petersburg R. Co.*, 3 *Hughes* (U. S.) 307.

90. Certificates of indebtedness.—Prior to the passage of the N. Y. Act of 1885 (ch. 376), which requires a receiver of an insolvent railroad to pay the wages of its employés in preference to other debts, and conceding that said act applies to a receiver appointed in an action to foreclose a mortgage on the property of such a corporation (as to which, *quere*), the court has no power to authorize a receiver so appointed to pay or issue his certificates of indebtedness for the payment of labor and services in operating the road prior to his appointment, and to make certificates so issued a lien prior to the mortgage. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 103 *N. Y.* 245, 8 *N. E. Rep.* 488, 2 *N. Y. S. R.* 69; *reversing* 40 *Hun* 80.

By an order issued in foreclosure the receiver was directed to pay or to issue certificates having a priority of lien over the mortgage to a sum stated for the payment of a sum stated "for deficiencies for supplies." The referee, upon whose report the order was based, found that the receiver in operating the road had incurred obligations to an amount stated which was greater than the sum so authorized to be paid. There was no statement in the findings or otherwise as to the consideration or cause of the indebtedness, or to show that the obligations were necessarily incurred. *Held*, that while, as the order directing the receiver to maintain and operate the road was made at plaintiff's request, it must abide by it, and it might be, as against it, the clause providing for such indebtedness should be allowed to stand as against another mortgagee who was not a party to the application for a receiver, it could not be sustained. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 103 *N. Y.* 245, 8 *N. E. Rep.* 488, 2 *N. Y. S. R.* 69; *reversing* 40 *Hun* 80.

Under a So. Car. act passed in 1869 certificates of indebtedness were authorized to be issued by a railroad company for funding interest due upon its bonds which were secured by a lien under an act of 1866, and which lien was extended by the later act to cover these certificates of indebtedness.

Held, that this was a mere substitution, and not a payment, and that the lien of these certificates was superior to that of a mortgage executed between 1866 and 1869. *Gibbes v. Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

91. Claims for labor and material, when entitled to priority.*—(1) *In general.*—Where a contractor furnishes labor and materials upon a section of a road in Iowa which is covered by a pre-existing mortgage, the contractor, by complying with the statute, obtains a paramount lien on the whole road. *Brooks v. Burlington & S. W. R. Co.*, 101 *U. S.* 443.—*APPLIED IN* *Giant Powder Co. v. Oregon Pac. R. Co.*, 43 *Am. & Eng. R. Cas.* 622, 42 *Fed. Rep.* 470, 8 *L. R. A.* 700. *DISTINGUISHED IN* *Giant Powder Co. v. Oregon Pac. R. Co.*, 14 *Sawy.* (U. S.) 560; *Buncombe County Com'rs v. Tommey*, 20 *Am. & Eng. R. Cas.* 495, 115 *U. S.* 122. *FOLLOWED IN* *Meyer v. Hornby*, 101 *U. S.* 728.

Claims of an insolvent railroad for labor or supplies accruing within six months of the time a receiver was appointed should be paid out of the net income in the hands of the receiver. As a general thing, claims accruing before that time are not entitled to preference. *Blair v. St. Louis, H. & K. R. Co.*, 22 *Fed. Rep.* 471.—*FOLLOWING* *Miltenberger v. Logansport, C. & S. W. R. Co.*, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140.—*FOLLOWED IN* *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 *Fed. Rep.* 182.

Where supplies are furnished an insolvent railroad, in making permanent improvements from time to time, under a verbal contract, continuing until the road goes into the hands of a receiver, but covering a period of two years or more, they constitute a superior lien on the earnings of the road to that held by mortgage creditors. *Blair v. St. Louis, H. & K. R. Co.*, 22 *Fed. Rep.* 769. *Blair v. St. Louis, H. & K. R. Co.*, 23 *Fed. Rep.* 704.

Where parties are entitled to a lien for materials prior to mortgages, and can secure it by certain proceedings under the statutes of the state, where the road is in the hands of a receiver, the court will not require the expense of such a proceeding, but will treat it as though all needful steps had been

* Constitutionality of statute giving labor and material liens priority over mortgages, see 57 *Am. & Eng. R. Cas.* 453, *abstr.* See also *post*, 109.

taken to establish the lien. *Central Trust Co. v. Texas & St. L. R. Co.*, 23 Fed. Rep. 673.

Where a system of railroads is operated by one corporation, a claim for work and materials, which constitutes a preferred debt, on a division of the system constitutes a lien upon the whole system prior to both local and general mortgages. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 30 Fed. Rep. 332.—FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182.

A claim for labor, supplies, or materials furnished to keep the road as a going concern constitutes a prior lien, and is entitled to payment in preference to interest on the mortgage bonds; and if it appears that money that should have gone to discharge such claims has been paid to discharge such interest, or to make permanent improvements on the road, the court will order such claims paid from any earnings in the hands of a receiver, or if not sufficient, then out of the proceeds of the property when sold. *Finance Co. v. Charleston, C. & C. R. Co.*, 48 Fed. Rep. 188.

Under the laws of Georgia a railroad mortgage constitutes a superior lien, except taxes and claims for labor and materials, where the proper steps have been taken to secure the lien, and priority will only be given to a claim for labor and materials where the lien has been perfected under the statute. *Jessup v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 441.

(2) *Illustrations.*—A railroad company whose road was covered by two mortgages bought of a manufacturer a large lot of steel rails which were absolutely necessary for the continued operation of the road, and gave therefor three notes which the president promised should be paid out of the earnings of the road. Subsequently, on application of the holders of the second mortgage the road was placed in the hands of a receiver. *Held*, that as against the holders of the second mortgage the equitable claim of the manufacturer would take preference, and he would be entitled to have the earnings of the road in the receiver's hands applied first to the payment of his claim. *Bound v. South Carolina R. Co.*, 51 Am. & Eng. R. Cas. 58, 47 Fed. Rep. 30.—APPLYING *Paine v. Central Vt. R. Co.*, 118 U. S. 159, 6 Sup. Ct. Rep. 1019; *Miltenberger v. Logansport, C. & S. W. R. Co.*,

106 U. S. 288, 1 Sup. Ct. Rep. 140; *Thomas v. Peoria & R. I. R. Co.*, 36 Fed. Rep. 817; *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. Rep. 471.

In such a case, however, the manufacturer's claim would have no preference over those of the holders of the first mortgage. These latter, not having invoked the aid of the court, although they filed cross-bills in the suit, stand in their legal right. *Bound v. South Carolina R. Co.*, 51 Am. & Eng. R. Cas. 58, 47 Fed. Rep. 30.

On August 13, 1875, J., whose original contract for building a certain railroad was recorded on May 13, 1875, made out a written statement, to the truth and correctness of which he made affidavit. In this written act he set up a claim against the company for extra work on its road not stipulated for in the original contract, and for damages, etc., for which privilege was claimed. This sworn statement was recorded August 31, 1875. *Held*, that because the builder's privilege resulting from the recording of the contract on May 13, 1875, was not recorded on the same day it was executed did not make it null so as not to take precedence of a mortgage which was not recorded for three months afterwards. *State ex rel. v. Recorder of Mortgages*, 28 La. Ann. 534.

Between an investment company and certain individuals it was agreed that the former should furnish substantially all the money necessary for, and to be used in, the construction of a proposed railroad, and take their notes therefor, their payment to be guaranteed by an existing railroad company controlled by such individuals; that they should execute and file a certificate of incorporation of the proposed railroad, and execute, or cause to be executed, in its name a mortgage on its anticipated property to secure its negotiable bonds to be issued by it and deposited with the investment company as collateral security for said notes. At the date of the execution and delivery of such bonds and mortgage, pursuant to said agreement, and at the date of the record of such mortgage, such proposed railroad company had acquired no property, right of way, or franchises, and had taken no step towards the acquisition of either, further than the filing of its certificate of incorporation and the naming of its board of directors and officers, of all which facts the investment company had knowl-

edge. The money agreed to be furnished by the investment company was by it paid over to the individuals aforesaid, they then being officers of the proposed railroad company, to be by them expended in the construction of said proposed railroad; and such individuals entered into contracts in the name of such railroad company for labor and material used in the building of its said road, but failed to pay therefor. *Held*, that the investment company should be regarded as a promoter and builder of the railroad, and was not entitled to have the mortgage decreed a lien upon the property and franchises of the railroad constructed superior to the statutory liens against the same for labor and material furnished in its construction. (Post, J., with Ryan and Irvine, C.C., dissenting.) *Kilpatrick v. Kansas City & B. R. Co.*, 57 Am. & Eng. R. Cas. 398, 38 Neb. 620, 57 N. W. Rep. 664.

92. — when not so entitled.*—The rule in equity that claims for materials, supplies, and labor furnished a company before the appointment of a receiver have a reference over the lien of mortgage bonds only applies to railroads on account of their quasi public character, and does not apply to mining or manufacturing corporations. *Fidelity I. & S. D. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

Where a railroad company draws a draft in favor of itself, which it indorses to a contractor for the construction of its road, this will make the company liable as indorser and constitute the holder of the draft a general creditor of the company; but the fact that the contractor used the money to pay for labor and materials used in the road will not give the holder of the draft a lien on the road. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

A written statement of a builder, made under oath and recorded on the same day the relator's mortgage was recorded, is not a detailed statement of the amount due as contemplated and required by article 3272 of the La. Civil Code. The recordation of it, although made on the same day the mortgage was recorded, has no effect against the rank of the mortgage, for the reason that the instrument or statement from which it is claimed the privilege arises was

executed the day before it was recorded, whereas article 3274 of the Civil Code declares that a privilege "shall confer no preference on the creditor who holds it over creditors who have acquired a mortgage, unless the act or evidence of the debt is recorded on the day the contract was entered into." *State ex rel. v. Recorder of Mortgages*, 28 La. Ann. 534.

Tenn. Statute of 1877, ch. 72, prohibiting railroad companies from creating liens on their property in preference to claims for labor or materials furnished, only applies where they are so furnished that the railroad company itself is liable therefor, and does not apply when they are furnished to a contractor individually, without establishing a lien, as required by statute. *Central Trust Co. v. Bridges*, 57 Fed. Rep. 753.

93. Claims for land damages—Vendor's lien.*—A landowner's title to damages is paramount to a mortgage given by a railroad company before the damages have been assessed and paid or secured to be paid. *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290.—APPLIED IN *Mercantile Trust Co. v. Pittsburgh & W. R. Co.*, 29 Fed. Rep. 732.

It is clearly settled that the rights and franchises of a railway company do not prevail over a vendor's lien; and where land was sold to a railway company for the purposes of the road, and a mortgage taken to secure the unpaid purchase money—*held*, that the vendor's lien was not thereby lost. *Galt v. Erie & N. R. Co.*, 15 Grant's Ch. (U. C.) 637.

94. Claims for loss of goods carried.—A claim against a railroad company for property lost while being transported, originating more than three years before the road went into the hands of receivers, is not entitled to priority over mortgage creditors, though negotiations were pending for the settlement of such claim from the time of the loss until the receivers were appointed. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 28 Fed. Rep. 871. — FOLLOWED IN *Easton v. Houston & T. C. R. Co.*, 39 Am. & Eng. R. Cas. 588, 38 Fed. Rep. 12.

95. Claims for material used in original construction.†—A claim for

* Claim for labor in original construction of road, when not entitled to priority over mortgage bonds, see 57 AM. & ENG. R. CAS. 204, *abstr.*

* See also *post*, 129.

† When debts incurred for construction of road before insolvency entitled to priority of payment out of net earnings, see 45 AM. & ENG. R. CAS. 94, *abstr.*; 46 *Id.* 317, *abstr.*

materials furnished in the construction of a railroad more than six months before the institution of foreclosure proceedings and the appointment of a receiver is not entitled to payment "as operating expenses" out of the net income in preference to mortgage creditors unless it appears that moneys had been diverted which should have been paid in the discharge of such claim. *American L. & T. Co. v. East & W. R. Co.*, 46 Fed. Rep. 101. — DISTINGUISHING *Fosdick v. Schall*, 99 U. S. 235; *Hale v. Frost*, 99 U. S. 389; *Union Trust Co. v. Souther*, 107 U. S. 591, 2 Sup. Ct. Rep. 295; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 462, 6 Sup. Ct. Rep. 809; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. Rep. 675. EXPLAINING *Easton v. Houston & T. C. R. Co.*, 38 Fed. Rep. 12. QUOTING *Miltenerberger v. Logansport, C. & S. W. R. Co.*, 106 U. S. 287, 1 Sup. Ct. Rep. 140.

96. Claims for personal injuries.*—Iowa Code, § 1309, making judgments for personal injuries prior to the liens of mortgages and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad takes it free from such claims unless the same have been prosecuted to judgment. *Burlington, C. R. & M. R. Co. v. Verry*, 48 Iowa 458.—FOLLOWED IN *White v. Keokuk & D. M. R. Co.*, 52 Iowa 97.

Under Tenn. Act of March 24, 1877, prohibiting railroad companies from creating mortgages or other liens in preference to judgments for labor or materials furnished, or for damages to persons and property in the operation of the road, a sum which a company has agreed to pay for personal injuries constitutes a lien on the road superior to that of mortgage creditors. *Frazier v. East Tenn., V. & G. R. Co.*, 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.

97. Claims for rent of right of way.†—A mortgagor held a leased road under a written lease providing for rent, and for payment for depreciation, and for the payment of a monthly rent by the lessor to the lessee for the use of a part of the road. Successive receivers took possession of the leased road and operated it as a continuation of the mortgaged road. Part of the

rent which accrued before C. became receiver was unpaid. C. after he became receiver paid the rent as it accrued. The successive receivers collected the rent monthly from the lessor for the use of a part of the road. The court allowed to the lessor, as a claim preferred to the first mortgage, a sum based on the actual value of the use of the road by the receivers, and for depreciation, and allowed, with a like preference, claims for supplies and materials furnished for the road while so operated. *Held*, that the allowances were proper, and that the final decree was not erroneous in not requiring the accounts of the receiver to be settled before paying out of the proceeds of sale the debts allowed against him, nor in ordering the sale of the property as an entirety without separating that acquired by the receiver. *Miltenerberger v. Logansport, C. & S. W. R. Co.*, 12 Am. & Eng. R. Cas. 464, 106 U. S. 286, 1 Sup. Ct. Rep. 140.—DISTINGUISHED IN *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 43 Am. & Eng. R. Cas. 436, 42 Fed. Rep. 6; *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26. FOLLOWED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 Fed. Rep. 259; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434.

Two railway companies entered into an agreement for the use of a portion of the road of one of the companies by the other company for a period of two years. The agreement provided that the contract and any damage accruing from a breach thereof should be a continuing lien upon the two roads, "their equipment, and income in whosoever hands they may come." *Held*, that such an agreement created no lien on the property of the company using a portion of the other company's road which takes precedence of a mortgage executed after a breach of the contract prior to the expiration of the term. *Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co.*, 43 Am. & Eng. R. Cas. 694, 135 U. S. 576, 10 Sup. Ct. Rep. 753.

A turnpike company, by a contract in the form of a deed, executed and recorded, agreed that a railroad company might use a certain portion of its road for a right of way at a certain stipulated annual rental; but no specific lien was reserved, and afterwards the railroad company became insolvent while in arrears for such rent. *Held*,

* See also *post*, 113.

† See also *post*, 114.

that a claim therefor did not constitute a lien on the road as against subsequent mortgagees. *Baltimore & L. Turnpike Co. v. Moale*, 71 Md. 353, 18 Atl. Rep. 658.

98. Claims for rolling stock, locomotives, etc.*—Where a car company leases cars to a railroad company at a certain fixed rental, a claim for such rental before the beginning of foreclosure proceedings and the appointment of a receiver does not constitute a lien in preference to a mortgage debt. *Thomas v. Western Car Co.*, 149 U. S. 95, 13 Sup. Ct. Rep. 824.

Rent due for rolling stock hired by a railway company is a "working expense" and a "proper outgoing" within the meaning of section 4 of the Railway Companies Act, and is entitled to priority over the claim of debenture holders. *In re Cornwall Minerals R. Co.*, 48 L. T. 41.

Intervener furnished certain personal property to a railroad company which remained such, and after the road had passed into the hands of a receiver he claimed that his lien should be valued, as against mortgage creditors, at its original amount, claiming that he could have levied execution had it not been for the appointment of a receiver. The statutes of the state provide that personal property shall be subject to execution upon judgment against the purchasers for the purchase price, and shall not be exempt, except in the hands of *bona fide* purchasers for value. *Held*, that, inasmuch as an execution would have been against the specific property, which was necessarily diminished in value by use, the lien could not be given for more than the present value of the property. *Central Trust Co. v. Texas & St. L. R. Co.*, 27 Fed. Rep. 178.

99. Claims for supplies used in making repairs.†—Neither the making of necessary repairs upon a railroad, under a contract with the company giving a lien until paid for; nor payment therefor, in bonds secured by a subsequent mortgage, give the trustees therein any lien for repairs against prior encumbrancers. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467.

* When price of locomotives sold to a company is not entitled to priority where road is subsequently placed in hands of a receiver, see 45 AM. & ENG. R. CAS. 93, *abstr.* See also *post*, 116.

† When a claim for betterments and repairs takes priority over mortgage, see 24 AM. & ENG. R. CAS. 351, *abstr.* See also *post*, 116.

The protection afforded to creditors by the statute extends to creditors engaged in manual labor in making repairs or in operating the road, or who have furnished materials to be used therein, as iron, ties, lumber, wood, coal, oil, etc., even although such creditors have taken promissory notes for their claims, as it is not to be presumed from a change in the form of indebtedness that it is intended to waive the priority of lien; but such protection does not extend to claims for services of directors, superintendents, civil engineers, attorneys, cashiers, paymasters, or heads of departments, nor to claims for rent of offices occupied by them, nor to claims for telegraphing ordered by them, nor to claims for the printing of tickets, bill heads, posters, time-tables, etc., and the materials used therein. *Poland v. Lamoille Valley R. Co.*, 4 Am. & Eng. R. Cas. 408, 52 Vt. 144.

100. Claims for wages, board of laborers, etc.*—In foreclosing a mortgage on a railroad, the net earnings must be applied first to the payment of wages, supplies, and materials; and if such earnings have been diverted to the payment of debts due mortgagees, or for betterments, the amounts due for such wages or supplies constitute a lien on the property, and should be provided for in the foreclosure decree. *Calhoun v. St. Louis & S. E. R. Co.*, 9 Biss. (U. S.) 330, 14 Fed. Rep. 9.

Where a court of equity, on appointing a receiver for a railroad, imposes as a condition an order requiring the payment of wages due employés for a certain period prior to the receivership, such an order is merely a personal protection given to the employés as a matter of favor because of their dependence upon their daily labor for support, and does not include a claim by a merchant for supplies or rations furnished to the employés under contract with the company, although such rations were charged to the employés as part of their wages. The claim is, however, entitled to preference over the payment of interest on the mortgage bonds, and if any sums applicable thereto have been used to pay such interest, or for permanent improvements by which the bondholders have been benefited, the claim will be a charge, to the extent of

* Claims for board and supplies furnished laborers treated as claims for wages, see 45 AM. & ENG. R. CAS. 653, *abstr.* See also *post*, 117.

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the money so used, upon any earnings in the hands of the receiver, or, if these are insufficient, upon the proceeds of the sale of the road. *Finance Co. v. Charleston, C. & C. R. Co.*, 51 Am. & Eng. R. Cas. 55, 49 Fed. Rep. 693.—EXPLAINING *Fosdick v. Schall*, 99 U. S. 235.

101. Claims of general creditors.

—Creditors obtaining a general equitable lien against an insolvent corporation upon funds brought into court for distribution have a lien only against the corporation and its shareholders, and not against lien holders who have specific prior liens upon the corporate property created before the court received the fund. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 Am. & Eng. R. Cas. 271, 127 Ind. 250, 26 N. E. Rep. 784.

The claims of a general creditor can never take priority over the mortgage creditors, except when it is shown that such general creditor has, upon the principles of courts of equity, a superior equity to the lien creditors. No general rule can be laid down on the subject, but each claim must be determined upon the particular facts showing the peculiar equity. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

A railroad company entered into an arrangement by which its indebtedness was scaled, and an old mortgage was surrendered and a new one issued. A certain bondholder who was secured by the old mortgage surrendered his bonds, and received new ones, except for a small balance which was below the amount for which a single bond was issued. *Held*, that he was entitled to a lien equal with the other mortgagees for the whole amount due, including the small amount for which no bond issued. *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 524.

102. Debts contracted in carrying on corporate business.—Where a mortgaged railroad goes into the hands of a receiver, current expenses should be paid from current earnings, but where the earnings are diverted to payment of the mortgage securities, such securities are chargeable in equity with such earnings thus improperly diverted. *Burnham v. Bowen*, 17 Am. & Eng. R. Cas. 308, 111 U. S. 776, 4 Sup. Ct. Rep. 675.—FOLLOWING *Fosdick v. Schall*, 99 U. S. 252; *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 260.—DIS-

TINGUISHED IN *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 43 Am. & Eng. R. Cas. 436, 42 Fed. Rep. 6; *American L. & T. Co. v. East & W. R. Co.*, 46 Fed. Rep. 101. FOLLOWED IN *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 Fed. Rep. 797; *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182. FOLLOWED AND QUOTED IN *McIlhenny v. Binz*, 80 Tex. 1. RECOGNIZED IN *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 Fed. Rep. 800.—*Poland v. Lamoille Valley R. Co.*, 4 Am. & Eng. R. Cas. 408, 52 Vt. 144.

Where current earnings are thus diverted, and the mortgagees take the property at a strict foreclosure sale, they take it subject to the charge for current expenses to the amount of the earnings diverted, and, if not paid, the charge may be enforced by sale of the property. *Burnham v. Bowen*, 17 Am. & Eng. R. Cas. 308, 111 U. S. 776, 4 Sup. Ct. Rep. 675.

A company whose road was heavily mortgaged made an arrangement to operate the road in connection with other roads, all of which were under a general management, but the business of each was kept separate. The other companies loaned such company money to pay taxes, employés, and balances due themselves. *Held*, that such loans were within the meaning of Miss. Code, § 1033, providing that no mortgage on the income, future earnings, or rolling stock of a railroad should be valid as against debts contracted for carrying on the business of the corporation. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.*, 33 Fed. Rep. 778.

Miss. Code, § 1033, does not constitute such a debt a prior lien, but merely prevents those claiming under a prior mortgage from setting it up to defeat such debt. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.*, 33 Fed. Rep. 778.

The class of debts to be thus paid includes taxes, payment of officers and employés, for materials and supplies furnished necessary to keep the road and its rolling stock in a safe condition, balances due to other lines of transportation for tickets and freights, damages which may be incurred in operating the road, and whatever may be necessary in the successful maintenance and operation of the road. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.*, 33 Fed. Rep. 778.

Current debts incurred in operating a

railroad are to be paid out of the current earnings, as against mortgage bondholders, whether accruing before or after the road goes into the hands of a receiver. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.*, 33 *Fed. Rep.* 778.

103. Debts of consolidating company.—A corporation which was indebted to plaintiff and others transferred its assets to a new corporation, which was composed substantially of the same persons, and which assumed the liabilities of the old company; but such transfer was not recorded, and subsequently the new company executed a mortgage to secure bonds issued. *Held*, that such mortgage took precedence over plaintiff's claim, which was not reduced to judgment until after the mortgage was executed, and of which the mortgagees had no actual notice. *Blair v. St. Louis, H. & K. P. Co.*, 25 *Fed. Rep.* 684.

A statute authorizing the consolidation of two companies provided that the debts of the existing companies should not be affected by the consolidation, and authorized the company to dispose of any property which belonged to either of the old companies. The consolidated company issued bonds and secured them by what it termed a first mortgage. *Held*, that outstanding debts of either of the old companies constituted a prior lien over such bonds, as the purchasers of such bonds were chargeable with notice of the provisions of the statute authorizing the consolidation. *Spence v. Mobile & M. R. Co.*, 79 *Ala.* 576.—REVIEWED IN *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422, 5 *So. Rep.* 138.

104. Judgment creditors.*—Mortgagees of personal property of a railroad company out of possession are to be postponed to creditors who have obtained a lien by judicial process. *Merchants' Bank v. Petersburg R. Co.*, 12 *Phila. (Pa.)* 482.

A railroad company whose road is under mortgage cannot defeat the right of its creditors to sell the equity of redemption by executing a deed of trust with long time to run, etc. Nor are the judgment creditors limited, on a bill to obtain satisfaction of their judgments, to the earnings or the income of the company. *Vicksburg & M. R. Co. v. McCutchen*, 52 *Miss.* 645.

A general judgment creditor of a railroad garnisheed the officers of the company.

The road at the time was mortgaged, but the trustees did not demand possession of the road or the income. *Held*, that the judgment creditor was entitled to the income between the date of a decree of foreclosure and the appointment of a special receiver, or so long as the company continued to operate the road. *Gilman v. Illinois & M. Tel. Co.*, 1 *McCrary (U. S.)* 170. —FOLLOWING *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall. (U. S.)* 459.

105. Liens for taxes.—A decree of the United States circuit court that certain personal property of a railway under mortgage be sold, "subject to all claims legally due for taxes which are a lien" on the same, and a direction in a certain other order that the proceeding should be "without prejudice to any of the rights or liens" that the treasurer, etc., had on the property for taxes, will preserve only such liens as are prior to rights under the mortgage. *Ream v. Stone*, 102 *Ill.* 359.

106. Mechanics' liens.*—A lien acquired by filing notice in one county extends to the entire road within the state, and a subsequent mortgagee of the entire road takes his mortgage subject to such lien. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250, 26 *N. E. Rep.* 784.

A mortgage of a railroad yet to be built to secure bonds issued to raise money for the construction of said railroad is junior to a mechanic's lien acquired in furnishing material for or performing labor upon such railroad, unless it is affirmatively shown that the holders of such bonds paid value for them before notice of such liens. *Farmers' L. & T. Co. v. Canada & St. L. R. Co.*, 47 *Am. & Eng. R. Cas.* 271, 127 *Ind.* 250, 26 *N. E. Rep.* 784.

The lien given to mechanics and materialmen on a railway by Iowa statutes dates from the commencement of the construction of a railroad, and is therefore prior to a mortgage executed while the road is building, but before the particular work was done, or the materials furnished for which the lien is claimed. *Taylor v. Burlington, C. R. & M. R. Co.*, 4 *Dill. (U. S.)* 570. *Neilson v. Iowa Eastern R. Co.*, 44 *Iowa* 71.

The lien of a mechanic, under Iowa Code, §§ 2130-2139, for repairs upon a completed railway is not paramount and superior to

* See also *post*, 124.

* See also *post*, 126.

the lien of a mortgage executed after the commencement and before the completion of the road. Nor will the lien of the mechanic upon the particular work performed by him take precedence of the mortgage, when the improvements he has made constitute an integral part of the road. *Bear v. Burlington, C. R. & M. R. Co.*, 48 Iowa 619.

A landowner agreed to convey lands for a station and depot in consideration that the company would erect a depot building thereon. The company employed plaintiff to do the mason work on such building, and upon completion of his work, but before the building was completed, he filed a certificate of an alien thereon. A conveyance of the land was never executed. Prior to such agreement the company had mortgaged its franchises and entire property, both present and after-acquired. *Held*, that plaintiff's lien took precedence over the mortgage lien. *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454, 7 Am. Ry. Rep. 153.—REVIEWING *Rider v. Stryker*, 4 T. & C. (N. Y.) 399.—DISTINGUISHED IN *Toledo, D. & B. R. Co. v. Hamilton*, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296.

3. Priority over Equities Subsequently Arising.

107. In general.—An agreement by the purchasers of a railroad to pay, as part of the consideration, a liquidated claim against the road, not reduced to judgment, does not create a lien in favor of the holder of the claim that will take precedence over a mortgage executed by the purchasers to secure an issue of bonds. *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. Rep. 338.—FOLLOWED IN *Thompson v. White Water Valley R. Co.*, 132 U. S. 68.

Claims for moneys received by a connecting road on through fares and freights for which it may be accountable in part to connecting lines constitute nothing more than open accounts, which stand on the same footing as other unsecured debts. *Jessup v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 441.

Where a company agrees to take up lumber on a side track ordinarily used only for obtainingsand, but subsequently refuses, a claim against the company by the owner of the lumber for such refusal does not constitute a prior claim, after the road goes into the hands of a receiver, as against the

mortgage bondholders. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 Fed. Rep. 566.

Where a deed conveying a right of way stipulates that the company may change the location of its road upon paying an equitable difference, and a change has been made and a difference paid before the landowner mortgages his lands to secure a pre-existing debt, the new location is protected as against the mortgage. *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605.

Mortgagees of a railroad which is in the hands of a receiver have no greater interest in the earnings of the road than unsecured creditors, unless the trustee in the mortgage has taken possession of the property, or the receiver is appointed at his or the bondholders' instance. *State v. East Line & R. R. Co.*, (Tex.) 48 Am. & Eng. R. Cas. 656.

The funds in the hands of a receiver of a railroad appointed in a suit to foreclose a mortgage executed by the company must be applied to the satisfaction of the lien of the mortgage creditors, and not to the payment of debts due to the general creditors. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

These rules are subject to this modification, however: the net earnings while the road is in the possession of a receiver appointed by the court may be applied to the payment of claims having superior equities to that of the bondholders. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

These claims are confined to such outstanding debts for labor, supplies, equipments, or permanent improvements of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

A railroad corporation, being indebted to three classes of bondholders, secured by first, second, and third mortgages, made an arrangement with most of the bondholders under which a new bonded debt was to be created, secured by a new mortgage. A large majority of the bondholders (W., who held bonds secured by the second and third mortgages, being one of them) came in under this arrangement, and exchanged their old for the new bonds. The mortgaged premises were afterwards sold under a decree to foreclose the new mortgage, and

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the proceeds, after paying off the creditors under the first, second, and third mortgages who had not come into the arrangement, were insufficient to satisfy the bonds of a class which, by the terms of the new mortgage, had precedence over those of the class to which W.'s new bonds belonged, nor would the proceeds of the sale have been sufficient to satisfy the bonds secured by the first mortgage if no exchanges had been made. W. then intervened by petition, alleging that he had exchanged his old for new bonds under a separate agreement that if all the old bondholders did not come into the arrangement his old bonds should be returned to him, and he be restored to all his rights thereunder. He prayed that his old bonds be returned, and that he be paid out of the proceeds of the sale as a creditor under the second and third mortgages. *Held*, that W., assuming his allegations to be true, had no equity to the relief he asked as against purchasers of the new bonds without notice of his equity. *Ex parte White*, 2 So. Car. 469.

108. Advances to pay debt for construction.*—One who pays a debt incurred in the construction of a railroad has no superior equity over the bondholders unless it appears that it was done under such circumstances as to estop the bondholders from asserting their lien as against such claim. It is not sufficient to show that the original indebtedness was incurred at the request of the bondholders. *Kelly v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 151, 5 Fed. Rep. 846.

109. Claims for labor.†—Claims for labor performed in the construction of a mortgaged railroad will not be given preference over the mortgage debt of a prior date, though mechanics' or laborers' liens may have been secured. *Tommey v. Spartanburg & A. R. Co.*, 4 Hughes (U. S.) 640, 7 Fed. Rep. 429.

Although the statute of a state giving claims for labor a superior lien to that of mortgages, and providing that such lien might be enforced by the sale of the railroad in a suit to which it should not be necessary to make the bondholders parties, though they might intervene, was passed prior to the making of a mortgage, the trustees under the mortgage or the bondholders are

not bound by a judgment rendered in a suit brought under the statute by an alleged lien-holding creditor to which they were not parties, and they may, in a subsequent suit in a federal court for the appointment of a receiver, compel such creditor to prove affirmatively the existence and priority of his lien. *Hassall v. Wilcox*, 40 Am. & Eng. R. Cas. 385, 130 U. S. 493, 9 Sup. Ct. Rep. 590.

110. Claims for legal services.*—A claim against a company for legal services rendered eighteen months before the road went into the hands of a receiver is not entitled to any preference; but where the attorney is to be paid an annual salary which falls due a short time before the road goes into the hands of a receiver, his claim constitutes a prior lien. *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 521.

But where the attorney pays off sundry small judgments against the company only a few weeks before the road goes into the hands of the receiver, under an agreement that he shall be repaid in a short time, he has no priority for the amount thus paid over the mortgage bondholders. *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 521.

A claim against a company for legal services in maintaining the validity of certain municipal bonds issued in aid of the road is not entitled to priority over mortgage bonds, especially where the services were rendered two years before the road went into the hands of a receiver. *Finance Co. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 678.—DISTINGUISHING *Fosdick v. Schall*, 99 U. S. 235. QUOTING *Kneeland v. American L. & T. Co.*, 136 U. S. 97, 10 Sup. Ct. Rep. 950.

The fact that the attorney's services resulted in benefit to the mortgage bondholders will not justify making the claim therefore a prior lien when the bondholders were not parties to the employment of the attorney. *Finance Co. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 678.—FOLLOWING *Hand v. Savannah & C. R. Co.*, 21 So. Car. 162.

111. Claims for loss of goods, by fire.—A claim for the value of goods lost by fire while in the possession of a railroad

* See also *ante*, 89.

† See also *ante*, 91, 92.

* When claim for legal services not entitled to priority over mortgage bonds in foreclosure proceeding, see 57 AM. & ENG. R. CAS. 303, *abstr.*

company as carrier, and before the road is placed in the hands of a receiver in a foreclosure suit, is not entitled to be allowed as prior in equity to the claim of bondholders. *Easton v. Houston & T. C. R. Co.*, 39 *Am. & Eng. R. Cas.* 588, 38 *Fed. Rep.* 12.—FOLLOWING *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 28 *Fed. Rep.* 871; *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 30 *Fed. Rep.* 895.—EXPLAINED IN *American L. & T. Co. v. East & W. R. Co.*, 46 *Fed. Rep.* 101.

112. Claims for materials.*—Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing a stipulation that the title to the property shall not pass till the property is paid for, and reserving to the vendor the right to remove the property. *Porter v. Pittsburg Bessemer Steel Co.*, 30 *Am. & Eng. R. Cas.* 495, 122 *U. S.* 267, 7 *Sup. Ct. Rep.* 1206.

A company executed a mortgage to secure the full amount of a bond issue; but many of the bonds were sold at a discount, and it was judicially determined that the holders were not entitled to more than the amount actually paid for the bonds. Plaintiff, who had sold the company materials to use in constructing the road, took in payment bonds at 80 per cent., with an agreement that if the company should at any time sell other bonds at a lower rate he should have additional bonds, so as to make up full payment of the materials. The company became insolvent and sold bonds as low as 40 per cent. *Held*, that plaintiff was not entitled in a foreclosure suit to have his equity enforced. *Vose v. Bronson*, 6 *Wall. (U. S.)* 452.

113. Claims for personal injuries.†—One who holds a judgment against the receivers of a railroad for a personal injury received while a passenger is not entitled to priority of payment over first mortgage bonds unless the order appointing the receivers so provided. *Davenport v. Alabama & C. R. Co.*, 2 *Woods (U. S.)* 519.—QUOTED IN *Ex parte Brown*, 9 *Am. & Eng. R. Cas.* 723, 15 *So. Car.* 518.

114. Claims for rent of leased road.*—A lessor of a railroad who has received as rent more than the net earnings of the road under the lease has no equitable claim for rent due on the fund arising from a foreclosure sale over those having mortgage liens. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 33 *Am. & Eng. R. Cas.* 16, 125 *U. S.* 658, 8 *Sup. Ct. Rep.* 1011.

An insolvent railroad company, on its own petition, procured the appointment of receivers to take possession of its road and lines leased by it. In the same suit the trustees of a mortgage upon the company's road asked and were denied an appointment of receivers or an extension of the receivership under their cross-bill. The trustees, however, obtained a decree of foreclosure and a sale of the property thereon. *Held*, that the rentals of the leased lines while in the possession of the receivers did not become a charge upon the *corpus* of the property having priority over the mortgage debt. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 *Am. & Eng. R. Cas.* 301, 46 *Fed. Rep.* 26.—APPLYING *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 38 *Fed. Rep.* 63. CRITICISING *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 34 *Fed. Rep.* 259. DISTINGUISHING *Milteneberger v. Logansport, C. & S. W. R. Co.*, 106 *U. S.* 286, 1 *Sup. Ct. Rep.* 140. QUOTING *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 125 *U. S.* 668, 8 *Sup. Ct. Rep.* 1011; *Kneeland v. American L. & T. Co.*, 136 *U. S.* 89, 10 *Sup. Ct. Rep.* 950. REVIEWING *Fosdick v. Schall*, 99 *U. S.* 235.

The receiver appointed took possession of a line which had been leased to the insolvent company and operated it for a certain time, keeping its accounts separate, however, and applying none of its earnings for the benefit of the general system. The court in appointing the receiver expressly recognized the right of the lessor to take possession on making proper application therefor. *Held*, that the receiver did not become the assignee of the lease or adopt it so as to render the agreed rentals a lien on the earnings of the general system superior to the rights of the general mortgagees. *Quincy, M. & P. R. Co. v. Humphreys*, 51 *Am. & Eng. R. Cas.* 36, 145 *U. S.* 82, 12 *Sup. Ct. Rep.* 787; affirming 34 *Fed. Rep.*

* See also *ante*, 91, 92.

† See also *ante*, 96.

* See also *ante*, 97.

259.—**APPLYING** Chicago Union Bank v. Kansas City Bank, 136 U. S. 223. **QUOTING** Gaither v. Stockbridge, 67 Md. 222; In re Oak Pitts Colliery Co., 21 Ch. D. 322.—**APPLIED IN** Park v. New York, L. E. & W. R. Co., 57 Fed. Rep. 799. **FOLLOWED IN** St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105.

It appearing that the net earnings of the general system were but a small fraction of the preferential indebtedness, the payment of the rental could not be set up as an equitable claim on the theory of diverted earnings as previously announced by the court. Nor was the rental entitled to priority over the mortgage liens as being an expense originating in the course of the receiver's administration. *Quincy, M. & P. R. Co. v. Humphreys*, 51 Am. & Eng. R. Cas. 38, 145 U. S. 82, 12 Sup. Ct. Rep. 787; *affirming* 34 Fed. Rep. 259.—**EXPLAINING** Fosdick v. Schall, 99 U. S. 235.

115. Claims for rent of rolling stock.*—Claims against a receiver for rent of rolling stock and for extraordinary depreciation of the rolling stock while used by the receiver in operating his road are not such claims as should be allowed precedence over the mortgage bonds. *Union Trust Co. v. Illinois Midland R. Co.*, 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.

But a court of equity having possession in a foreclosure suit of the property of a company has jurisdiction to authorize the creation of debts for rolling stock and other purposes, when, in its opinion, it is necessary to do so to secure the continued and successful operation of the road, and to charge the debts so created as a first lien on the mortgaged property. *Vilas v. Page*, 106 N. Y. 439, 13 N. E. Rep. 743, 12 N. Y. S. R. 864, mem., 9 Cent. Rep. 466; *affirming* 11 N. Y. S. R. 416.

116. Claims for supplies used in operating road.†—Two claims for coal furnished to the railroad company for the purpose of operating the road, one of which arose a little more, and the other a little less, than six months before the appointment of the receiver, are both entitled to priority over the mortgages. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

* See also *ante*, 98.

† See also *ante*, 99.

117. Claims for wages of employees.*—A claim by a general freight and passenger agent against an insolvent corporation for the balance of his salary is not entitled to priority of payment over the mortgage bondholders. *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 312.—**DISTINGUISHING** Fosdick v. Schall, 99 U. S. 235.

The claim of employes of a railroad company under the second section of the act "for the relief of citizens on the line of any railroad that has or may hereafter fail to operate" will, where the property is subject to encumbrance existing when the act becomes a law, be subject to such encumbrance. *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277, 14 Am. Ry. Rep. 34; *reversed in* 29 N. J. Eq. 311.—**DISTINGUISHED IN** Toledo, D. & B. R. Co. v. Hamilton, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296.

118. Claims of preferred stockholders.—An agreement to pay dividends on preferred stock out of the net earnings of the road does not necessarily mean the net earnings as they were when the stock was issued. The company may subsequently incur new obligations so as to diminish the net earnings. So a claim to such dividends may be subordinate to creditors who subsequently loan money to carry on the road. *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136, 11 Am. Ry. Rep. 446.—**APPLIED IN** Mackintosh v. Flint & P. M. R. Co., 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582. **FOLLOWED IN** Warren v. King, 108 U. S. 389.

And where the agreement to pay such dividends provides that they shall be paid out of the net earnings, if earned in the current year, but not otherwise, payment is restricted to the current year, whether the business of the road for the year was large or small, and without regard to what it consisted of. *St. John v. Erie R. Co.*, 22 Wall. (U. S.) 136, 11 Am. Ry. Rep. 446.

119. Claims of surety on injunction bond.—A judgment creditor of a railroad levied execution on its property, which was mortgaged, and the railroad enjoined the judgment. Afterwards the surety in the injunction bond paid off the judgment debt. *Held*, as the bond was executed for the protection of the railroad property, the surety should be paid out of

* See also *ante*, 100.

the fund arising from a foreclosure sale of the road in preference to the mortgage creditors. *Union Trust Co. v. Morrison*, 33 Am. & Eng. R. Cas. 33, 125 U. S. 591, 8 Sup. Ct. Rep. 1004.

120. Claims under construction contracts.—Upon foreclosure of a mortgage upon the roadbed and franchise of a railroad, no preference will be given to a claim for work of original construction done for the railroad after the mortgage was executed. *Barstow v. Pine Bluff, M. & N. O. R. Co.*, 57 Ark. 334.—**QUOTING** Toledo, D. & B. R. Co. v. Hamilton, 134 U. S. 296.

A mortgage upon a railroad "built and to be built" is entitled to precedence over the claim of a contractor who thereafter finishes a portion of the road under an agreement that he shall retain possession and apply the earnings to the discharge of his claim, and who has never surrendered possession to the company. *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254.—**FOLLOWED IN** Central Trust Co. v. Kneeland, 46 Am. & Eng. R. Cas. 268, 138 U. S. 414; *Scott v. Clinton & S. R. Co.*, 6 Biss. (U. S.) 529; *Bell v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 785. **REVIEWED IN** Hollister v. Stewart, 111 N. Y. 644, 19 N. E. Rep. 782.

Where a construction contract provides that the contractor is entitled to possession of the road until his contract is completed, but he receives from the company a large number of bonds secured by a mortgage which authorizes the mortgage trustee to take possession upon default of payment of interest on the bonds, and the contractor negotiates the bonds for value, his right to possession is subordinate to the right of the trustee to possession upon a default in payment of interest. *Allen v. Dallas & W. R. Co.*, 3 Woods (U. S.) 316.

121. Damages for causing death of employee.—A claim against a company for negligently causing the death of an employé is not entitled to priority of payment over a precedent mortgage. *Farmers' L. & T. Co. v. Green Bay, W. & St. P. R. Co.*, 45 Am. & Eng. R. Cas. 296, 45 Fed. Rep. 664.—**DISAPPROVING** Dow v. Memphis & L. R. R. Co., 17 Am. & Eng. R. Cas. 324, 20 Fed. Rep. 260.

122. Debentures and debenture stock.—Ordinarily a court of equity ought not to enter upon the work of building or completing a railroad during the progress

of a foreclosure suit; but where the trustees and four fifths of the bondholders consent, and none oppose, the court may depart from this rule in order to prevent a forfeiture of the company's franchise, and also of a valuable land grant, and authorize the receiver to construct unfinished portions of the road out of moneys furnished by the bondholders, and secured by debentures to be issued by the receiver. *Kennedy v. St. Paul & P. R. Co.*, 5 Dill. (U. S.) 519.

Under section 30 of the Companies Clauses Act, 1863, mortgages and bonds granted before the "creation" of debenture stock have priority over such stock. *In re Burry Port & G. V. R. Co.*, 54 L. J. Ch. D. 710, 52 L. T. 842, 33 W. R. 741.

123. Execution liens.—A creditor of a railroad who attaches and afterwards levies execution upon mortgaged property of the company, before the mortgage has been recorded, but with full knowledge of the facts, obtains no priority over the mortgage. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199, 17 Am. Ky. Rep. 367.

Where an action against a railway company is brought upon a bond, and such action is compromised before judgment on the terms that the company shall transfer the whole of its rolling stock as security, the conveyance of such rolling stock is valid as against an execution creditor who subsequently seizes it. *Blackmore v. Yates*, L. R. 2 Ex. 235, 36 L. J. Ex. 121, 15 W. R. 750.

124. Judgment liens.—Judgment liens on a railroad are cut off by the foreclosure of a prior mortgage. *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283.

A mortgage of the personal property of a railroad company is good without delivery of possession to the mortgagee against an ordinary judgment creditor as respects all property necessary to carry on the business of the road. *Covey v. Pittsburg, Ft. W. & C. R. Co.*, 3 Phila. (Pa.) 173.

A judgment was obtained against a company on a claim which was not entitled to priority, and an appeal was taken, the company's attorney going on the appeal bond. Pending the appeal a receiver for the road was appointed, and judgment was subsequently taken on the bond in the appellate court, which was discharged by the attorney. *Held*, that the claim of the attorney

* See also ante, 104.

against the company was not entitled to priority over the mortgage bondholders. *Blair v. St. Louis, H. & K. R. Co.*, 23 Fed. Rep. 523.

The complainant bought at a public sale, and under a power of sale in a mortgage given by a horse railroad company, all its real estate, personal property, franchises, rights, and privileges; he sold everything so bought to one Boylan December 23, 1874, taking, as part of the purchase money, a mortgage thereon from Boylan and his wife. This mortgage was filed as a chattel mortgage on February 5, 1875, but was never refiled. In April, 1876, an act of the legislature was passed providing that a mortgage of chattels, etc., of any railroad or canal company should be valid without being filed as a chattel mortgage. *Held*, that such mortgage was a lien on the chattels described therein, prior to judgments recovered after it was given, either against the mortgagor or a new horse railroad company created after the mortgage was given, and claiming the disputed chattels by a devolution of title under Boylan, the mortgagor. *Kelly v. Boylan*, 32 N. J. Eq. 581.

125. Loans of money.—Where an order of court directs receivers to "continue in possession and management of the property," and they in good faith borrow money to enable them properly and successfully to manage the property, a claim for moneys thus loaned is entitled to payment from the net earnings in the receivers' hands in preference to second mortgage bondholders. *Ex parte Carolina National Bank*, 18 So. Car. 289.—REVIEWING *In re Fifty-four First Mortgage Bonds*, 15 So. Car. 304.

A company interested in maintaining as a "going concern" a mortgaged connecting line loaned it money, which was expended in the payment of operating expenses, and interest on its first mortgage bonds. *Held*, that the company loaning this money was not entitled to preference over the first mortgage bonds by way of subrogation, or on the ground of superior equities; although the advances made might have enabled the mortgaged company to maintain itself as a going concern, that fact alone did not give such advances priority over first mortgage bonds upon the theory that the interests of the public and the bondholders were subserved by such advances. *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*,

45 Am. & Eng. R. Cas. 631, 137 U. S. 171, 11 Sup. Ct. Rep. 61.—QUOTED IN *Quincy, M. & P. R. Co. v. Humphreys*, 28 Abb. N. Cas. (N. Y.) 332.

126. Mechanics' liens.—The lien of a mortgage of a railroad duly recorded takes priority over a mechanic's lien for the construction of a dock on the property of the railroad company three years after registration of the mortgage. *Toledo, D. & B. R. Co. v. Hamilton*, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296, 10 Sup. Ct. Rep. 546.—FOLLOWED IN *Central Trust Co. v. Kneeland*, 46 Am. & Eng. R. Cas. 268, 138 U. S. 414; *Brady v. Johnson*, 75 Md. 445. QUOTED IN *Bartow v. Pine Bluff, M. & N. O. R. Co.*, 57 Ark. 334.—*Jessup v. Stone*, 13 Wis. 466.

The construction of the dock and the consequent improvement of the mortgaged property did not give to the contractor an equitable lien prior in right to the lien of the mortgage, or furnish equitable reasons why the legal priority of the mortgage should be displaced, the claim of the contractor being simply an ordinary debt for construction. *Toledo, D. & B. R. Co. v. Hamilton*, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296, 10 Sup. Ct. Rep. 546.—DISTINGUISHING *St. Louis, A. & T. H. R. Co. v. Cleveland, C. & I. R. Co.*, 125 U. S. 638; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649.

If the mortgagor had full equitable title to the property upon which the dock was constructed, a mortgage with words of general description conveyed the same, and the fact that the mortgagor had not the full title does not entitle a contractor to priority over the mortgage under his mechanic's lien. *Toledo, D. & B. R. Co. v. Hamilton*, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296, 10 Sup. Ct. Rep. 546.—DISTINGUISHING *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277, 29 N. J. Eq. 311; *Botsford v. New Haven, M. & W. R. Co.*, 41 Conn. 454.—FOLLOWED IN *Augusta, T. & G. R. Co. v. Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409, 2 C. C. A. 615.

127. Right of way acquired subsequently to mortgage.—A construction company entered into a contract to build and furnish a railroad, to be paid for in the stock and mortgage bonds of the railroad company, to be issued from time to time, as sections of the road should be completed.

* See also *ante*, 106.

But one section of the road was completed, and the construction company received payment according to the contract, and in turn negotiated the mortgage bonds received for a good consideration; but it did work at various points on the rest of the road, and acquired nearly all of the necessary right of way; and subsequently another railroad company secured title to these properties through the construction company and completed the road. *Held*, that the holders of the bonds issued to the construction company had a prior lien on the whole of the road for the full face of the bonds. *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 13 Sup. Ct. Rep. 892.

128. Unsecured floating debts for construction.—In the absence of some statutory provision, unsecured floating debts of a railroad corporation incurred in the construction of its road do not constitute a lien superior to a valid mortgage duly executed, made to secure bonds of the company, and held by *bona fide* purchasers. *Porter v. Pittsburg Bessemer Steel Co.*, 30 Am. & Eng. R. Cas. 472, 120 U. S. 649, 7 Sup. Ct. Rep. 741.—DISTINGUISHED IN *Toledo, D. & B. R. Co. v. Hamilton*, 43 Am. & Eng. R. Cas. 476, 134 U. S. 296.

After a decree of foreclosure of a railroad mortgage was entered the creditors, with the consent of all parties in interest, entered into an agreement for a perpetual lease of the property to another company, the lessee stipulating to pay the receiver 30 per cent. of the gross earnings of the road, to be applied by the receiver to the payment of interest on bonds issued by the lessee in lieu of the ones formerly issued by the lessor, and secured by the mortgage; but no provision was made for the payment of the floating debts of the company. Certain unsecured notes had been given for debts growing out of the construction of the road, and the holders of these notes intervened and asked to have their claims established as equitable liens upon the road and its funds, and declared paramount to the mortgage liens. *Held*, that they were entitled to the relief sought. *Farmers' L. & T. Co. v. Missouri, I. & N. R. Co.*, 17 Am. & Eng. R. Cas. 314, 21 Fed. Rep. 264.

Where a suit is brought to foreclose a first railroad mortgage, the court has no power, without the consent of the first mortgage bondholders, to direct the application of the income of the road to the dis-

charge of a floating debt created for the purpose of paying interest on the bonds and for supplies and repairs, though it appear that it was probably for the interest of the bondholders that such payment be made, and that the floating debt was equitable and could be paid on favorable terms. *Duncan v. Mobile & O. R. Co.*, 2 Woods (U. S.) 542.

Where net earnings have been applied to the payment of interest on the bonded debt of the company, and to improvements on the property subject to the mortgages, whereby its value is enhanced to the amount expended on it, the debts incurred for construction before the appointment of the receiver are entitled to be paid from the *corpus* of the property in preference to the mortgage debts, though the mortgage creditors were not parties to the suit at the time of the application of the net earnings to the purposes mentioned. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.—FOLLOWING AND QUOTING *Burnham v. Bowen*, 111 U. S. 777.

The mere lapse of more than six months between the time within which claims for operating and construction expenses accrued and the appointment of a receiver does not deprive them of priority over the mortgages where they arose within twelve months before, and were, by Sayles' Civ. St. Tex. art. 3179a, given a lien for that time, though the court fixed six months before the appointment of the receiver as the limit for such claims, which it ordered paid, and though the statutory lien was inferior to that of the mortgages. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

129. Vendor's lien.*—Where a stockholder of a company, who has acted as agent of the company in acquiring title to lands, conveys lands to the company after it has executed and recorded a mortgage of all of its lands which it then owned or might thereafter acquire to secure its bondholders, he must be deemed to have waived a vendor's lien on the land conveyed. *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, 2 Keyes 64.

V. THE TRUSTEES.

1. *Appointment and Removal; Filling Vacancies.*

130. Construction of statute—Election.—Me. Rev. St. 1857, ch. 51, § 51

* See also *ante*, 93.

and the nine following sections, and St. 1858, ch. 30, relative "to trustees of railroads," and regulating the proceedings to be had when the railroad has been conveyed to trustees for the use of the bondholders, apply to cases where the trust, the trustee, and the *cestui que trust* are all created by one and the same deed, and not to a case where a mortgage is made to an individual to secure him and his assigns who may subsequently become holders of bonds to be issued by him. *In re York & C. R. Co.*, 50 Me. 552.

Should such a mortgagee transfer any part of the bonds, he would hold the mortgaged estate as mortgagee for the bonds not transferred, and as trustee for the holders of the portion transferred, precisely as any mortgagee would do under similar circumstances. But neither before nor after such transfer would he be such a trustee as the statutes referred to contemplate. *In re York & C. R. Co.*, 50 Me. 552.

The statutes referred to contemplate a deed of trust, and such a mortgage as has been described is not within the letter or spirit of their provisions. *In re York & C. R. Co.*, 50 Me. 552.

In such a case the election of trustee in place of the original mortgagee, made at a meeting of the bondholders called for the purpose of foreclosing the mortgage, is unauthorized by the statutes. *In re York & C. R. Co.*, 50 Me. 552.

131. Appointment—Powers of the court.—An express trust validly created shall not fail for the want of a trustee; and the power of the court over the removal and appointment of trustees independently of any statute authority, or any directions in the instruments of trusts is well established. *Anson v. Somerset R. Co.*, 85 Me. 79, 26 Atl. Rep. 996.

The special provisions respecting the election of trustees, being cumulative and not restrictive, must be regarded merely as auxiliary regulations designed to aid the court in the discharge of its duty, and to facilitate the action of bondholders who may desire to co-operate in securing a more efficient execution of the trust. These provisions are not designed to prohibit bondholders from directly invoking the aid of the equity court in behalf of themselves and others entitled to the protection of the same security. *Anson v. Somerset R. Co.*, 85 Me. 79, 26 Atl. Rep. 996.

The power of the court to make such ap-

pointment is not defeated by the formation of a new corporation, under Me. Rev. St. ch. 51, by a majority of the bondholders who have exchanged their bonds for stock in the new corporation; nor by a foreclosure promoted by the bondholders, the trustees not being parties thereto, and a sale of the equity of redemption on execution to the new corporation; nor by the creation of a new debt, secured by mortgage, for the extension of the road; nor by estoppel through laches, and because a majority of the bonds was represented at the organization of the new corporation. *Anson v. Somerset R. Co.*, 85 Me. 79, 26 Atl. Rep. 996.

In this proceeding the court will not consider the validity of the alleged foreclosure, nor the question of estoppel, nor determine the relative equities between the outstanding bonds and those surrendered for stock, nor the status of the new corporation and its new issue of bonds. *Anson v. Somerset R. Co.*, 85 Me. 79, 26 Atl. Rep. 996.

The original mortgagor and the surviving trustee are necessary parties. *Anson v. Somerset R. Co.*, 85 Me. 79, 26 Atl. Rep. 996.

The appointment of trustees under Mass. St. of 1876, ch. 236, to receive a mortgage to be made to them by the Eastern R. Co. as security for its certificates of indebtedness, and to perform the other duties required by that statute, may be made in the exercise of the equity jurisdiction of this court; and the trustees so appointed may be ordered at any time hereafter to report or account to the court, without any express provision to that effect in the statute or in the order of appointment. *In re Eastern R. Co.*, 120 Mass. 412.

132. Removal and new appointment.*—After a railroad company had issued bonds and mortgaged its road to secure them it united with another road under the name of the latter, and new trustees were appointed for the consolidated road. Subsequently certain bondholders of the original road filed a bill against the trustees in the mortgage of their individual road and the trustees of the consolidated road, seeking, among other things, to depose the second trustees, and the appointment of others in their stead. *Held*, that they were proper parties to maintain a bill seeking the

* Appointment of new trustees under mortgage. Authority of court paramount to action of bondholders, see 57 AM. & ENG. R. CAS. 187, *abstr.*

removal of the trustees of their individual road for misconduct, and to have others appointed in their place, but not to contest the appointment of the trustees of the consolidated road; that should be done by the trustees of the original road. *Stevens v. Eldridge*, 4 *Cliff. (U. S.)* 348.

133. Non-residence of trustee vacates his office.—The duties devolving upon the trustee under a railroad mortgage are of a personal nature, often requiring his presence, and cannot be delegated; so where a trustee removes to a foreign country so as to incapacitate himself from the discharge of such duties, he thereby vacates his office. *Farmers' L. & T. Co. v. Hughes*, 11 *Hun (N. Y.)* 130.

And upon a proper case made a trustee thus removing to a foreign country will be enjoined from acting as trustee in this country. *Farmers' L. & T. Co. v. Hughes*, 11 *Hun (N. Y.)* 130.

134. Filling vacancies.—Where a railroad mortgage provides for filling vacancies in the office of the trustee by nomination by one of the beneficiaries, and approval by the court, notice to the company of the application for approval is not required. The mode of appointment in such case is governed by the mortgage, and not by the general law. *Macon & A. R. Co. v. Georgia R. Co.*, 1 *Am. & Eng. R. Cas.* 378, 63 *Ga.* 103.

2. Their Powers, Duties, and Liabilities.

135. In general.—The courts will construe strictly any limitation upon the power of a trustee contained in a railroad mortgage to take proceedings to enforce the payment of the amount secured. *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. Co.*, 45 *Am. & Eng. R. Cas.* 689, 139 *U. S.* 137, 11 *Sup. Ct. Rep.* 512.—FOLLOWING *Alexander v. Central R. Co.*, 3 *Dill. (U. S.)* 487; *Credit Co. v. Arkansas C. R. Co.*, 15 *Fed. Rep.* 46.

Where the statutes of a state prescribe the duties of mortgage trustees, a mortgage is sufficient which merely names the trustees, in which case their duties will be those prescribed by the statute. *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 *Fed. Rep.* 604.

In the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee. *Credit Co. v. Arkansas C. R. Co.*, 5 *McCrory (U. S.)* 23, 15 *Fed. Rep.* 46.—QUOTING *Shaw v. Little Rock & Ft. S. R. Co.*, 100 *U. S.* 605.

Where a company mortgages its property, including lands which are not necessary for the construction or operation of the road, upon default the trustee must pursue the remedy provided by statute for a foreclosure, and cannot sell the lands without judicial proceedings; but under the terms of the mortgage he may proceed to a foreclosure upon a failure to pay interest, though the principal is not yet due. *Taber v. Cincinnati, L. & C. R. Co.*, 15 *Ind.* 459.

Where railroad mortgage bonds provide that the company shall deposit a fixed amount annually with the trustee as a sinking fund, and that the sinking fund shall be invested in certain other specified bonds of the company, the court will not, in the absence of the bondholders, direct the trustee to invest the sinking fund in other bonds of the company, bearing a lower rate of interest, merely because the bonds required by the terms of the trust can only be purchased at a premium. *Fidelity I., T. & S. D. Co. v. United N. J. R. & C. Co.*, 12 *Am. & Eng. R. Cas.* 404, 36 *N. J. Eq.* 405.

136. Right to take possession in cases of default by mortgagor.*—Until a railroad mortgagee asserts his rights under the mortgage to the possession of the road by filing a bill of foreclosure, or, if the road be in the hands of a third party as lessee, by demanding possession of such party, he has no right to its earnings and profits. *United States Trust Co. v. Wabash Western R. Co.*, 150 *U. S.* 287, 14 *Sup. Ct. Rep.* 86.—FOLLOWED IN *Seney v. Wabash Western R. Co.*, 150 *U. S.* 310.

Where a mortgage trustee takes possession of the property upon a default in the payment of interest before any principal falls due, he may be required to surrender possession upon payment of the interest due, where the mortgage does not provide a different course. *Union Trust Co. v. Missouri, K. & T. R. Co.*, 26 *Fed. Rep.* 485.

A railroad mortgage provided that the company should remain in possession until a default, and that it should be void if the bonds which it secured were paid; but upon default of payment of principal or interest of the bonds, the trustees, at the request of one half of the bondholders, should sell the property, and apply the proceeds to the

* Right of trustee in railroad mortgage to take possession on default without foreclosure. Rights under junior and senior mortgages, see note, 57 *AM. & ENG. R. CAS.* 142.

payment of such principal and interest. *Held*, that upon a default in the payment of interest the trustees had the power to take possession and foreclose without being requested to do so by one half of the bondholders. *First Nat. Fire Ins. Co. v. Salisbury*, 4 Am. & Eng. R. Cas. 480, 130 Mass. 303.

By the provisions of a mortgage the trustees were required to exercise their power of entry or power of sale, or both, if the default was in the payment of interest or principal of the bonds, upon the requisition of the holders of one fourth of the aggregate amount of the bonds; but if the default was in anything required to be done for the further assuring of the title of the trustees to any property or franchises belonging to the company, "the requisition shall be as aforesaid, but it shall be within the discretion of the trustees to enforce or waive the rights of the bondholders by reason of such default, subject to the power hereby declared of a majority in interest of the holders of said bonds, by requisition in writing, or by a vote at a meeting duly held to instruct said trustees to waive such default, or to enforce their rights by reason thereof." *Held*, that this provision did not give the trustees a discretion to waive a default in the payment of interest or principal of the bonds, subject only to be controlled by the requisition or vote of a majority in the interest of the bondholders. *Hollister v. Stewart*, 38 Am. & Eng. R. Cas. 599, 111 N. Y. 644, 19 N. E. Rep. 782; reversing 37 Hun 645, mem.

137. What is a sufficient taking of possession.—Where a deed of possession of a railroad was given to the trustees of certain creditors who held a prior deed of trust to secure the debt, and the trustees, without taking possession personally, employed the former superintendent and other employés and servants of the road to carry on the business as their agent and servants, and to put up notices all along the line of the road to apprise all parties of the change of ownership—*held*, that the change of possession was sufficient as to subsequent judgment creditors of the company. *Palmer v. Forbes*, 23 Ill. 301.

If a mortgage or deed of trust gives the trustees power to use and run a railroad as the agents and attorneys of the company, that fact will not affect or give character to the title or possession of the property, but only as to the mode and manner of using it;

and a proper transfer under the power will cut off all liens not acquired prior to that transfer. *Palmer v. Forbes*, 23 Ill. 301.

138. Suits to compel trustees to take possession.—The courts have power on bill in equity to decree a specific performance of a stipulation in a railway mortgage authorizing the trustees to take possession of the mortgaged property for non-payment of the bonds. *Shepley v. Atlantic & St. L. R. Co.*, 55 Me. 395.

It is no defense in such a case that litigation may be necessary to ascertain what property is covered by the mortgage, or that a great burden and personal liability for injuries done and debts subsequently incurred will thereby be imposed upon them. *First Nat. Fire Ins. Co. v. Salisbury*, 4 Am. & Eng. R. Cas. 480, 130 Mass. 303.

If a railroad corporation executes a mortgage to trustees to secure the payment of certain bonds, and afterwards executes a second mortgage to the same trustees to secure other bonds, the bondholders under the second mortgage are not necessary parties to a bill in equity by the bondholders under the first mortgage to compel the trustees to take possession of the mortgaged property. *First Nat. Fire Ins. Co. v. Salisbury*, 4 Am. & Eng. R. Cas. 480, 130 Mass. 303.

139. Authority, powers, and duties of trustees, as such.—Trustees in a deed of trust from a railroad containing covenants of warranty may pay a prior judgment lien in order to protect the property, and after payment may be subrogated to the rights of the judgment creditor. *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. Rep. 482.

A mortgage trustee vested with the power of sale has a right to decide in the first instance upon the right of bondholders to have the property sold; but, on the other hand, those representing the railroad have the right to appeal to the courts for an adjudication of such right. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 674.

Where mortgage trustees are empowered, upon the happening of certain contingencies, to declare the whole of the bonds secured by the mortgage due and payable, they are bound to exercise such power in the utmost good faith. The power vests in them a discretion, but it is not an arbitrary one. It does not include the unrestrained power to do what the trustees please; but

they should do only what their honest, disinterested judgment approves, or ought to approve. They must not act under the impulse of fraud, collusion, or self-interest. *Round v. South Carolina R. Co.*, 50 Fed. Rep. 853.

Where a company mortgages its property to trustees for the benefit of bondholders, and such trustees purchase a parcel of land which has been conveyed to the company at the foreclosure of a prior mortgage, but the purchase is made in their own right, and not as trustees, it cannot be treated as a payment of the mortgage by them as mortgagees so as to entitle the amount to be set off against a mortgage given by the company to secure the price of the land. *Griggs v. Detroit & M. R. Co.*, 10 Mich. 117.

140. — of trustees in possession.

Where trustees of a railroad, selected by the company and its bondholders, are placed in possession of the road, and operate the same to earn money to be applied in payment of the debts of the corporation, exercising only the right and franchise of the company, such trustees must be regarded as the agents of the corporation in so far as relates to the transaction of business with third persons. *Wisconsin C. R. Co. v. Ross*, 53 Am. & Eng. R. Cas. 73, 142 Ill. 9, 31 N. E. Rep. 412; affirming 43 Ill. App. 454. — FOLLOWING Grand Tower M. & T. Co. v. Ullman, 89 Ill. 244.

The trustees in a railroad mortgage in possession, after default and a foreclosure, do not hold a mere nominal, naked, dry trust for the sole benefit of the *cestuis que trust*, and their functions do not cease upon the foreclosure, but must continue at least until there is some organization of bondholders with capacity to act, and until relieved by a court of chancery. *Sturges v. Knapp*, 31 Vt. 1.

Where the mortgage trustees are in possession of a road, they are not bound by the wish of a majority of the bondholders as to the future management of the property, it being impossible to consult all the *cestuis que trust*, as the trustees remain liable to the minority for the manner of executing the trust. *Sturges v. Knapp*, 31 Vt. 1.

The law is now well settled that until possession of the trust property is taken by the trustee, or by proper judicial authority, the grantor is entitled to the profits. When possession is thus taken, the trustee becomes entitled to the profits, but only to

such as thereafter accrue. *Frayser v. Richmond & A. R. Co.*, 25 Am. & Eng. R. Cas. 597, 81 Va. 388. — FOLLOWING *Williamson v. Washington City, V. M. & G. S. R. Co.*, 33 Gratt. (Va.) 624.

A railroad corporation executed a mortgage of its road and other property to a trustee to secure payment of its bonds. The bonds not being paid at maturity, the trustee took possession under the mortgage and for several years controlled and managed the road and property on behalf of the bondholders. On a bill in equity brought by the corporation and several stockholders therein against the trustee and others for an accounting, and to redeem—*held*, that the trustee while so in possession must be regarded as the trustee of the corporation as well as of the bondholders. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397, 13 Am. Ry. Rep. 491.

It is inconsistent with the duties which such trustee owes to the corporation to deal in the bonds which the mortgage was given to secure for his own private gain. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397, 13 Am. Ry. Rep. 491.

Such trustee, after taking possession of the road and entering upon the performance of the active duties of his trust, cannot make a valid contract for the leasing of the road to another railroad corporation in which he is a stockholder and director. *Ashuelot R. Co. v. Elliot*, 57 N. H. 397, 13 Am. Ry. Rep. 491.

141. Authority to litigate in behalf of bondholders.*—To the extent that a trustee in a railroad deed of trust or mortgage acts in good faith he represents the bondholders in legal proceedings affecting the trust, where they are not actual parties, and whatever binds him will bind them. *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605. — QUOTED IN *Credit Co. v. Arkansas C. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. Rep. 46; *Meyer v. Utah & P. V. R. Co.*, 3 Utah 280.

The holders of railroad bonds secured by a mortgage cannot maintain a bill of review to avoid what the mortgage trustee has done in their behalf in legal proceedings, and if the bill would lie the bondholders would be entitled only to such relief as the trustee might have in the same proceeding.

* Authority of mortgage trustees to represent bondholders in litigation, see 57 AM. & ENG. R. CAS. 186, *abstr.*

Shaw v. Little Rock & Ft. S. R. Co., 100 U. S. 605.

A decree of foreclosure of a railroad mortgage embodying a plan of reorganization will not be set aside because entered by consent of the mortgage trustees, who hold bonds secured by the mortgage, in the absence of proof of fraud or unfaithfulness. *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605.

Where the bondholders are numerous and scattered, the mortgage trustees may maintain a bill in equity to enjoin an illegal proceeding which will cast a cloud upon the security and diminish the market value of the bonds, or they may maintain a bill to settle a disputed question as to the priority of liens. *Murdock v. Woodson*, 2 Dill. (U. S.) 188.

After a railroad mortgage has been foreclosed the mortgage trustees cannot enforce an agreement between their company and another company whereby the latter had agreed to make good any deficiencies in the net earnings of the other company so as to meet interest on its bonds, as such agreement is for the benefit of the company, and not of the bondholders. *Metropolitan Trust Co. v. New York, L. E. & W. R. Co.*, 45 Hun 84, 9 N. Y. S. R. 415.

A trustee in a railroad mortgage given to secure bondholders represents the latter; therefore general creditors of the company cannot complain that such trustee has improperly given a release of errors in a foreclosure proceeding. *Loeb v. Chur*, 6 N. Y. Supp. 296, 53 Hun 637; affirmed in 125 N. Y. 726, 26 N. E. Rep. 756.

And where it appears that the company is hopelessly insolvent, and in no event could the general creditors receive any of the assets, they cannot complain that the president of the company has executed a similar release of errors. *Loeb v. Chur*, 6 N. Y. Supp. 296, 53 Hun 637; affirmed in 125 N. Y. 726, 26 N. E. Rep. 756.

142. May consult wishes of majority of bondholders.—A railroad was entitled to a land grant as each twenty miles was completed. Before its completion a mortgage on the road was liable to foreclosure for non-payment of interest. The trustees, acting for a large majority of the bondholders, proceeded to foreclose, under an arrangement for the bondholders to buy in the road and reorganize. The minority bondholders desired a receiver, and to raise

money on his certificates to finish the road to prevent a forfeiture of the land grant. *Held*, that it was proper for the trustees to be controlled by the wish of the majority while not conflicting with their duties as trustees. Also that the plan of foreclosure and reorganization should be preferred. Courts should never be used to enable mortgagees to borrow money to complete roads, except under extraordinary circumstances. *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605.

143. Trustees' power to sell given in mortgage.—Trustees under a deed of trust given by a railroad to secure bonds issued by it, authorizing them to sell without foreclosure, may proceed to do so upon condition broken, and such sale will divest the title of the company. *Brunswick & A. R. Co. v. Hughes*, 52 Ga. 557, 7 Am. Ry. Rep. 137.

If the mortgage of a railroad creates a trust, and provides that the power of sale is to be executed by the trustee on certain contingencies, he may be controlled, restrained, and directed by a court of equity at the suit of a party standing in the relation of *cestui que trust*; the rule for his guidance being derived from the instrument itself. *Bradley v. Chester Valley R. Co.*, 36 Pa. St. 141.—**DISTINGUISHED IN** *Philadelphia & B. C. R. Co. v. Johnson*, 54 Pa. St. 127.

144. Power to ratify leases by mortgagor.—A railroad company executed a mortgage of real estate to trustees reciting that they were desirous of raising money by loan not exceeding in amount \$350,000, and had determined to issue bonds of a form which was annexed, and that the mortgage was executed in order to secure the same. The annexed form contained a certificate that the bond was secured by mortgage to the trustees on real estate for the sum of \$350,000. The mortgage contained a provision authorizing the trustees in case of failure to pay the principal or interest, or any part thereof, for ninety days from demand made after any of the said bonds should become due, to enter at the request of the bondholders, and take possession and use the premises, and apply the proceeds to the *pro rata* payment of the unpaid bonds; or, under circumstances therein expressed, to cause the premises, or so much thereof as might be necessary, to be sold at public auction. The mortgage

also contained the following provision: "And it is further mutually agreed that until breach of condition of the aforesaid mortgage the party of the first part, their successors and assigns, shall remain in undisturbed possession and occupation of the premises hereby conveyed; and nothing herein contained shall be so construed as to prevent said corporation from improving said real estate, or making leases of such parts thereof as they may desire and have opportunity to make." *Held*, that under this provision the validity of leases executed by the mortgagors subsequently to the execution of the mortgage, and their authority to execute leases, terminated upon breach of the condition of the mortgage; and that the trustees could not, by an oral assent, confirm leases so as to give them validity thereafter. *Haven v. Boston & W. R. Corp.*, 4 Allen (Mass.) 80.

145. Receipts and expenditures of money—Charges against income.

—Where a railway mortgage provides for the payment of interest on the bonds secured, at stated semi-annual periods, out of the net earnings of the company, the latter owes the duty to the bondholders to keep its accounts so as to show the net earnings for each period; and the mortgage trustees are charged with the duty of so supervising the accounts that this may appear. *Barry v. Missouri, K. & T. R. Co.*, 29 Am. & Eng. R. Cas. 384, 27 Fed. Rep. 1.

The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period, except the payment of interest on prior encumbrances, as stipulated by the terms of the mortgage; and the company cannot charge against income, for any period during the life of the mortgage, a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. *Barry v. Missouri, K. & T. R. Co.*, 29 Am. & Eng. R. Cas. 384, 27 Fed. Rep. 1.

A provision in a railroad mortgage for the expenditure of money received from the sale of part of the property clear of the mortgage is not complied with by the expenditure of other money before the receipt of the purchase money of the property sold unless it was expended under cir-

cumstances such as to connect the antecedent expenditure and the purchase money together in such a way as to show that the expenditure was made with the expectation of reimbursement out of the purchase money, and in reliance upon the receipt thereof for that purpose. *Long Dock Co. v. Morris & E. R. Co.*, (N. J. Eq.) 30 Am. & Eng. R. Cas. 431, 9 Atl. Rep. 194.

146. Inspection and approval of improvements.—A mortgage of a railroad given to a trustee for the bondholders provided that a further issue of bonds, with the same security, might be made at a subsequent time for the purpose of making improvements, but that the company should first submit to the trustee the question of the policy and necessity of making said improvements and obtain his approval thereof. Certain work having been done subsequently upon the line without consulting the trustee in advance, the company requested that it be inspected and bonds to the proper amount be issued if approved. The trustee objected because the application came too late to allow an impartial decision to be made, the proper time being before the work was begun. *Held*, that it did not appear from the deed to be certain that the trustee must give his decision until the issue of bonds was demanded, and that, as it was for the benefit of the bondholders that he should wait for the improvements to be completed before giving an opinion as to their expediency, he could not refuse to comply with the request of the company. *North Chicago R. Co. v. Fidelity Ins. Co.*, 19 Phila. (Pa.) 354.

147. Duty to account to bondholders.—Where a mortgage trustee is authorized to purchase the property at a foreclosure sale, the purchase to enure to the benefit of the bondholders, upon each one paying his proportionate share of the money and expenses paid out by the trustee, the payment or tender of such proportionate amount is a condition precedent to the right of the bondholder to demand an accounting from the trustee. *Zebley v. Farmers' L. & T. Co.*, 45 N. Y. S. R. 425, 18 N. Y. Supp. 526.

And a bondholder will not be allowed to come in after a lapse of fourteen years and pay his proportionate share so as to participate in the benefits of the purchase, where the property in the meantime has been sold by the trustee. *Zebley v. Farm-*

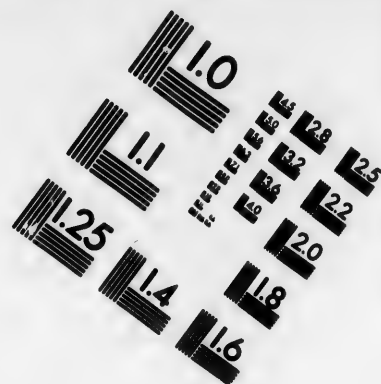
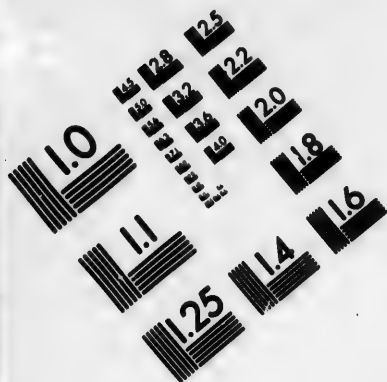
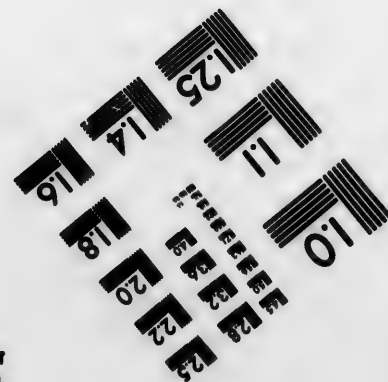
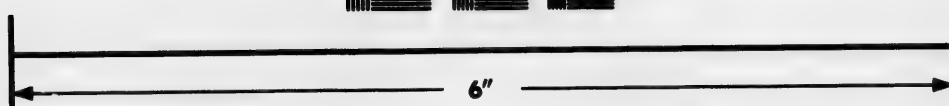
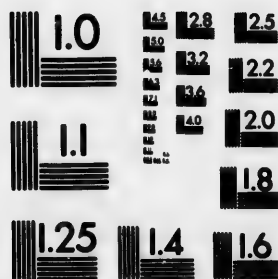


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ers' L. & T. Co., 45 N. Y. S. R. 425, 18 N. Y. Supp. 526.

148. Effect of notice to trustee.—

Notice to a trustee is notice to the *cestui que trust*; and this rule applies to trustees under an ordinary mortgage made by a railroad company to secure the holders of bonds issued under it. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 577, 32 W. Va. 244, 9 S. E. Rep. 180. *Haven v. Emery*, 3 N. H. 66.

149. Action by trustees for instruction by the court.—Where mortgage trustees file a bill to obtain instruction of the court as to the application of funds, it is not necessary to make a party the company, or a depositary of the funds who holds to the credit of the trustees, a party; nor is it necessary to make a sheriff a party who has levied an attachment on the fund. *Coe v. Beckwith*, 10 Abb. Pr. (N. Y.) 296, 31 Barb. 339, 19 How. Pr. 398.

150. Liabilities of the trustees, generally.*—Where a party obtains a judgment against a railroad company while it is in the hands of trustees, and files a bill against a new company which has succeeded to the property by virtue of a foreclosure sale, seeking to charge it with said judgment, and claiming that the trustees paid money to the bondholders that should have gone in discharge of the judgment, the complaint is bad on demurrer if it fails to allege what amount of earnings of the road, if any, had been received by the trustees. *Nicholson v. Louisville, N. A. & C. R. Co.*, 55 Ind. 504, 16 Am. Ry. Rep. 258.

A court of equity may enjoin parties from proceeding in a court of law in another state, but this will rarely be done. Such courts usually act *in personam*, and enforce obedience to their decrees by attachment, but they sometimes enforce obedience by sequestration of the property of a party; but where the proceeding is against mortgage trustees, such remedy is not available, as the rights of the *cestui que trust* could not be affected by sequestration of the property in the hands of the trustees. *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 470.—FOLLOWED IN Vermont & C. R. Co. v. Vermont C. R. Co., 46 Vt. 792.

151. — for labor and supplies necessary in operation of the road.—Although supplies were furnished at a time

* Liability of trustees operating railroad, see note, 17 AM. & ENG. R. CAS. 285.

when a railway company was in default to pay interest on bonds, and when the trustees under a mortgage might have taken possession under a statute, but neglected to do so, the company was not thereby constituted *negotiorum gestor* of the trustees so as to render the latter liable for supplies necessary for the operation of the road obtained by the company before the trustees took possession. *Farwell v. Walbridge*, 6 Montr. L. R. 77; reversing 3 Montr. Super. 238.

152. — for loss of goods carried.

—Where mortgage trustees are authorized to bid in the property at a foreclosure sale, and do so, and take possession and operate the road for the benefit of the mortgage bondholders, so far as the public is concerned, they will be regarded as owners of the road, and liable as common carriers for goods transported. *Rogers v. Wheeler*, 43 N. Y. 598; affirming 2 Lans. 486. *Barter v. Wheeler*, 49 N. H. 9.

Such persons are in no sense receivers, or officers of the court, entitled to the immunities from the ordinary liabilities of persons conducting such business, if any, belonging to such officers. *Rogers v. Wheeler*, 43 N. Y. 598; affirming 2 Lans. 486.

153. — for negligence of employees engaged in operating the road.—A railroad company cannot escape liability to the public for the negligence of its employés by reason of the fact that it has turned over the management of the road to trustees; in such a case the trustees are but agents of the company. *Jones v. Pennsylvania R. Co.*, 8 Mackey (D. C.) 178.

Under Conn. Rev. St. 1866, § 544, making railroad companies liable in a certain amount for negligently causing the death of a passenger, a trustee who is in possession and operating a railroad for the benefit of the bondholders or other creditors is equally liable. *Lamphear v. Buckingham*, 33 Conn. 237.

The trustees under a railway mortgage for the benefit of bondholders, after taking possession of the road, and entering into an agreement for a lease, but where they still receive the earnings of the road, pay its expenses, employ and discharge employés, and exercise the usual powers of railroads, are liable for the negligence of an employé while operating the road. *Bal-lou v. Farnum*, 9 Allen (Mass.) 47.—REVIEWED IN *Lyman v. Central Vt. R. Co.*, 59 Vt. 167.

154. Liability for fraudulent diversion of corporate property.—

Where a company mortgages all of its present and after-acquired property to secure its bondholders, a bondholder may maintain a bill to restrain the fraudulent diversion of iron rails, acquired by the company after the making of the mortgage, under a resolution of the board of directors authorizing one of the mortgage trustees to dispose of such rails to raise money to aid in the construction of an extension of the road. *Weetjen v. St. Paul & P. R. Co.*, 4 Hun (N. Y.) 529.

And the right of such bondholder to interfere is not affected by the fact that a part of such rails had been previously pledged with a firm, of which such trustee was a member, to secure advances made to the road, as such firm could not claim to be *bona fide* purchasers, as knowledge to the trustee was knowledge to the firm. *Weetjen v. St. Paul & P. R. Co.*, 4 Hun (N. Y.) 529.

155. Liability to bondholders for neglect of duty.—

The relation existing between a mortgage trustee and the bondholders who are secured by the mortgage makes it the duty of the trustee to see that the property is not burdened by unjust demands or unnecessary expenditures; and this duty is not fully discharged by the trustee holding himself ready to contest any item to which the bondholders may call his attention. *De Betz's Petition*, 9 Abb. N. Cas. (N. Y.) 246.

Where a mortgage trustee allows persons claiming to hold a majority of the bonds secured to institute proceedings in the name of the trustee to foreclose, and allows such proceedings to be prosecuted to final judgment without any attention on the part of the trustee, but wholly directed and controlled by such persons, such trustee is liable to a bondholder who may be damaged by reason of a failure faithfully to discharge the duties devolving upon the trustee. *Merrill v. Farmers' L. & T. Co.*, 24 Hun (N. Y.) 297; *adhered to in* 4 N. Y. S. R. 122.

But in order for a bondholder to recover damages against the trustee he must establish the amount and extent of his loss approximately, and also the fact that he has actually suffered loss by the act of the trustee. *Merrill v. Farmers' L. & T. Co.*, 4 N. Y. S. R. 122.

Trustees named in a mortgage to secure bondholders were made parties defendant to a bill to foreclose the mortgage filed by certain of the bondholders, and allowed a decree to be taken by default. *Held*, that this supineness was a constructive fraud against the bondholders whom they represented; and if taken advantage of by the complainants in the suit, to the prejudice of the bondholders, the complainants became participants in the fraud. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

A mortgage trustee was authorized in case of default to foreclose on request of holders of a certain amount of the bonds secured; or, on written request of a majority of the bondholders, he was authorized to purchase the property at a foreclosure sale, and proceed to organize a new company for the benefit of the bondholders, upon such terms as a majority of them shall direct. Default was made, a proper request was made, and a foreclosure suit was commenced, but before a sale plaintiff, a bondholder, asked for a stay of proceedings, and an order was entered by which the trustee was directed to bid, "for the benefit of all the holders of bonds," up to \$450,000; but he bid \$750,000, and took the title to the property, no request having been made by a majority of the bondholders for the trustee to make the purchase; whereupon plaintiff brought suit to recover the amount of his bonds. *Held*, that the trustee had the right to make the purchase as against plaintiff; and as the mortgage imposed no restraint as to the price, and as the order did not forbid a higher price than that specified, he had a right to bid over that amount. *James v. Cowing*, 2 Am. & Eng. R. Cas. 336, 82 N. Y. 449; *reversing* 17 Hun 256.

After such purchase, upon request of a majority of the bondholders, the trustee advertised the property for sale, and sold it to another company for \$100,000. *Held*, that such sale was unlawful; that the request of the majority of the bondholders gave no authority to make it so long as any bondholder dissented; that, if for any reason the due execution of the trust seemed to the trustee impossible, he should have sought the direction of the court. *James v. Cowing*, 2 Am. & Eng. R. Cas. 336, 82 N. Y. 449; *reversing* 17 Hun 256.

Plaintiff's measure of damages was the

value of his proportional part of the property thus wrongfully sold. *James v. Cowing*, 2 *Am. & Eng. R. Cas.* 336, 82 *N. Y.* 449; reversing 17 *Hun* 256.

T. and C. were trustees under a mortgage, their duty being to certify to the performance of certain conditions precedent to the issuing of the bonds of a company secured by said mortgage; said bonds were taken by S. The complainant, S., charged the trustees with negligent and faithless performance of duty, attributed loss sustained by them to this cause, and sought reimbursement from the estate of T., who is now deceased. The court, being satisfied that a loss did result from the negligence of T., referred the case to a master to ascertain the damages, with instructions that the proper measure of damages would be the difference in value of the property as actually sold under foreclosure and the value under foreclosure had the trustees performed their full duty. The claim of negligence against C. was not sustained by the court, and the bill as to him was dismissed. *Sulzbach v. Thomson*, 17 *Phila. (Pa.)* 530.

156. Compensation of trustees, generally.—A holder of railroad bonds secured by a mortgage has an interest in the amount of the trustee's compensation, which entitles him to intervene in a foreclosure suit, and to contest it, and to appeal from an adverse decision. *Williams v. Morgan*, 17 *Am. & Eng. R. Cas.* 217, 111 *U. S.* 684, 4 *Sup. Ct. Rep.* 638.

When purchasers at a sale of a railroad under foreclosure purchase under an agreement, recognized by the court and referred to in the decree, that a new mortgage shall be issued after the sale, a part of which is to be applied to the payment of the foreclosure debt, and a part to the payment of expenses, which expenses include the compensation of the trustees under the mortgage foreclosed, the purchasers have an interest in fixing that compensation which entitles them to intervene, and to appeal from an adverse decision. *Williams v. Morgan*, 17 *Am. & Eng. R. Cas.* 217, 111 *U. S.* 684, 4 *Sup. Ct. Rep.* 638.—**DISTINGUISHING** *Swann v. Wright*, 110 *U. S.* 590.

Where there are two mortgage trustees, one resident and having actual control of the mortgaged road, amounting to 134 miles of road, and having the charge of business amounting to \$160,000, and the other residing at a distance and only ex-

amining the reports made by his co-trustee, an allowance of \$5000 to the resident trustee and of \$1500 to the other is deemed proper. *Walker v. Quincy, M. & P. R. Co.*, 28 *Fed. Rep.* 734.

Where it appears that trustees and receivers of a road had contracted to serve for \$1500 per year, and since litigation had commenced they had been paid \$4500 per year for services which were not exclusive of their other business, nor of such a nature as to impose great responsibility, nor take all, or nearly all, of their time, there is no ground for allowing further compensation. *Easton v. Houston & T. C. R. Co.*, 40 *Fed. Rep.* 189.

Though a railroad mortgage may have been originally for \$1,500,000, yet where the whole amount has been discharged before foreclosure proceedings are commenced except one bond amounting to \$500, and the mortgage trustee merely allows the use of his name in the litigation, and renders nothing more than nominal services, an allowance to him of \$500 is ample compensation. *Easton v. Houston & T. C. R. Co.*, 40 *Fed. Rep.* 189.

A mortgage upon a railway and its lands stipulated that the proceeds of the sale of the mortgaged lands were to constitute a sinking fund for the discharge of the bonds secured by the mortgage; that the holders of any mortgage bonds should have the privilege of purchasing lands with the same at not less than a fixed minimum price; that the trustees of the bondholders should be required to cancel the bonds so received; and that, "for services in selling and conveying the lands herein described, and applying the proceeds to the sinking fund," the trustees were to receive "two per cent. on the par amount of the bonds canceled." *Held*, that a sale of lands and payment in bonds were equivalent to a sale for cash, and that the trustees were entitled to two per cent. on the par value of bonds received in exchange for lands and canceled. *Gilman v. Des Moines Valley R. Co.*, 41 *Iowa* 22.

If a mortgage by a company to trustees to secure the payment of certain bonds with semi-annual interest provides that in default of payment the trustees may enter into and take possession of the premises, and "by themselves, their agents, or substitutes have, use, and enjoy the same, making from time to time all needful re-

pairs, alterations, or additions thereto, and, after deducting the expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining due and unpaid, *pro rata*," and that the trustees "shall be entitled to receive proper compensation for every labor or service performed in the discharge of said trust in case they shall be compelled to take possession of said premises or any part thereof, or to manage the same," the trustees, having taken possession for breach of condition, may, on a bill to redeem, be allowed any sum which is reasonable for their own services and expenditures authorized by the mortgage, but not for counsel fees in suits between them and the mortgagors, or for insurance procured by them without the request of the mortgagors. *Boston & W. R. Corp. v. Haven*, 8 Allen (Mass.) 359.

157. Allowance for expenses and disbursements.—When the trust deed provides for the payment of the expenses of foreclosure proceedings, as well as compensation for the execution of the trust, an order will, on the application of the trustee, be entered directing the receivers to pay to the trustee a sum on account of the expenses and services. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8.

Trustees in a railroad mortgage have an inherent equitable right to be reimbursed all expenses reasonably incurred in the execution of the trust, and it is immaterial that there are no provisions for such expenses in the instrument of trust. *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 146.

All such expenses are a lien upon the trust property, and the trustee will not be compelled to part with the property until such expenses are paid. *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 146.—QUOTED IN *McLane v. Placerville & S. V. R. Co.*, 26 Am. & Eng. R. Cas. 404, 66 Cal. 606; *Langdon v. Vermont & C. R. Co.*, 54 Vt. 593.

Plaintiff was one of three trustees appointed by and under a mortgage given by a railroad company to secure certain of its bonds. Said company subsequently executed a lease of its road to plaintiff for the unexpired term of its charter on consideration that he should, among other things, pay the interest upon said bonds and the principal at maturity. This liability

plaintiff assumed without any consideration or prospect of personal benefit, but solely in the interest and for the protection of the bondholders, and with the understanding that he should transfer it on the same terms to the E. R. Co. He, in pursuance of this understanding, leased the road to that company, it agreeing to make the payments and perform the covenants in the lease to plaintiff. The E. R. Co. entered into possession, and, after performing its covenants and paying the interest on the bonds for several years, defaulted, became insolvent, and its assets went into the hands of a receiver. An action to foreclose said mortgage was brought by said trustees against the mortgagor, plaintiff individually, and the successors of the E. R. Co., which resulted in a judgment for a sale and for a deficiency against the mortgagor and plaintiff. Plaintiff commenced and carried on a series of litigations in his individual name against the E. R. Co., its receiver, and others to compel payment to the bondholders of the unpaid interest. These litigations resulted in the collection of a fund, which was deposited in a bank to the credit of the trustees. In a proceeding to obtain certain allowances for plaintiff's services and expenses in prosecuting said litigations—held, that in so doing plaintiff was performing a trust duty, and was entitled to an allowance for his necessary costs and expenses, and to a compensation for his services, at the rate usually awarded to executors and administrators. *Woodruff v. New York, L. E. & W. R. Co.*, 51 Am. & Eng. R. Cas. 89, 129 N. Y. 27, 29 N. E. Rep. 251, 41 N. Y. S. R. 193; *modifying* 31 N. Y. S. R. 7, 10 N. Y. Supp. 305.

158. Allowances to trustees' counsel.—Where a mortgage on a road of considerable magnitude was foreclosed, and many other questions had to be litigated, except those pertaining to a strict foreclosure, the court sitting in the city of St. Louis, Mo., counsel of that city were allowed \$5000, New York counsel a like amount, and counsel of St. Joseph were allowed \$2000. *Walker v. Quincy, M. & P. R. Co.*, 28 Fed. Rep. 734.

Where a mortgage trustee insists on the services of his attorney in filing a foreclosure bill, and it is admitted at the time that the services were worth \$2500, that amount should be allowed. *Easton v. Houston & T. C. R. Co.*, 40 Fed. Rep. 189.

Where there was substantially no contest in a foreclosure proceeding, but the matter carried out according to a plan of reorganization, the court allowed \$100,000 as ample compensation to the solicitors who represented the trustees of all the mortgages, to be divided among them in certain specified amounts. *Easton v. Houston & T. C. R. Co.*, 40 *Fed. Rep.* 189.—DISTINGUISHED IN *Central Trust Co. v. Valley R. Co.*, 55 *Fed. Rep.* 903.

Where a mortgage trustee declines to act in a foreclosure proceeding, but agrees that complainant, who is a holder of a majority of the bonds, shall bring the suit, and the trustee is made a defendant, and full allowance is made to the trustee for his services, and to the complainant's counsel, it is not error to refuse a further allowance to the trustee's counsel. *Investment Co. v. Ohio & N. W. R. Co.*, 46 *Fed. Rep.* 696.—REVIEWING *Tracy v. Gravios R. Co.*, 13 *Mo. App.* 295.—DISTINGUISHED IN *Central Trust Co. v. Valley R. Co.*, 55 *Fed. Rep.* 903.

VI. ENFORCEMENT; FORECLOSURE.

1. The Different Remedies Available.

159. Construction of statutes.—

The intention of Me. Rev. St. 1857, ch. 57, is to provide a mode for the foreclosure of all existing, as well as all subsequent, railroad mortgages, and it therefore applies to mortgages executed before its passage. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 *Me.* 9.

A mortgage was given by a company to trustees to secure certain bonds one of the terms of which was that, if the principal or interest should not be paid at the time stated, the principal sum secured by the mortgage should become immediately due "at the election of the trustees." *Held*, that a subsequent act of the legislature could not authorize a sale of the property, free from this mortgage, where the trustees had not exercised such election, and the mortgage moneys were not due. *Randolph v. Middleton*, 26 *N. J. Eq.* 543.

160. What default will authorize foreclosure.—Where a railroad company is insolvent, and has no funds at the place where its bonds are payable, presentment and demand of payment at such place need not be made before a suit to foreclose a mortgage to secure the bonds. *Shaw v. Bill*, 95 *U. S.* 10.

In the absence of any special provision

therefor, a mortgage as security for interest as well as principal may be foreclosed on default in payment of the interest. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 *Am. & Eng. R. Cas.* 259, 36 *Fed. Rep.* 221.

Where a small minority of stockholders ask for the appointment of a receiver, which is opposed by the majority, it is proper for the majority to institute a foreclosure suit and have a receiver appointed so as to control the litigation; and the officers of the company cannot be charged with fraud or collusion because they file an answer admitting the allegations of the bill. *Pennsylvania Co. v. Johnsonville, T. & K. W. R. Co.*, 55 *Fed. Rep.* 131.

Whenever a debt is payable by instalments, the failure to pay any one of them will authorize a foreclosure and sale of property mortgaged to secure the debt. *Goodman v. Cincinnati & C. R. Co.*, 2 *Disney (Ohio)* 176.

A railroad company alleged its insolvency, and prayed for a sale of its property and distribution of the proceeds among its creditors. A receiver was appointed. A mortgage creditor filed a cross-bill asking foreclosure of two mortgages, on both of which default in the interest had been made, but the debt secured by the second only was due. *Held*, that both mortgages were properly foreclosed, though by its terms the first was not subject to foreclosure until default in payment of the principal at maturity. Even if it had been error to foreclose the first mortgage, the railroad company was not injured thereby, where it was hopelessly insolvent. It is not error to direct that the property of an insolvent company, when offered for sale to the highest bidder, should not be sold for less than a certain sum. *McIlhenny v. Binz*, 80 *Tex.* 1, 13 *S. W. Rep.* 655.

A railroad gave its contractors twenty year interest-bearing bonds in payment for the construction of the road. The principal of the bonds was secured by a ten-year mortgage. The contractors held certain other bonds as collateral. *Held*, that a failure to pay interest on the mortgage bonds did not accelerate the right of the mortgagees to proceed upon the mortgage; but they were entitled to a decree to sell the bonds held as collateral. *Great Western R. Co. v. Galt & G. R. Co.*, 8 *Grant's Ch. (U. C.)* 283.

161. Additional security no waiver of right to foreclose.—Railroad bondholders do not waive their right to foreclose a mortgage to secure the bonds by taking an indorsement of such bonds by another company as additional security. *Muller v. Dows*, 94 U. S. 444.

162. Provision in mortgage prohibiting foreclosure invalid.—A provision in a railroad mortgage prohibiting foreclosure and judicial sale, by providing that the mode of sale by the trustees as set forth therein "shall be exclusive of all others," is an attempt to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, and is therefore illegal. *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. Co.*, 45 Am. & Eng. R. Cas. 689, 139 U. S. 137, 11 Sup. Ct. Rep. 512.—QUOTED IN *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176.

163. Cumulative remedies not affecting right to foreclose.—A provision in a railroad mortgage that the trustees, after default, and upon the request of the holders of \$50,000 worth of bonds, may take possession of the road and operate it, or sell it, as they may think best, does not prevent their going into court and asking for a receiver and a foreclosure of the mortgage without any action on the part of the bondholders. *Phinney v. Augusta & K. R. Co.*, 56 Fed. Rep. 273. *Dow v. Memphis & L. R. Co.*, 17 Am. & Eng. R. Cas. 324, 20 Fed. Rep. 260. *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487.—FOLLOWED IN *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. Co.*, 139 U. S. 137.—*Central Trust Co. v. New York City & N. R. Co.*, 33 Hun (N. Y.) 513.—APPROVING *Howell v. Western R. Co.*, 94 U. S. 463. QUOTING *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47.

The insertion of a power of sale in a mortgage to trustees for the benefit of bondholders does not supersede the right of foreclosure by bill in equity. *Hall v. Sullivan R. Co.*, *Brun. Col. Cas.* (U. S.) 613.—APPROVING *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162.—*Eaton & H. R. Co. v. Hunt*, 20 Ind. 457. *McAllister v. Plant*, 54 Miss. 106, 17 Am. Ry. Rep. 389. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176, 22 Atl. Rep. 932.—QUOTING *Hall v. Sullivan R. Co.*, *Brun. Col. Cas.* 613; *Guaranty Trust Co. v. Green Cove S. & M. R. Co.*, 139 U. S. 137.

A railroad mortgage one of the articles of which provides for entry by the trustees, not to be made until six months after default and demand of payment; another article providing for sale by advertisement, containing the same limitation as to the time, followed by a paragraph providing that "its provision is cumulative to the ordinary remedies of foreclosure in the courts upon default being made as aforesaid," may be foreclosed without waiting six months after default. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 259, 36 Fed. Rep. 221.—APPLYING *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10.—*Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 45 Am. & Eng. R. Cas. 631, 137 U. S. 171, 11 Sup. Ct. Rep. 61.

A mortgage of a railroad to a trustee to secure bondholders contained a provision that in case default should be made in payment of interest six months after demand the whole principal sum should become due and payable, and the lien might be enforced. *Held*, that this provision was cumulative and did not interfere with the right to foreclose on breach of the condition without waiting for the six months to elapse after demand. *Farmers' L. & T. Co. v. Nova Scotia C. R. Co.*, 24 Nov. Sc. 542.

164. Sale without foreclosure under power in mortgage.—A power inserted in a mortgage authorizing the mortgagee upon default of payment to take possession of a railroad and other property connected therewith, and use or sell the same, must be exerted upon all the property mortgaged; and does not authorize the mortgagee to detach portions thereof, either from the possession of the company or an officer succeeding to its rights, by a valid levy thereon. *Coe v. Peacock*, 14 Ohio St. 187.

165. Right to sue upon the bonds.—The common law right to sue upon bonds when mature is not affected by a mortgage to secure the bonds unless the mortgage, by express terms or necessary implication, takes away the right to sue. *Manning v. Norfolk Southern R. Co.*, 29 Fed. Rep. 838.—DISTINGUISHED IN *Guilford v. Minneapolis, S. St. M. & A. R. Co.*, 48 Minn. 560.

The pendency of an action for the foreclosure of a mortgage given to trustees by a company upon its road and franchises as security for an issue of negotiable coupon bonds, and containing the usual powers

found in such instruments, authorizing them, upon default in the payment of any installment of interest coupons, to declare the bonds due, and thereupon to proceed to realize upon the security by foreclosure or otherwise, as prescribed in the mortgage, and to apply the proceeds, but with no further or other power or interest in respect to the obligations or their collection, is no bar to an action in favor of any holder or owner of any of such overdue coupons to recover the amount due thereon by judgment and execution. *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314.—FOLLOWED IN *Patterson v. First Div. St. P. & P. R. Co.*, 25 Minn. 324, *n*.

An action for foreclosure by the trustees in such a case is in the nature of a remedy *in rem*. The effect of the judgment is to determine the amount of the mortgage debt so as to know how much of the security will be required to satisfy the same. The provisions of Minn. Gen. St. ch. 81, § 30, as to an execution for the balance of a debt do not apply thereto. *Welsh v. First Div. St. P. & P. R. Co.*, 25 Minn. 314.—FOLLOWED IN *Patterson v. First Div. St. P. & P. R. Co.*, 25 Minn. 324, *n*.

106. Bill for specific performance.

—Where a mortgage covers real estate, if the mortgagor fails to pay the debt when due, the mortgagee is entitled to the possession of the property, and may maintain ejectment therefor; but where the mortgage embraces also personal property, such as rolling stock, the proper remedy of the mortgagee is by a bill in equity for specific enforcement of the mortgagee's rights. *Dow v. Memphis & L. R. R. Co.*, 17 Am. & Eng. R. Cas. 324, 20 Fed. Rep. R. 260.

107. English and Canadian remedies.—Where a railway act divides the undertaking into three parts with separate capital, and provides that no mortgagee shall have any right or remedy against the company or its undertaking except only with respect to such part as was included in his mortgage, and that the liabilities of the company to its several mortgagees shall be limited accordingly, this does not prohibit an action being brought against the company generally by a mortgagee to recover the principal due, but only applies to the rights and remedies flowing from execution. *Coleman v. Llanelly R. & D. Co.*, 17 L. T. 86, 15 W. R. 1014.

A mortgagee or judgment creditor of a

railway company is not entitled to enforce payment of his demand by sale or foreclosure of the railway; he is only entitled to have a manager or receiver of the undertaking appointed. *Galt v. Erie & N. R. Co.*, 14 Grant's Ch. (U. C.) 499.

A railway company mortgaged land to secure purchase money, subsequently laid down rails upon the mortgaged land, and worked the railway. *Held*, that the mortgagees were entitled to maintain ejectment, and that such mortgage was not *ultra vires*; that the public rights cannot stand in the way of mortgagees claiming by ejectment; but that where land is taken under the compulsory clauses, the compensation must be worked out in the manner prescribed by the statute. *Galt v. Erie & N. R. Co.*, 19 U. C. C. P. 357.—DISTINGUISHING *Pell v. Northampton & B. J. R. Co.*, L. R. 2 Ch. 100.—APPROVED IN *Slater v. Canada C. R. Co.*, 25 Grant's Ch. (U. C.) 363.

2. Jurisdiction.

108. In general.—In a suit to recover interest on bonds the amount of the interest determines the question of jurisdiction; and this rule applies to a proceeding to collect the interest by foreclosure proceedings, notwithstanding the fact that the proceeding may involve the sale of property, and the ascertaining of the rights of other bondholders, which might involve sums much above the amount necessary to give jurisdiction. *Bruce v. Manchester & K. R. Co.*, 25 Am. & Eng. R. Cas. 76, 117 U. S. 514, 6 Sup. Ct. Rep. 849.

Pennsylvania Act of April 11, 1862, giving the supreme court the powers of a court of chancery in corporation mortgages, does not violate the constitution of the United States as to a mortgage dated before its passage in which the remedy provided for the payment of interest is permissive, not exclusive. The act is merely remedial for a breach of contract, and a party in default cannot complain that an additional remedy is given for his breach of contract. *McElrath v. Pittsburg & S. R. Co.*, 55 Pa. St. 189.

The legislature after the decree of sale in equity passed a law to carry the decree into effect. *Held*, that this cured any defect in the jurisdiction of the court. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

160. As dependent upon locality — Suits in state courts.*—A court of chancery has jurisdiction of a bill for the foreclosure of a mortgage, although embracing property out of the state as well as within it. *Mead v. New York, H. & N. R. Co.*, 45 Conn. 199, 17 Am. Ry. Rep. 367.

A foreclosure of a mortgage of a telegraph line which extends through more than one state, in a state court, has no effect beyond the state where the foreclosure is had. *Farmers' L. & T. Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. Rep. 184.—FOLLOWED IN *Lynde v. Columbus, C. & I. C. R. Co.*, 57 Fed. Rep. 993.

Foreclosure proceedings in New York are ineffectual to pass title to property in Pennsylvania. *Pittsburgh & S. L. R. Co. v. Rothschild, (Pa.)* 26 Am. & Eng. R. Cas. 50, 4 Atl. Rep. 385.

A shareholder of a consolidated company who has accepted and disposed of bonds illegally issued, although he might be precluded from questioning the validity of the bonds and mortgage, may yet assert want of title in the purchaser of the corporate property situate in Pennsylvania and sold under foreclosure proceedings in New York. *Pittsburgh & S. L. R. Co. v. Rothschild, (Pa.)* 26 Am. & Eng. R. Cas. 50, 4 Atl. Rep. 385.

Where a mortgaged railroad is situate in two states, a court of one state in foreclosing the mortgage cannot merge into its judgment the mortgage lien existing in the other state. It may act upon the company so as to compel a conveyance of the entire property, or a release of the entire lien, but if it does not do so, the foreclosure is not a bar to another suit by the same parties in the other state to foreclose there. *Lynde v. Columbus, C. & I. C. R. Co.*, 57 Fed. Rep. 993.—DISTINGUISHING *Muller v. Dows*, 94 U. S. 444. FOLLOWING *Farmers' L. & T. Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. Rep. 184.

Where actions to foreclose two or more mortgages on a railroad are instituted in one judicial district, and all the relief which the parties are entitled to may be obtained therein, it is improper to allow another action, in another district, which seeks substantially the same relief. *Whitney v. Stevens*, 16 How. Pr. (N. Y.) 369.

* Effect of foreclosure on property in other state, see note, 26 AM. & ENG. R. CAS. 65. See also 57 *Id.* 206, *abstr.*

170. — suits in federal courts.—A United States circuit court, sitting as a court of equity, has jurisdiction to foreclose a railroad mortgage given to secure its bonds. *Bell v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann. 785.

Where a federal court has jurisdiction of property, and has taken possession by the appointment of a receiver, it thereby acquires jurisdiction of a subsequent foreclosure suit without reference to the citizenship of the parties. *Carey v. Houston & T. C. R. Co.*, 52 Fed. Rep. 671.—FOLLOWING *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 137 U. S. 171, 11 Sup. Ct. Rep. 61.

Where a railroad lies partly in one state and partly in another, in foreclosing a mortgage thereon a court of equity may decree a sale of the entire road, and direct a deed to the purchaser. *Muller v. Dows*, 94 U. S. 444.—DISTINGUISHED IN *Lynde v. Columbus, C. & I. C. R. Co.*, 57 Fed. Rep. 993.—*Randolph v. Wilmington & R. R. Co.*, 11 Phila. (Pa.) 502.

So held, where the road was one indivisible and inseparable piece of property which could not be divided without affecting its value. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 447.

The circuit court of the southern district of New York has jurisdiction of a suit to foreclose a railroad mortgage executed upon its right of way granted to it by congress, together with its improvements thereon, through the United States reservation at West Point in the state of New York. *Beekman v. Hudson River W. S. R. Co.*, 36 Am. & Eng. R. Cas. 321, 35 Fed. Rep. 3.

171. As affected by consolidation.—Where several railroads are consolidated and reorganized under a new name, and the bondholders of the several lines surrender their bonds and take in lieu thereof bonds of the consolidated company, they thereby surrender the mortgage lien on the several lines, and must look to the mortgage on the consolidated road alone for security of their bonds. *Union Trust Co. v. Illinois Midland R. Co.*, 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.

Where three different companies existing in different states consolidate their roads, and execute a mortgage on the consolidated property, in foreclosing the mortgage

a court of equity may direct a sale of the entire property. Separate suits in each state are not necessary. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525.

And the jurisdiction of the court over the entire property may not be ousted by proceedings in one of the states to subject the property to other claims; and the effect of the foreclosure decree cannot be avoided by a sale of part of the property under subsequent proceedings in another state. *Blackburn v. Selma, M. & M. R. Co.*, 2 *Flipp.* (U. S.) 525.

A mortgage sought to be foreclosed contained a covenant on the part of the company to pay interest on mortgages upon different divisions of the road made by separate companies before a consolidation. Plaintiff, who was a large bondholder, had not paid anything for these division mortgages, and the holders were not parties to the suit. *Held*, that no decree of foreclosure could be granted for a default in the payment of interest on the divisional mortgages. (Treat, J., dissenting.) *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 5 *Dill.* (U. S.) 1.

172. Conflict of jurisdiction, generally.—Where suit is brought to foreclose a junior mortgage, and the court has taken possession of the property by appointing a receiver, senior mortgagees cannot gain possession while the suit is pending by bringing a suit on their mortgage. *Young v. Montgomery & E. R. Co.*, 2 *Woods* (U. S.) 606.

Where a railroad extending through three states is mortgaged to the same trustees, and a foreclosure proceeding is instituted in each state, and the same person is appointed receiver in each state, an application in one of the states by a creditor of the company to obtain relief as against the receiver cannot be defended on the ground that the principal suit is in one of the other states, and that relief can only be properly had there. The proceeding in each state is independent so far as relates to the property situate within the state. *In re United States Rolling Stock Co.*, 55 *How. Pr.* (N. Y.) 286.

After the foregoing decision was announced (55 *How. Pr.* 286) a motion was made to amend the complaint and order appointing a receiver so as to make the action in one state merely ancillary to that pending in another state, which should be re-

garded as the principal suit. *Held*, that the motion might be granted, provided the issues already made and the court's power effectually to dispose of them were not changed. But under the facts of the case the court refused to modify its order appointing the receiver. *Taylor v. Atlantic & G. W. R. Co.*, 57 *How. Pr.* (N. Y.) 9.

A mortgaged railroad was situate in two states, and after a bill was filed in a United States circuit court to foreclose in one state, and a receiver was appointed, complainant filed a bill in a United States circuit court for the other state, which he termed an "ancillary bill." *Held*, that the bill could not be maintained. If the aid of the court in the second state was desired, it must be invoked by an independent suit. *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 39 *Fed. Rep.* 337.

173. Effect, in state courts, of previous proceedings in federal courts.

—The rights of parties who have obtained judgments in state courts establishing statutory liens on a railroad, and who are not parties to a foreclosure proceeding in a federal court, are not affected by the foreclosure and sale in such federal court. *Blair v. Walker*, 26 *Fed. Rep.* 73.—**DISTINGUISHING** *Blair v. St. Louis, H. & K. R. Co.*, 25 *Fed. Rep.* 232.

Where a federal court has jurisdiction of the property of a mortgaged railroad, and has all the parties in interest before it, a decree of foreclosure entered therein cannot be affected by any subsequent action in a state court. Such state court is entirely without jurisdiction or power in the matter. *Gernsheim v. Olcott*, 7 *N. Y. Supp.* 872; *reversed on another point* in 31 *N. Y. S. R.* 321, 10 *N. Y. Supp.* 438.

A state court has no jurisdiction to foreclose a railroad mortgage or to set aside a sale made by the mortgage trustee, under power conferred by the mortgage, where the property at the commencement of the action is in the hands of a receiver appointed by a federal court of competent jurisdiction, and this is so whether the lien which the receiver was appointed to enforce was subsequent to the one sought to be enforced in the state court or not. *Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co.*, 20 *Wis.* 165.

174. Effect, in federal courts, of previous proceedings in state courts.

—Where a railroad mortgage is foreclosed

in a state court having jurisdiction of the persons and the property, a stockholder cannot have such proceeding reviewed in a collateral proceeding in a federal court on a charge that it was obtained by fraud. *Graham v. Boston, H. & E. R. Co.*, 25 Am. & Eng. R. Cas. 53, 118 U. S. 161, 6 Sup. Ct. Rep. 1009.

The fact that a suit by trustees to foreclose a railroad mortgage is pending in the state courts will not bar a similar action by a second bondholder in the federal court. *Beekman v. Hudson River W. S. R. Co.*, 36 Am. & Eng. R. Cas. 321, 35 Fed. Rep. 3.—FOLLOWING *Stanton v. Embrey*, 93 U. S. 548; *Mutual Life Ins. Co. v. Brune*, 96 U. S. 588; *Weaver v. Field*, 16 Fed. Rep. 22.

Where the trustees of a railroad mortgage, given upon a written request of the holders of a majority in amount of outstanding bonds made in pursuance of a provision contained in the mortgage, file a bill to foreclose in the state courts, which is dismissed for want of jurisdiction, from which dismissal they appeal, and before the determination of the appeal they are urged by a bondholder to renew the litigation in the federal courts, but refuse to do so, such bondholder may properly bring a suit, either himself or in his own name, to the extent of accrued and unpaid interest. *Beekman v. Hudson River W. S. R. Co.*, 36 Am. & Eng. R. Cas. 321, 35 Fed. Rep. 3.

Holders of some of the mortgage bonds of a railroad brought a suit in equity in a circuit court of the United States against the corporation, and three individual defendants who were trustees in the mortgage, to foreclose the mortgage and remove the trustees. To the foreclosure portion of the bill the corporation pleaded the pendency of a foreclosure suit in a state court, but as that suit was not between the same parties, or those fully authorized to represent the same parties, in the same behalf and for the same relief, the plea was overruled. To the part of the bill relating to the removal of the trustees they pleaded that what was alleged against them in the bill as ground for their removal had been done by them, but in other relations to the property and in other capacities, under the direction of a state court. The plea was held to be bad. The trustees demurred to the whole bill, on the ground that to proceed with it would interfere with the possession and control of the mortgaged property by the state court,

and be a contempt of that court. *Held*, that, as neither the mortgagors nor any one claiming under them were in possession, such would not be the effect of proceeding with the suit for foreclosure merely, and that the demurrer must be overruled. *Brooks v. Vermont C. R. Co.*, 14 Blatchf. (U. S.) 463. —EXPLAINED IN *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 Fed. Rep. 604.

A trust company of New York filed a bill in a federal court in Texas to foreclose a mortgage on a railroad situate in that state, and also sought to make certain citizens of Texas parties, so as to require them to assert their claims in the federal court instead of in the state court. While the bill was pending the road was sold under a decree rendered in a state court in favor of a citizen of the state, but who was a party to the bill in the federal court, and the road was purchased by citizens of New York, who consented to the appointment of a receiver in the federal court. *Held*, that citizens of New York who had acquired an interest in the road after the jurisdiction of the federal court had attached, and being the real parties in interest in the sale, were entitled to intervene and set up their rights. *Farmers' L. & T. Co. v. Texas Western R. Co.*, 32 Fed. Rep. 359.

A receiver appointed in a foreclosure suit included in his inventory of property certain notes executed by a land company and secured by a mortgage, which were treated as a part of the mortgaged property at the time a consent decree was entered directing a sale of the company's property. But it seemed, as a matter of fact, that such notes were not included in the mortgage sought to be foreclosed. *Held*, that the court would not release its control over the notes that they might be subjected to process at the suit of certain creditors in a state court; nor would the court award such creditors a prior lien thereon by reason of their proceeding in the state court. The federal court, having before it all the parties in interest, would proceed to decide any conflicting claims thereto. *Farmers' L. & T. Co. v. San Diego Street-Car Co.*, 49 Fed. Rep. 188.

3. Right of Action and Defenses.

a. Who may Sue or be Joined as Plaintiffs.

175. Right of mortgagee or trustee to sue.—The mortgagees of a railroad

in foreclosure proceedings represent the bondholders, and the latter are neither necessary nor proper parties to the action, and any question as to the amount for which the security would be available must be made with the mortgagees, by an issue in the action, *Coe v. Columbus, P. & I. R. Co.*, 10 *Ohio St.* 372.

A trustee to whom a mortgage is made for the benefit of bondholders, and who has no interest except as trustee, is not authorized by Ky. Code, § 37, to bring an action in his own name for its foreclosure; but where the mortgage makes it his duty to sue he may do so without making the bondholders parties upon showing that they are numerous, and that it is impracticable to bring them before the court in a reasonable time. *Bardstow & L. R. Co. v. Metcalfe, & Metc.* (Ky.) 199.

170. When bondholders may sue, generally.—Where mortgage trustees first file a bill for a strict foreclosure and for general relief, but subsequently file a supplemental bill asking that a certain plan of reorganization be carried out, and a certain bondholder be restrained from interfering with the plan, such bondholder can only be heard in the pending suit, and cannot prosecute an independent bill seeking a foreclosure and a removal of the trustees. *Stern v. Wisconsin C. R. Co.*, 1 *Fed. Rep.* 555.

The fact that a mortgage trustee is trustee in twelve different mortgages executed by different companies existing under different charters, but the roads of each are all operated under one system, is not sufficient ground for allowing a committee representing the bondholders to become the plaintiff in a foreclosure suit, in the absence of anything tending to show that the trustee has not properly protected the interests of all, or that there is any conflict of interest between the several parties that the trustee represents. *Clyde v. Richmond & D. R. Co.*, 55 *Fed. Rep.* 445.

A provision in a railroad mortgage to secure bonds to the effect "that the principal sum secured by said mortgage shall become due in case the interest on the bonds remains unpaid for four months" does not give the several bondholders a right of action for the principal of their bonds upon a failure to pay interest, but only gives the mortgage trustee a right of foreclosure for such failure. *Mallory v. West Shore H. R. R. Co.*, 3 *J. & S. (N. Y.)* 174.

177. — because trustees refuse to sue.—Bondholders themselves are entitled to prosecute a suit to foreclose a mortgage where the mortgage trustees refuse to institute a proceeding. *Owens v. Ohio C. R. Co.*, 20 *Fed. Rep.* 10.

And such proceeding cannot be arrested by a tender of interest due, unless it includes all the interest on bonds the holders of which have not agreed to postpone their claims. *Van Benthuyzen v. Central N. E. & W. R. Co.*, 45 *N. Y. S. R.* 16, 63 *Hun* 627, 17 *N. Y. Supp.* 709.

The holder of any one of a series of bonds secured by a mortgage made to trustees may, on refusal of the trustees so to do, maintain a suit for the foreclosure of the mortgage for default in the payment of interest. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 *N. J. Eq.* 176, 22 *Atl. Rep.* 932.—QUOTING *Chicago, D. & V. R. Co. v. Fosdick*, 106 *U. S.* 47.—*Seibert v. Minneapolis & St. L. R. Co.*, 57 *Am. & Eng. R. Cas.* 208, 52 *Minn.* 148, 53 *N. W. Rep.* 1134.

Such suit ordinarily should be brought by the bondholder in behalf of himself and all other bondholders, but an averment to this effect is unnecessary when default has been made only on the bonds held by complainant. *McFadden v. May's Landing & E. H. C. R. Co.*, 49 *N. J. Eq.* 176, 22 *Atl. Rep.* 932.

But it is competent for the bondholders to agree among themselves upon what conditions this right may be exercised by an individual bondholder; and a provision in the mortgage that no proceedings in law or equity shall be taken by any bondholder secured thereby to foreclose the equity of redemption, independently of the trustee, until after the refusal of the trustee to comply with a requisition first made upon him by the holders of a certain percentage of the bonds secured by such mortgage, is reasonable and valid. *Seibert v. Minneapolis & St. L. R. Co.*, 57 *Am. & Eng. R. Cas.* 208, 52 *Minn.* 148, 53 *N. W. Rep.* 1134.

It is not the purpose or effect of such a stipulation to divest the bondholders of their right to judicial remedies, or to oust the courts of their jurisdiction, but it is merely the imposition of certain conditions upon themselves in respect to the exercise of that right. *Seibert v. Minneapolis & St. L. R. Co.*, 57 *Am. & Eng. R. Cas.* 208, 52 *Minn.* 148, 53 *N. W. Rep.* 1134.

The right of bondholders to institute such proceeding does not depend upon whether

the road is properly managed or not. In case of default they are entitled to a receiver, even if the management is honest and capable. *Van Benthuyzen v. Central N. E. & W. R. Co.*, 45 N. Y. S. R. 16, 63 Hun 627, 17 N. Y. Supp. 709.

Where trustees under a mortgage of a railroad, of whom it is alleged in the bill for a foreclosure that they had refused to proceed to realize on the security, apply to come in and have been admitted as complainants in the bill, they must control the proceeding. *Richards v. Chesapeake & O. R. Co.*, 1 *Hughes* (U. S.) 28.

In a bill filed by the holder of bonds secured by an income mortgage made by a railroad corporation to enforce his rights, the trustee under the mortgage was made a defendant, on the allegation that he had refused to bring the suit. The corporation denied this allegation and it was not proved. The trustee did not appear and was not served with process, and it was not alleged or proved that he was beyond the jurisdiction of the court. *Held*, that the bill must be dismissed. *Morgan v. Kansas Pac. R. Co.*, 21 *Blatchf.* (U. S.) 134, 15 *Fed. Rep.* 55.—DISTINGUISHED IN *Spies v. Chicago & E. I. R. Co.*, 24 *Blatchf.* 280; *Spies v. Chicago & E. I. R. Co.*, 30 *Fed. Rep.* 397. FOLLOWED IN *Barry v. Missouri, K. & T. R. Co.*, 22 *Fed. Rep.* 631.

178. — where trustees have died.—Where the trustees of a railroad mortgage or deed of trust are dead, a bill of foreclosure and sale may be filed against the company by one or more of the bondholders on behalf of themselves and all other bondholders secured by the same mortgage; or if there be several successive mortgages, the trustees of which are dead, and the complainants hold bonds secured by each mortgage, the bill may be filed on behalf of themselves and all of the bondholders under each mortgage. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall.* (U. S.) 459.—FOLLOWED IN *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 *Am. & Eng. R. Cas.* 259, 36 *Fed. Rep.* 221.

In such case no injustice could be done, because any bondholder not made a party would have a right to intervene and contest the priority of a mortgage earlier in date than that by which his bonds are secured, or the validity of bonds held by any other bondholder. *Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall.* (U. S.) 459.

179. Bondholders' consent or request that trustees sue.—A railroad mortgage provided that the trustees, upon the written request of the holders of a majority of the bonds then outstanding, shall proceed to collect. *Held*, that this made it necessary to prove that a bill filed to collect the entire debt was upon the written request of the holders of a majority of the outstanding bonds. *Chicago, D. & V. R. Co. v. Fosdick*, 7 *Am. & Eng. R. Cas.* 427, 106 U. S. 47, 1 *Sup. Ct. Rep.* 10.—DISTINGUISHED IN *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 *Fed. Rep.* 164. REVIEWED IN *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 24 *Am. & Eng. R. Cas.* 166, 27 *Fed. Rep.* 146.—See also *Barnes v. Chicago, M. & St. P. R. Co.*, 30 *Am. & Eng. R. Cas.* 453, 122 U. S. 1, 7 *Sup. Ct. Rep.* 1043.

180. Joinder of bondholders as plaintiffs.—Where a company executes a mortgage directly to its bondholders, who are named, and their several interests specified, and the adequacy of the security is doubtful, all of the bondholders should be made parties to a foreclosure suit, so that each may be present to defend his own claims, and, if necessary, attack others. *Nashville & D. R. Co. v. Orr*, 18 *Wall.* (U. S.) 471, 6 *Am. Ry. Rep.* 396.—DISTINGUISHED IN *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 *Fed. Rep.* 164. QUOTED IN *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, 12 *Sup. Ct. Rep.* 364.

Where mortgage trustees have acquired interests adverse to the bondholders, or stand in a hostile position to them, the bondholders may bring a suit to foreclose, and make the trustees defendants. *Webb v. Vermont C. R. Co.*, 20 *Blatchf.* (U. S.) 218, 9 *Fed. Rep.* 793.

Where bondholders of one state bring a foreclosure suit in a federal court against a corporation of another state, and the jurisdiction of the court depends upon citizenship, other bondholders who are citizens of the state where the railroad is situate, and where the suit is brought, cannot be made plaintiffs. *Jackson v. Burlington & L. R. Co.*, 29 *Fed. Rep.* 474, 24 *Blatchf.* (U. S.) 194.—FOLLOWING *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 *Sup. Ct. Rep.* 10.

The mortgage trustee represents the bondholders in a railroad foreclosure suit, and ordinarily whatever binds the trustee binds

the bondholders; and they have no right to be made parties unless the trustee is acting in bad faith, or failing to protect their interests. *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 *Fed. Rep.* 182.—FOLLOWING *Kneeland v. Luce*, 141 U. S. 491, 12 Sup. Ct. Rep. 32; *Kent v. Lake Superior Ship C., R. & I. Co.*, 144 U. S. 75, 12 Sup. Ct. Rep. 650; *Elwell v. Fosdick*, 134 U. S. 500, 10 Sup. Ct. Rep. 598.

While a cause is pending in the court of chancery to foreclose a mortgage brought by a part of the bondholders in behalf of themselves and all others the owners and holders of bonds who might choose to come into the suit, other owners of bonds secured by the same mortgage, on petition, in the discretion of the court, may be made parties orators. And this is so although the cause had passed to the supreme court, and, at the time the petition was brought, had been pending for several terms in the court of chancery, having been remanded with a mandate affirming the decree below, and the bonds of the original orators paid off. *In re Chickering*, 26 *Am. & Eng. R. Cas.* 646, 56 *Vt.* 82.

b. Parties Defendant; Intervention.

181. Parties defendant, generally.*

—Where a receiver is appointed for a railroad on a bill filed by a second mortgagee, and the first mortgagee is made a party, it has the effect of bringing the entire property into court, and not merely the equity of redemption, or interest of the second mortgagee. *Milttenberger v. Logansport, C. & S. W. R. Co.*, 12 *Am. & Eng. R. Cas.* 464, 106 U. S. 286, 1 *Sup. Ct. Rep.* 140.

Where a federal court has taken possession of mortgaged railroad property by the appointment of a receiver, and is proceeding to foreclose a junior mortgage, and suit is brought in the same court to foreclose a senior mortgage, the court, having acquired jurisdiction over the property, will retain it for all purposes, and will make the purchaser under the first foreclosure sale a defendant and order substituted service of process upon him regardless of his citizenship. *Farmers' L. & T. Co. v. Houston & T. C. R. Co.*, 44 *Fed. Rep.* 115.

The proceeding to foreclose a real estate mortgage is void as to all persons interested

in the subject of the suit who are not parties to the action. Therefore, if such persons are not made parties, another action may be instituted either by or against them for the purpose of determining their rights; it against them, it may be by the purchaser of the property sold under the first foreclosure. *Dodge v. Omaha & S. W. R. Co.*, 28 *Am. & Eng. R. Cas.* 260, 20 *Neb.* 276, 29 *N. W. Rep.* 936.

182. Proper and necessary parties.*—In a suit for the foreclosure of a railroad mortgage, the trustees of the mortgage bondholders should be parties. *Hale v. Nashua & L. R. Co.*, 60 *N. H.* 333.

Where bondholders who hold bonds secured by a first mortgage on part of a road, and by a second mortgage on the remainder of the road, commence suit to foreclose, and to have an accounting of the earnings of the different parts of the road, and for other relief, the trustees in the second mortgage are necessary parties. *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 *Fed. Rep.* 604.—EXPLAINING *Brooks v. Vermont C. R. Co.*, 14 *Blatchf. (U. S.)* 463; *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 *Blatchf.* 324.

If such trustees reside in another state, the statute of 1875, ch. 137, § 8, which provides for summoning into the circuit court of such absent parties where there is property within the jurisdiction of the court upon which a lien is claimed, applies. *Mercantile Trust Co. v. Portland & O. R. Co.*, 10 *Fed. Rep.* 604.

In foreclosure brought by the trustees and the holders of the bonds, an assignor of the bonds to such holders, as collateral security for a debt less than the amount of the bonds, should be made a party. *Ackerson v. Lodi Branch R. Co.*, 28 *N. J. Eq.* 542.

Where the question is one of a common or general interest of many persons, or where the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. *Stevens v. Union Trust Co.*, 57 *Hun* 498, 33 *N. Y. S. R.* 130.

When a party brings an action for himself, he can select his own defendants, but when he volunteers to sue as the represent-

* Necessary parties, see note, 36 *AM. & ENG. R. CAS.* 250.

Prior mortgagees as proper parties, see note, 17 *AM. & ENG. R. CAS.* 260.

* Prior and subsequent encumbrancers as parties, see note, 3 *AM. & ENG. R. CAS.* 530.

ative of others, he should join all who ought to be sued. If a railroad is to be sold, the common interest of the bondholders requires that the outstanding liens and clouds upon the title behind the bonds secured by the mortgage should be cut off, to the end that there should be no diminution of price upon account thereof; and where mortgage trustees refuse to act, and one or more bondholders sue as the representative of all, the trustees should be made parties. *Stevens v. Union Trust Co.*, 57 Hun 498, 33 N. Y. S. R. 130.

Where a foreclosure is instituted against a railroad company, and it claims that a trust deed executed to a third person on the same premises is prior to the mortgage sought to be foreclosed, it is the right of the company to have that question determined, and for that purpose to have the grantee in such deed made a defendant. Therefore a refusal to vacate an order making such grantee a defendant is not error, though the plaintiff offer to stipulate, for the purpose of the suit, that such trust deed constitutes a prior lien, as such stipulation would not be conclusive as to third parties. *Baass v. Chicago & N. W. R. Co.*, 39 Wis. 296.

183. Proper though not necessary parties.—Where a bill to foreclose a railroad mortgage executed by two companies sets out the respective incorporations and grants of the original franchises to one of the companies, the practical consolidation of the two companies, the expenditure of large sums by the consolidated companies in the construction of a road, and the execution of a mortgage thereon, and traces the franchises through numerous mesne conveyances into the hands of a third company, by which it is leased to a fourth, such latter companies, being respectively owners of the equity of redemption and lessee in possession, are properly made parties to the foreclosure. *Beekman v. Hudson River W. S. R. Co.*, 36 Am. & Eng. R. Cas 321, 35 Fed. Rep. 3.

Where a company procured a conveyance for right of way over a tract of land encumbered by a mortgage during the pendency of an action (to which the grantor was a party) to foreclose the mortgage, it was charged with notice of the action without being made a party thereto, and was bound by the decree of foreclosure. It might have intervened in the action for its own

protection, but failing in that, its only remaining right was to redeem from the foreclosure sale. Failing so to redeem, the sheriff's deed divested it of its title. *Jackson v. Centerville, M. & A. R. Co.*, 17 Am. & Eng. R. Cas. 181, 64 Iowa 292, 20 N. W. Rep. 442.

Where a first mortgage trustee files a bill to foreclose and makes the trustee in a second mortgage a party, the bondholders secured by such mortgages are not parties; but they are privies and may defend *pro interesse suo*, but their rights are affected by a decree against the trustee. The bondholders are not creditors claiming the right to attack the decree of an opposing creditor for fraud or collusion between the plaintiff and defendant, but are affected by the decree against their own trustee. *McElrath v. Pittsburg & S. R. Co.*, 68 Pa. St. 37, 1 Am. Ry. Rep. 139. — FOLLOWED IN *Rice v. Southern Pa. I. & R. Co.*, 9 Phila. (Pa.) 294.

184. Improper or unnecessary parties.—Where a mortgage is executed to trustees to secure an issue of bonds, in foreclosing the mortgage it is not necessary to make all the bondholders parties. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

And where there are two or more mortgages, and the trustees in a prior mortgage file a bill to foreclose, it is not necessary to make bondholders secured by a subsequent mortgage parties. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

And where the bondholders are numerous it is not necessary to make any of them parties to a foreclosure proceeding, if they are represented by trustees who are made parties. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

Where the parties are numerous, a suit brought by or against some on behalf of all is binding on all; but the parties not named may intervene and become actual parties so long as the proceedings are *in fieri*. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

Where bondholders are represented by trustees who are made parties, a decree against the trustees is binding on the bondholders unless they can show fraud or connivance on the part of the trustees. *Campbell v. Texas & N. O. R. Co.*, 1 Woods (U. S.) 368.

Junior mortgagees may maintain a bill to

foreclose without making the senior mortgagees parties; but the foreclosure sale must be subject to the senior mortgage. *Young v. Montgomery & E. R. Co.*, 2 Woods (U. S.) 606.

In such case the senior mortgagees cannot be made parties by general notice to creditors to present their claims. They must be either served with process or voluntarily appear. *Young v. Montgomery & E. R. Co.*, 2 Woods (U. S.) 606.

But if the senior mortgagees are represented by trustees who are actual parties, then a general notice to present their claims is sufficient. *Young v. Montgomery & E. R. Co.*, 2 Woods (U. S.) 606.

It is not proper to allow senior mortgagees to become parties to a foreclosure of a junior mortgage, and to allow them to contest a judgment providing for a reorganization of the road, where there is nothing to show how their securities will be impaired thereby, as ordinarily parties cannot be affected by proceedings to which they are neither parties nor privies. The proper remedy is through a separate action, either by their trustees or, if they are hostile, in their own names. *McHenry's Petition*, 9 Abb. N. Cas. (N. Y.) 256.

In a suit to foreclose a mortgage to which the mortgagee and the holder of the legal title are parties, it is not necessary to bring in the grantor of the legal title as a party defendant. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8.

Unsecured creditors are not necessary or proper parties to a suit to foreclose a mortgage of a railroad, and have no right to intervene therein, but are bound by an adjudication against the mortgagor. *Herring v. New York, L. E. & W. R. Co.*, 35 Am. & Eng. R. Cas. 54, 105 N. Y. 340, 19 Abb. N. Cas. 340, 12 N. E. Rep. 763, 7 N. Y. S. R. 547; *affirming* 34 Hun 634, mem., 63 How. Pr. 497.—FOLLOWING *Bronson v. La Crosse & M. R. Co.*, 2 Black (U. S.) 524; *Stout v. Lye*, 103 U. S. 66.

If the attorney-general commences an action in the name of the people against an insolvent corporation for the purpose of effecting its dissolution and winding up, and after appointment of a temporary receiver therein the mortgagee is permitted by the court to commence a suit to foreclose his mortgage upon the road, the people are not necessary parties to such

foreclosure suit, although the court in its discretion might permit them or the receiver in their action to intervene therein upon application for that purpose. *Herring v. New York, L. E. & W. R. Co.*, 35 Am. & Eng. R. Cas. 54, 105 N. Y. 340, 19 Abb. N. Cas. 340, 12 N. E. Rep. 763, 7 N. Y. S. R. 547; *affirming* 34 Hun 634, mem., 63 How. Pr. 497.

A village granted permission to a railroad company to lay its tracks in the streets, on condition that the company give a bond to indemnify the village against all damages caused by building the road. The village claimed damages and brought suit on the bond, pending which a proceeding was commenced to foreclose a mortgage on the road. *Held*, that the village was only a general creditor, and was not a proper party to the foreclosure suit. *Farmers' L. & T. Co. v. New Rochelle & P. R. Co.*, 10 N. Y. Supp. 810, 57 Hun 376, 32 N. Y. S. R. 714; *affirmed in* 126 N. Y. 624, mem., 27 N. E. Rep. 410, mem.

185. Who may intervene.*—Where a majority of bondholders, after a foreclosure suit has been instituted, adopt a plan to form a new corporation, a minority of the bondholders, who dissent from the plan, and charge, among other things, that the trustees are improperly acting with the majority, are entitled to intervene for the purpose of protecting their own interests, and prosecuting charges made against the trustees. *De Betz's Petition*, 9 Abb. N. Cas. (N. Y.) 246.

Immediately after a judgment was obtained against a railroad foreclosure proceedings were instituted, and a receiver appointed, but the judgment creditor proceeded to levy his execution upon property in the receiver's hands, claiming that the suit was collusively brought in order to defeat a recovery on his judgment. *Held*, that after disclaiming any intention to interfere with the property in the hands of the receiver he should be permitted to intervene in the foreclosure suit, and support his claim and right of recovery. *Farmers' L. & T. Co. v. Toledo & S. H. R. Co.*, 43 Fed. Rep. 223.

186. Who may not—Dismissal of petition to intervene.—Where a rail-

* Right to intervene after a decree of foreclosure, see 33 AM. & ENG. R. CAS. 45, *abstr.*

Exercise by bondholder of option to come in, see 46 AM. & ENG. R. CAS. 351, *abstr.*

road, under its charter, is divided into two divisions, and the company mortgages each division separately for independent debts, creditors of the company and purchasers of one division cannot intervene in a suit affecting the other division for the purpose of lessening a decree. *Bronson v. La Crosse & M. R. Co.*, 2 *Black (U. S.)* 524.—FOLLOWED IN *Herring v. New York, L. E. & W. R. Co.*, 35 *Am. & Eng. R. Cas.* 54, 105 *N. Y.* 340, 19 *Abb. N. Cas.* 340, 12 *N. E. Rep.* 763, 7 *N. Y. S. R.* 547.

Where a foreclosure is instituted against a road, and it appears that certain lands are specially excepted from the property that passes into the hands of a receiver, and no claim is made of any lien thereon, one who has purchased a part of the lands, and who is a citizen of the same state with the company, should not be allowed to intervene, (1) because it is introducing foreign litigation, and (2) because of the citizenship of the intervener and the company. *Cutting v. Florida R. & N. Co.*, 45 *Fed. Rep.* 444.

A foreclosure suit is not a proper proceeding in which to litigate the rights of a party claiming title to the mortgaged premises in hostility to the mortgagor. Therefore, where defendants, who were permitted to intervene in a foreclosure suit upon a mortgage made by a railroad company formed by the amalgamation or consolidation, pursuant to legislative authority, of certain existing railroad companies, sought to question and litigate the validity of the consolidation—*held*, that that defense would not be entertained. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; *reversed in* 34 *N. J. Eq.* 266.

A foreclosure proceeding was commenced against a railroad, and a receiver appointed, with the consent of the company. The court proceeded to adjudicate intervening claims, and the receiver operated the road at a loss, requiring receiver's certificates to be issued, and after the company had failed to answer, and the property had been thus managed for sixteen months, and when the court was about ready to close up the proceeding, a bondholder appeared, and objected that the proceeding was improperly brought. *Held*, that his position was no better than that of the company, and application to intervene would not be granted. *Central Trust Co. v. Texas & St. L. R. Co.*, 24 *Fed. Rep.* 153.

A mortgage of railroad property was made
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to one, his heirs and assigns, as trustee for bondholders. Under proceedings for foreclosure, the mortgagee being dead, another trustee was substituted and a decree of foreclosure rendered. Afterwards a petition was filed by a son of the original mortgagee claiming to be his heir at law, and praying to be made a party. Petition dismissed. *Gibbes v. Greenville & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 459, 13 *So. Car.* 228.

187. Rights of interveners.—Where a personal representative intervenes in a foreclosure suit to recover damages for the death of his intestate, who was killed by the operation of the road, he is not entitled to a trial by jury. *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 *Fed. Rep.* 97, 2 *Filipp. (U. S.)* 704.

A party who has intervened in a foreclosure to which there are several parties defendant will not, upon the rendering of a decree and the dismissal of all the parties save one, from whom the intervener claims relief, lose his standing in the action. *Joliet I. & S. Co. v. Chicago, C. & W. R. Co.*, 51 *Iowa* 300.

188. Admitting bondholders as defendants.—The Raritan, etc., R. Co., to secure bonds issued under its charter, executed a mortgage upon the railroad and its branches and all its real and personal property, including steamboats, etc., and all franchises, etc., then held or thereafter to be acquired by it. After the name had been changed to the New Jersey Southern R. Co. the trustees under the first mortgage filed a bill to foreclose, making only the company and the trustees under the second and third mortgages defendants, and took a decree *pro confesso* against all the defendants, with the usual order of reference. Certain of the first mortgage bondholders afterwards filed a petition alleging that the N. J. S. R. Co., after executing the first mortgage, became the actual owners of the Long Branch, etc., railroad and certain steamboats, etc., which road it had extended, and with its own funds built a pier and costly buildings to be used therewith. The petitioners claimed that the original bill was insufficient to secure their claim to a lien on this after-acquired property, and prayed to be admitted as complainants with the trustees, who might be instructed to amend, etc., or file a supplemental bill, etc., also for a receiver of all the roads. *Held*: (1) that the lien of the mortgage attached to such after-acquired prop-

erty the instant it was acquired, and these trustees held it subject to the trusts therein; (2) that a supplemental bill should be filed by the trustees distinctly setting up this claim, and making all parties in adverse interest defendants; (3) that although bondholders are not necessary parties to a bill to foreclose, the petitioners would be admitted as defendants if they so desired. *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13.

c. Notice of Foreclosure; Defenses.

189. Notice of foreclosure.—A provision in a charter that a foreclosure of a mortgage of the company's property "shall not take place until ninety days after publication of notice of the commencement of proceedings" to foreclose only applies to the foreclosure itself, and not to the bringing of a suit to foreclose. *Hodder v. Kentucky & G. E. R. Co.*, 7 Fed. Rep. 793.

A railroad mortgage provided that on the default to pay interest the trustees might elect to declare the entire debt due, in which case they must give notice to the mortgagor. *Held*, that a mere default to pay interest would not make the entire debt due, without such declaration and notice by the trustees. *Chicago, D. & V. R. Co. v. Fostick*, 7 Am. & Eng. R. Cas. 427, 106 U. S. 47, 1 Sup. Ct. Rep. 10.—APPLIED IN *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 Am. & Eng. R. Cas. 259, 36 Fed. Rep. 221. DISTINGUISHED IN *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.*, 137 U. S. 171.

A railroad mortgage provided that, upon default in the payment of interest or principal of the bonds secured, the trustees might take possession of the road and operate it for the benefit of the bondholders; or they might at their option, in case of default, after sixty days' notice to the company, sell the property after advertising it for sixty days. *Held*, that the trustees, in case of default in payment of the interest, might take possession and subsequently sell; but they must advertise the property for sixty days after giving the company sixty days' notice. *Macon & A. R. Co. v. Georgia R. Co.*, 1 Am. & Eng. R. Cas. 378, 63 Ga. 103.

The Kennebec & Portland R. Co., on the 15th of October, 1852, pursuant to a vote of its directors, mortgaged its road, franchise, and other property to certain persons named in trust for the benefit of the holders of a

certain class of its bonds, duly issued by the company, with interest payable semi-annually. The company having neglected to pay the interest coupons due on the bonds, on and after April 1, 1856, the trustees, upon due application by the holders of the bonds to an amount exceeding one third of the amount of the mortgage, on the 18th of October, 1859, in accordance with Me. Pub. Laws of 1857, ch. 57, gave the public notice, and caused the same to be published, and a copy of the printed notice recorded at the time and place and in the manner prescribed in said statute, for the purpose of obtaining a foreclosure of the mortgage for the breach of its condition. In a bill to redeem—*held*, by a majority of the court, that the mortgage was legally foreclosed. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 59 Me. 9.—FOLLOWED IN *Sullivan v. Portland & K. R. Co.*, 94 U. S. 806.

190. What defenses are available, generally.—In an action to foreclose a railroad mortgage given to secure negotiable bonds, no greater defense can be made than could be made in a suit on the bonds themselves. *Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452.

Where the proof shows that a company never received any consideration for bonds issued by it to the payee, a contractor, which bonds were secured by a mortgage on its road, this will constitute a good defense as against the payee or person to whom delivered, and as against a *bona fide* purchaser when seeking to foreclose the mortgage. *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433.

Where a company executing a mortgage upon its road as contemplated has no legal title to any of the right of way, and a new company is organized which builds the road and acquires the legal title to most of the right of way, no foreclosure can be had as against the new company for the sale of its property. *Chicago, D. & V. R. Co. v. Loewenthal*, 93 Ill. 433.

An action to foreclose a mortgage on a railroad by a trustee will be stayed on a motion made in such action, where it is shown that such action is brought to injure the owners of the bonds and benefit the stockholders of the corporation. *Tillinghast v. Troy & B. R. Co.*, 16 N. Y. S. R. 475, 48 Hun 420, 1 N. Y. Supp. 243; *affirmed in* 121 N. Y. 649, *mem.*, 24 N. E. Rep. 1091, *mem.*

Where trustees have commenced a fore-

closure suit at the request of certain bondholders, and other bondholders do not desire a foreclosure, they may defeat it by paying to the bondholders who are seeking a foreclosure the full value of their bonds, and the costs of the suit, and may compel an assignment of their interest in the suit. *Tillinghast v. Troy & B. R. Co.*, 16 N. Y. S. R. 475, 48 Hun 420, 1 N. Y. Supp. 243; affirmed in 121 N. Y. 649, mem., 24 N. E. Rep. 1091, mem.

191. What defenses will not defeat foreclosure.—Where a railroad is mortgaged to secure a large number of bonds, the fact that some of the bonds are invalid will not avoid the mortgage or proceedings to foreclose it. *Graham v. Boston, H. & E. R. Co.*, 25 Am. & Eng. R. Cas. 53, 118 U. S. 161, 6 Sup. Ct. Rep. 1009.

It cannot concern bondholders how service of process on a railroad company is obtained in a foreclosure suit provided the court legitimately obtains jurisdiction of the parties and the indebtedness is not questioned. *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 203, 6 Fed. Rep. 100.

Where a corporation existing under the laws of one state executes a mortgage on property in another state, it is no defense to a suit to foreclose the mortgage that certain directors of the corporation were not residents of the same state with the corporation at the time the mortgage was executed. *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. Rep. 164.—**DISTINGUISHING** *Nashville & D. R. Co. v. Orr*, 18 Wall. (U. S.) 471; *Chicago, D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 1 Sup. Ct. Rep. 10.

Neither is it any defense that such directors went into the state only for a short time to attend a meeting of the directors, which, by resolution, authorized the mortgage. *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. Rep. 164.

Neither is it any defense that the corporation by authority of the directors pledged certain bonds to raise money to carry on its work of construction, and that on a foreclosure of the pledge the bonds were sold much below their face value, where the pledge itself was legal. Such facts, in the absence of fraud, cannot affect the purchaser's title to the bonds. *Wheelwright v. St. Louis, N. O. & O. Canal Transp. Co.*, 56 Fed. Rep. 164.

Neither the minority stockholders nor one who is not a stockholder at the time of the alleged illegal transactions can maintain a bill in defense of the foreclosure of a railroad mortgage alleging that the affairs of the corporation have been mismanaged in the interest of the principal stockholder, and that the bonds are void for usury, in their negotiation, where no demand has been made upon the directors or stockholders to make such defense, the only excuse for not making the demand being that the officers are in collusion with the plaintiff. *Alexander v. Searcy*, 36 Am. & Eng. R. Cas. 239, 81 Ga. 536, 8 S. E. Rep. 630.

A lease of a mortgaged railroad, made by the mortgagor without the consent of the mortgagees, is inoperative against them, and cannot be set up to defeat a foreclosure of the mortgage. *Hale v. Nashua & L. R. Co.*, 60 N. H. 333.

In a bill to foreclose at the instance of a mortgagee who has acquired all the claims against the corporation, and has been allowed by the receiver to enter into the possession of the corporate property and assets, the receiver cannot set up as a defense an agreement with the complainant by which the receiver was to hold the road for the benefit of the complainant, and the latter was to pay all the receiver's costs and expenses, which he has not done, such agreement not being intended to secure to the receiver the right to set off his fees and costs against the amount due on the mortgage. *Ryan v. Anglesea R. Co.*, (N. J. Eq.) 35 Am. & Eng. R. Cas. 51, 12 Atl. Rep. 539.

The net income of a mortgaged road was not enough to pay full interest on its bonds, to extinguish its floating debt, and to maintain its road in good condition, and the holder of a majority of the bonds agreed to accept, and requested the company to pay, only half interest, and to appropriate the rest of the income to the floating debt. *Held*, that this only amounted to a waiver of payment when the interest fell due, which might be terminated at any time upon notice and a demand for full payment, and would not thereafter prevent the trustee from proceeding to foreclose. *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 5 Dill. (U. S.) 1.

192. Delay—Failure to certify bonds.—Where there is no pretense that a suit brought on the part of a bondholder to foreclose a railroad mortgage is barred

by any statute of limitation, if delay for any less period than that prescribed by statute is sought to be availed of in bar of complainant's right to recover, the fact of such delay is a mixed question of law and fact which should not be passed upon on demurrer. *Beekman v. Hudson River W. S. R. Co.*, 36 *Am. & Eng. R. Cas.* 321, 35 *Fed. Rep.* 3.

In an action to foreclose a railroad mortgage, the fact that first mortgage bonds issued to secure bondholders under a general mortgage have not been certified by the trustee will not prejudice the rights of the general mortgage bondholders, and if it be necessary the court will compel the trustee to certify them. *Atwood v. Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 534, 85 *Va.* 966, 9 *S. E. Rep.* 748.

193. Estoppel to set up defense.—Where power is conferred upon a corporation to borrow money, and secure the same by mortgage on its property, such corporation, after having received the loan on the security of its mortgage, will not be allowed to avoid liability by questioning its power to make the mortgage, or showing a defective execution of the power conferred upon it. *Thomas v. Citizens' Horse R. Co.*, 11 *Am. & Eng. R. Cas.* 306, 104 *Ill.* 462.

In an action to foreclose a mortgage executed by two companies, to one of which the franchise was originally granted, and to which franchise a third company had succeeded through numerous mesne conveyances, and had leased to a third company for 975 years, it not appearing by the pleadings or the evidence that the validity of the incorporation of the original company had ever been questioned in direct proceedings brought for that purpose, and it being averred that such original company had acted continuously as a corporation, had acquired the mortgaged premises, and executed the mortgage as such, received the proceeds of the bonds, and put them into the construction and operation of the road, the companies succeeding to the franchise are estopped from setting up that the original company had never been duly incorporated, and hence a demurrer by them on that ground should be dismissed. *Beekman v. Hudson River W. S. R. Co.*, 36 *Am. & Eng. R. Cas.* 321, 35 *Fed. Rep.* 3.

Where a railroad mortgage was executed jointly by the grantee of the original franchise and another company, covering the

railways already constructed or thereafter to be constructed and the franchise owned by each, for the purpose of building and operating their respective lines, the bonds secured being those of the other company, issued to enable it to acquire a lease from the original company of the road and entire property, including the franchise, and to build and operate its road, etc., and the original company leased its franchise for the full corporate term of the other company, and transferred to it its entire capital stock, and thereafter the property and franchise passed through mesne conveyances into the hands of a third company who leased them to a fourth, the last two companies are estopped to dispute the validity of the mortgage, and hence a demurrer to a bill to foreclose such mortgage should be dismissed. *Beekman v. Hudson River W. S. R. Co.*, 36 *Am. & Eng. R. Cas.* 321, 35 *Fed. Rep.* 3.

4. Pleading and Evidence.

194. Bill—Setting out execution of mortgage.—Where a bill to foreclose a mortgage on a railroad alleges that the company, by its corporate name, made certain bonds and coupons, and on the same day, to secure such bonds, made and delivered a deed purporting to be a trust deed, and by said trust deed granted, sold, and conveyed to the trustees certain property, real and personal, which is described, it is set forth with sufficient definiteness that a mortgage was in fact executed; and the objection that it is not sufficiently stated that the same was under seal is not well founded. *McAllister v. Plant*, 54 *Miss.* 105, 17 *Am. Ry. Rep.* 389.

Where, on bill to foreclose a mortgage, plaintiff shows *prima facie* the execution thereof, and there is no contrary evidence, it is not error to direct a verdict for plaintiff on defendant's plea of *non est factum*. *McIlhenny v. Binn*, 80 *Tex.* 1, 13 *S. W. Rep.* 655.

195. Prayer of the bill—Demurrer.—A complaint in intervention by an individual bondholder in a suit by a trustee to foreclose a certain mortgage executed by the defendant railway company, and in which other mortgagees are made defendants, set forth, in separate portions thereof, the facts under which he claimed the right to have several mortgages securing his bonds foreclosed. Held, that a mortgagee defend-

ant might demur to the separate portion of the complaint relating to his mortgage, though the demand for relief was not fully stated therein. *Seibert v. Minneapolis & St. L. R. Co.*, 57 *Am. & Eng. R. Cas.* 208, 52 *Minn.* 148, 53 *N. W. Rep.* 1134.

A bill for the foreclosure of a railway mortgage prayed a sale of the property, or at the option of plaintiff that the property be delivered to him, or that a receiver be appointed. The company demurred to such part of the bill "as prays for a foreclosure or sale of said railway, and that possession * * * be delivered to plaintiff, and that a receiver be appointed to take possession of the road." *Held*, that the demurrer was not bad in form because only to part of the prayer of the bill; that, the prayers of the bill being in the alternative, a demurrer might be interposed to one of the alternatives. *Abbott v. Canada C. R. Co.*, 24 *Grant's Ch. (U. C.)* 579.

196. Multifariousness.—A bill by bondholders to foreclose a railroad mortgage, and also to recover bonds claimed by some of the plaintiffs and wrongfully held by one of the defendants—*held*, not bad for multifariousness. *Hale v. Nashua & L. R. Co.*, 60 *N. H.* 333.

197. Sufficiency of answer.—In an answer to a bill to foreclose a mortgage, it is not enough to say in response to a material allegation that the defendant, "having no personal knowledge thereof, leaves the said complainant to make such proof as he may be advised," since the respondent in such bill may have information and belief of a strong character, especially when it is considered that he is the receiver of the corporation, and has entered into an agreement with the complainant by which the latter has obtained possession of the mortgaged property. *Ryan v. Anglesea R. Co.*, (N. J. Eq.) 35 *Am. & Eng. R. Cas.* 51, 12 *Atl. Rep.* 539.

An individual mortgaged a tract of land to a railroad company to secure a note, which the company assigned, and it came to plaintiff, who brought suit to foreclose. After the assignment the company obtained possession of a part of the premises for depot purposes, and subsequently a mortgage on all of its property was foreclosed, and the land in question was purchased by defendant company, a new corporation, which defended the foreclosure on the ground that the original company took the

land under condemnation proceedings, but there was no averment that the company obtained an appraisal of the land, and there was nothing in the record to show that such appraisal was made. *Held*, that it was proper to adjudge a sale of so much of the mortgaged premises as should be necessary to pay the debt, making no exception in favor of the company. *Aiken v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 469.

198. Extension of time to file answer.—Where leave is asked to file an answer in a foreclosure proceeding long after it should have been filed, the court may require affidavits showing that there was good cause for the delay. *Central Trust Co. v. Texas & St. L. R. Co.*, 23 *Fed. Rep.* 846.

Where a foreclosure proceeding has been protracted for nearly a year and a half, and the court is proceeding to wind it up, it may refuse leave to file an answer relating to matters which might have been litigated long before, and which raises an irrelevant issue. *Central Trust Co. v. Texas & St. L. R. Co.*, 24 *Fed. Rep.* 151.

199. Answer filed by stockholders.—Where stockholders of a railroad appear in a foreclosure suit, and, by leave of court, file an answer in the name of the company, such answer may be treated as that of the individual stockholders, but not as the answer of the corporation. *Bronson v. La Crosse & M. R. Co.*, 2 *Wall. (U. S.)* 283.—EXPLAINED IN *Heath v. Erie R. Co.*, 8 *Blatchf. (U. S.)* 347. QUOTED IN *Central Trust Co. v. Marietta & N. G. R. Co.*, 48 *Fed. Rep.* 14; *People ex rel. v. State Treasurer*, 24 *Mich.* 468. REVIEWED IN *Kelley v. Mississippi C. R. Co.*, 2 *Flipp. (U. S.)* 581, 1 *Fed. Rep.* 564.

200. Cross-bill.—Leave to the mortgagor to file a cross-bill against the lessee of the railroad and the mortgagees seeking an accounting and decree terminating the lease, and an adjustment between the mortgagees of their liens, will not be granted when it is not necessary for the protection of the rights of the mortgagor and will tend to delay the proceedings. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 *Am. & Eng. R. Cas.* 469, 41 *Fed. Rep.* 8.

Original defendants in a suit to foreclose a railroad mortgage cannot be allowed to file a cross-bill, after a decree of foreclosure, attacking a prior lien set up by another defendant, so as to interfere with the foreclo-

sure. The practice of filing cross-bills after the case has been heard on its merits, condemned. *Bronson v. La Crosse & M. R. Co.*, 2 Black (U. S.) 528.

A railroad company filed a bill to enjoin a sale of the road under a mortgage. One defendant filed a cross-bill, asking a dissolution of the injunction, and that the property be sold under the mortgage, but the cross-bill made no defendants, and asked for no process. The court under it decreed a foreclosure. *Held*, that the irregularity in the pleadings was fatal to the judgment. *Washington, A. & G. R. Co. v. Bradley*, 10 Wall. (U. S.) 299.

201. Petition of intervention.—A bill to foreclose a mortgage contained the necessary averments to show that enough bonds secured by the mortgage were outstanding to entitle plaintiff to institute the proceeding, but made no reference to any of the bonds having been pledged. An intervenor filed a petition in which he made no reference to the pledge; but a hearing before the master revealed the facts relating to the pledge, and the intervenor excepted to the master's report sustaining the validity of the pledge. *Held*, that the intervenor could not be expected to know the facts in advance of the hearing, and was, therefore, not prevented from filing such exceptions because his petition did not contain any allegation charging that the pledge of the bonds was invalid. *Farmers' L. & T. Co. v. San Diego Street-Car Co.*, 45 Fed. Rep. 518.

202. Reference to master—Ascertaining priorities.—Where a court finds that certain bonds secured by a mortgage sought to be foreclosed are fraudulent except as to *bona fide* holders for value, the court is not bound to enter judgment, which involves both questions of law and fact, as to which are fraudulent, but may refer the matter to a master to ascertain and report who were the holders of the bonds, and how they have been acquired, and all information necessary to enable the court to render final judgment. *Central Trust Co. v. New York City & N. R. Co.*, 18 Abb. N. Cas. (N. Y.) 381; *modifying* 18 Abb. N. Cas. 64.

A reference of a railroad foreclosure suit to masters to "ascertain and report the whole amount of rolling stock on the road, and that they specify the quantity thereof that is covered by this mortgage, also in the first and second mortgages respectively,"

did not require the masters to ascertain and settle the priorities between the different mortgages. *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609.

203. Proof of amount and validity of the bonds.—A court will not dismiss a bill to foreclose a railroad mortgage given to secure the bonds of the company, on the ground that there are no bonds legally outstanding, where it appears from the affidavits of the holders of some of the bonds that they are *bona fide* holders, and that the testimony of other witnesses corroborates these statements. In such case proof of the amount and validity of the bonds will be determined at the hearing. *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. Co.*, 45 Am. & Eng. R. Cas. 689, 139 U. S. 137, 11 Sup. Ct. Rep. 512.

Where a proceeding is instituted to foreclose a mortgage to secure bonds, it is not error for the referee to include in his estimate of the amount of bonds due certain bonds which had been pledged by the company, where it appears that it failed to pay the pledges, and the bonds have been sold and the liability of the company thereon fixed. *Peck v. New York & N. J. R. Co.*, 59 How. Pr. (N. Y.) 419; *appeal dismissed* in 85 N. Y. 246.

204. Ascertaining earnings and expenses.—Where a decree in a foreclosure suit directs a master to ascertain the gross earnings and expenses of a certain section of a road, he may make a *pro rata* estimate of the earnings and expenses of the whole road, where it appears that such section has been operated with the rest of the road and no separate accounts have been kept. Such rule may not lead to the exact result desired, but it will not be rejected where it appears that it approximates the result, and is the best that could be adopted. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 Biss. (U. S.) 237.

And the company cannot object to the rule adopted for finding the gross earnings and expenses, where a provision of its charter requires it to keep separate accounts of such section, which it has negligently failed to do. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 Biss. (U. S.) 237.

Where a master is directed to ascertain and report the value of mortgaged property, and the evidence adduced is conflicting, the report of the master valuing the property according to the highest estimates will not

be set aside unless it appears that the evidence fixing the lower value was entitled to more credit; and the party excepting to the report of the master must satisfy the court that it is wrong. *Pullan v. Cincinnati & C. A. L. R. Co.*, 5 Biss. (U. S.) 237.

205. Filing interrogatories.—Where the only questions involved in a foreclosure suit are, whether the suit is brought and is prosecuted in good faith, and whether plaintiffs are entitled to a decree of foreclosure, interrogatories filed relating to plans, acts, or intentions of parties touching the formation of a new company to buy the road are irrelevant, and should be rejected. *Robinson v. Philadelphia & R. R. Co.*, 28 Fed. Rep. 340.

5. Judgment or Decree.

206. What relief may be granted, generally.—Where there are several mortgages on the same railroad property, and there is no community, but a conflict of interests between the parties claiming under them, the court will not order in one decree a foreclosure of all the securities, and order a sale of the property as an entirety. *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 17 Am. & Eng. R. Cas. 254, 22 Fed. Rep. 138.

Where material-men intervene in a foreclosure suit, and claim a superior lien on the property, it is not error to fail to give the different claimants personal judgments for their respective claims. *Tod v. Kentucky Union R. Co.*, 52 Fed. Rep. 241, 6 U. S. App. 186, 3 C. C. A. 60.—REVIEWING *Davis v. Alvord*, 94 U. S. 545.

P. gave a mortgage to a railroad company as a security for the performance of certain work, and the chancellor rendered a decree of foreclosure of the mortgage for a balance found to be due by P. to the company on an account stated between them. *Held*, that, the mortgage being a mere security for the performance of work, and not for the payment of a debt, the decree was erroneous. *Petrie v. Wright*, 14 Miss. 647.

207. Provisions for the payment of bonds.—Where a railroad mortgage, given to secure its bonds with the accruing interest, provides that, upon a default in paying interest or principal, all bonds, principal and interest, should become due, and entitled to a *pro rata* dividend in case of foreclosure, a decree which gives precedence

to past due coupons is erroneous. *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254.—REVIEWED IN *Evans v. New York & O. M. R. Co.*, 13 Blatchf. (U. S.) 412.

Under a foreclosure of a railroad mortgage for non-payment of interest on bonds, the court cannot decree that the principal sum of the bonds shall at once become due, and direct a balance, after paying interest and costs, of the fund arising from the sale to be applied to such principal, and this though the bill was taken *pro confesso*. *Ohio C. R. Co. v. Central Trust Co.*, 133 U. S. 83, 10 Sup. Ct. Rep. 235.

A decree for foreclosure of a railroad mortgage securing bonds found the sum due on twenty-eight bonds pledged by the company as collateral security for a debt also secured by a deed of trust, and ordered sale of the property, subject to the trust deed, for the whole sum due on all the bonds, and that the bonds so pledged, or the judgment thereon in the foreclosure suit and the personal property pledged, should be surrendered. *Held*, that the latter part of the decree neutralized the portion of it for the payment of the twenty-eight bonds, and was no decree for their payment. *Galena & S. W. R. Co. v. Stahl*, 103 Ill. 67.

208. — or unsecured debts.—Mortgage creditors cannot complain of a decree requiring payment of unsecured debts due by the company before the filing of the bill to connecting railroads for moneys it had collected, when their refusal, because of the failure to pay them, to continue business relations with the receiver would have greatly diminished the receipts and injured the business of the road. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ky. Rep. 467.

209. Provisions as respects sale.—Where the litigation is likely to be protracted as to what claims shall be allowed against a mortgaged railroad, and their priorities, the court may order a sale, subject to such claims as shall be finally adjudicated and established as liens. *Turner v. Indianapolis, B. & W. R. Co.*, 8 Biss. (U. S.) 380.

It is proper that the sheriff be named by the decree as authorized to enforce it by making sale of road, roadbed, and franchise of a company against which a decree of foreclosure is rendered. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ky. Rep. 233.

Where a mortgagee of real estate has received no notice of the assessment of damages for a right of way over it, if a sale subject to the right of way would be insufficient to pay the mortgage debt, the judgment of foreclosure should direct a sale of the right of way, either with the lot or independent of it, as shall be most advantageous. *Severin v. Cole*, 38 Iowa 463.

In foreclosing a mortgage on a railroad which exists in two states, the decree should direct a sale of the entire road, the sale of the portion in the other state being subject to existing liens in that state. *Hand v. Savannah & C. R. Co.*, 12 So. Car. 314.

A decree in a foreclosure suit should name an upset price large enough to cover the costs and allowances made by the court, such as fees to the master, receiver, and counsel, and enough to cover receiver's certificates, and interest, and all other liens prior to the bonds. *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. Rep. 232.—DISTINGUISHED IN *Blair v. Walker*, 26 Fed. Rep. 73.

A decree in a railroad foreclosure suit which orders a sale for non-payment of a greater sum than is actually due is fatally erroneous. *Chicago, D. & V. R. Co. v. Fostick*, 7 Am. & Eng. R. Cas. 427, 106 U. S. 47, 1 Sup. Ct. Rep. 10.

A decree to foreclose a mortgage on railroad property given to secure bonds which directs a sale of all the lands covered by the mortgage free from all liens, mortgages, and encumbrances to satisfy certain claims, without making provision for other bondholders, subsequent mortgagees, or other creditors of the road, is fatally defective. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42; 12 Sup. Ct. Rep. 364, affirming 33 Fed. Rep. 693.

A railroad mortgage contained a provision that, in case of a foreclosure, the trustee in the mortgage, upon the request of a majority of the bondholders, should bid in the property for the benefit of the bondholders, and organize a new company. Held, that it was not error, in a foreclosure decree, to direct the trustee to bid at the sale for the first mortgage bondholders, at least to the amount of their bonds. *Sage v. Central R. Co.*, 99 U. S. 334.

In such a foreclosure, though the specific relief sought was a strict foreclosure, yet under a prayer for general relief it was proper for the court to carry out the pro-

vision of the mortgage by directing the trustee to bid in the property, a majority of the bondholders having so requested. *Sage v. Central R. Co.*, 99 U. S. 334.

It was proper to direct the trustee to convey the property to a new corporation organized by, and for the benefit of, the bondholders, according to the priority of their interests, giving a power of management and a controlling interest to the first mortgage bondholders. *Sage v. Central R. Co.*, 99 U. S. 334.—QUOTED IN *Mackintosh v. Flint & P. M. R. Co.*, 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582.

Where a mortgage of a railroad provides that, in case of a foreclosure, the mortgage trustee should bid in the property for the benefit of the bondholders, it is not error to provide in a foreclosure decree that if any one, except the trustee, became the purchaser he should pay down in cash a part of his bid as earnest money. *Sage v. Central R. Co.*, 99 U. S. 334.

210. — for conveyance by mortgagor.—Where part of the lands covered are in another state, the court has power to decree a sale of the whole, and may require the mortgagor to execute a conveyance to the purchaser. Where a provision for a conveyance is omitted from the judgment, the court has power after a sale to amend the judgment by inserting therein such a provision. *Union Trust Co. v. Olmstead*, 26 Am. & Eng. R. Cas. 61, 102 N. Y. 729, 7 N. E. Rep. 822.

211. Conclusiveness of the judgment or decree, generally.—Where a mortgage is to trustees to secure bondholders, a decree in a foreclosure suit, where the bondholders are represented by the trustees, is conclusive upon the bondholders, especially where they were present and had knowledge of the proceedings, and actually appeared at times and obtained certain orders therein. *Huntington v. Little Rock & Ft. S. R. Co.*, 3 McCrary (U. S.) 581, 16 Fed. Rep. 906.

The decree entered in *James v. Railroad Co.*, 6 Wall. 752, when properly construed, invalidated the foreclosure of the mortgage made by the La Crosse & Milwaukee R. Co. to plaintiff in error only as to the creditors of the company subsequent to the mortgage who assailed it in that suit, but did not affect it as to the rights of plaintiff in error or of the bondholders secured by the mortgage, which were acquired under that fore-

closure. *Barnes v. Chicago, M. & St. P. R. Co.*, 30 Am. & Eng. R. Cas. 453, 122 U. S. 1, 7 Sup. Ct. Rep. 1043.

212. — of decree pro confesso, or by consent.—Contractors having a claim against a railroad company which, by the Pa. Act of Jan. 21, 1843 (P. L. 467), is paramount to the lien of a subsequent mortgage, and who are made parties defendant to a bill of foreclosure of said mortgage, are bound by a decree entered against them *pro confesso* in said foreclosure proceedings, by virtue of which the road and franchises of the company are ordered to be sold discharged of all liens, and cannot, therefore, long subsequently assert their claim as against the purchaser at said sale. *Woods v. Pittsburgh, C. & St. L. R. Co.*, 3 Am. & Eng. R. Cas. 525, 7 Am. & Eng. R. Cas. 478, 99 Pa. St. 101.

A judgment creditor of a railroad is bound by a decree rendered in a foreclosure suit, when he appears by attorney and consents to the decree, though not a party to the suit. *Bronson v. La Crosse & M. R. Co.*, 2 Black (U. S.) 524.

213. Amendments—Striking out provisions.—Where a foreclosure decree directs the company to deliver to the receiver certain moneys on hand, and it appears that they are unexpended earnings of the property not included in the mortgage, that portion of the decree may be stricken out on motion. *Dow v. Memphis & L. R. Co.*, 20 Fed. Rep. 768.

A bill to foreclose a mortgage on a street railway in a city made the city a defendant on an allegation that the plaintiff was informed that the city might have or claim some interest in the property, but no claim or demand was made against the city; but the judgment entered went on to declare that the company owned certain premises, with the right to lay tracks, construct tunnels, operate a railway, and do many other things which might affect the city. *Held*, that the judgment affected the city in a manner not authorized by the complaint, and might be amended on motion. *Vandenberg v. Mayor, etc., of N. Y.*, 5 N. Y. Supp. 664; affirmed at general term in 25 J. & S. 285, 28 N. Y. S. R. 578.

214. Setting aside decree.—A decree in foreclosure determining the ownership of certain rolling stock and the right to its possession, and finding that it was essential to the operation of the road by

the receiver and should be purchased by him; that certain amounts should be paid for the rentals, and that the purchase price should be made a charge upon the earnings, income, and property of the railroad company, and that any balance unpaid at the date of its foreclosure sale should be a first lien upon the railroad and the sale should be subject thereto, is final in its nature, and cannot be vacated by the court of its own motion at a term subsequent to that at which it was entered. *Central Trust Co. v. Grant Locomotive Works*, 43 Am. & Eng. R. Cas. 503, 135 U. S. 207, 10 Sup. Ct. Rep. 736.

In the foreclosure of railway mortgages, third parties should not be allowed to disturb the decree without giving the mortgagor and mortgagee, who are the parties principally interested, a right to be heard. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 Sup. Ct. Rep. 693.

6. Receivers.

215. Power to appoint—Discretion.—In the foreclosure of a railroad mortgage the appointment of a receiver is not a matter of right, but rests in the sound discretion of the court, and is a power to be exercised sparingly, and with great caution. *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182. —FOLLOWING *Milwaukee & M. R. Co. v. Howard*, 131 U. S. lxxxi, app'x.; *Fosdick v. Schall*, 99 U. S. 235; *Sage v. Memphis & L. R. R. Co.*, 125 U. S. 361, 8 Sup. Ct. Rep. 887. —*Williamson v. New Albany, etc., R. Co.*, 1 Biss. (U. S.) 198. —FOLLOWED IN *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 4 Dill. (U. S.) 114. REVIEWED IN *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Biss. 35.

To dispossess the owner of property before a final hearing is a strong measure, not to be adopted except in a strong case, and should never be done unless without it the complainant would be in danger of suffering irreparable loss. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 Biss. (U. S.) 35.

An order appointing or removing a receiver in a railroad foreclosure suit rests in the sound discretion of the court below, and cannot be reviewed on appeal. *Milwaukee & M. R. Co. v. Howard*, 131 U. S. lxxxi, app'x. —FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182.

Under Cal. Code Civ. Proc. § 564, pro-

viding that a receiver may be appointed by the court in which the action is pending in all cases where receivers have heretofore been appointed by the usages of the courts of equity, the district court may appoint a receiver in a proceeding to foreclose a railroad mortgage. *Sacramento & P. R. Co. v. San Francisco Superior Court*, 53 Cal. 453. —QUOTING *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162; *American Bridge Co. v. Heidelbach*, 94 U. S. 798. REVIEWING *Shepley v. Atlantic & St. L. R. Co.* 55 Me. 395.—APPLIED IN *McLane v. Placerville & S. V. R. Co.*, 26 Am. & Eng. R. Cas. 404, 66 Cal. 606.

When a mortgage of a railroad's debt has become due, and it appears that the mortgaged property is probably insufficient to discharge it, a court of equity, if applied to to foreclose the mortgage, will appoint a receiver to secure the rents, profits, incomes, and earnings accruing after the date of the appointment, and will in that way secure to the mortgagee a specific equitable claim to them to make good the deficiency. But the mortgagee has not the absolute right to demand that the chancellor shall assist him to acquire this equitable claim. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.

The Civil Code affects, and to some degree extends or enlarges, the remedy, but it cannot be construed as enlarging the legal or contract rights of mortgagees, and as conferring upon them the absolute and unqualified right to require the chancellor, in either one of the contingencies provided for, to sequester for their exclusive benefit the rents, profits, and incomes of the mortgaged premises. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.

A receiver may be appointed in an action to foreclose a mortgage "where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed," etc. The latter clause of section 329, "and that the property is probably insufficient to discharge the mortgage debt," was intended to aid the mortgagee by securing as far as possible out of the thing mortgaged, and its rents, profits, and issues, the payment of his claim. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

The right to appropriate rents, etc., of mortgaged property was a legal incident to

the contract of mortgage so long as the mortgagee could have relief at law; and since his remedy at law has been practically taken away, the statute authorizes courts of equity to treat it as an equitable incident. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

That equities of third parties may sometimes so far intervene as to estop the mortgagee from claiming the full benefit of this equitable right to the rents does not militate against the conclusion that, as against the mortgagor, the statute provides for the interposition of courts of equity through receivers. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

Obligations relating to the management of mortgaged property made by the mortgagor terminate when he loses power to control the property, although he may be liable to an action on the contract. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

If an action has been commenced by the attorney-general on behalf of the people, alleging that a railroad corporation is insolvent, and praying for its dissolution, and a temporary receiver is appointed therein, it is within the discretion of the court, notwithstanding such action, and the appointment of a receiver, to authorize the commencement of foreclosure proceedings, to appoint a receiver therein to supersede the receiver appointed in the people's action, to transfer all the duties of the receiver in that action to the receiver appointed in the foreclosure action, and to order all the property covered by the mortgages to be delivered to such receiver. *Herring v. New York, L. E. & W. R. Co.*, 35 Am. & Eng. R. Cas. 54, 105 N. Y. 340, 19 Abb. N. Cas. 340, 12 N. E. Rep. 763, 7 N. Y. S. R. 547; affirming 34 Hun 634, mem., 63 How. Pr. 497.

The ground on which courts of equity intervene, either by injunction or by the appointment of a receiver, is the preservation of the property and securities, either or both, which constitute the subject-matter of the litigation pending the controversy. But where the mortgagor or his assigns are in possession, and denying the right of the mortgagee to a foreclosure, the court will not, by preliminary injunction, predicated on the mortgagee's asserted right at law as mortgagee, transfer to him the possession

pending the litigation; the most that can be done in such cases is to appoint a receiver for the purposes only of preserving the property, and its rents and profits, from waste and diversion. And even were the object of the bill to enforce a specific provision in a deed for the taking of possession on default and demand of payment, and an injunction were asked for to effect a transfer of the possession pending the litigation, the same rule and reason would apply as in case of a suit for the foreclosure of an ordinary mortgage, while the question of the right of possession should be in litigation, and would be effectual against the granting of an injunction. *Cheever v. Rutland & B. R. Co.*, 39 *Vt.* 653, 4 *Am. Ry. Rep.* 291.

216. Grounds for appointment, and when proper.—Where a railroad company makes default in the payment of the interest on its mortgage indebtedness, and the mortgaged property, consisting of its road and other property, is inadequate security for the mortgage debt, and the company is insolvent and appropriating its earnings to its own use, a receiver will be appointed, during the pendency of a bill filed by the mortgagee, to be put in possession of the mortgaged property. *Dow v. Memphis & L. R. R. Co.*, 17 *Am. & Eng. R. Cas.* 324, 20 *Fed. Rep.* 260.

Where a railroad 1600 miles long is mortgaged for \$28,000 a mile, the interest in arrear being \$1,000,000, and the business being on the decrease, and apparently liable to further decrease, there being a lack of harmony as to its management among the owners, a receiver will be appointed upon a foreclosure under a second mortgage. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 36 *Am. & Eng. R. Cas.* 259, 36 *Fed. Rep.* 221.—*FOLLOWING Galveston, H. & H. R. Co. v. Cowdrey*, 11 *Wall. (U. S.)* 463; *Gilman v. Illinois & M. Tel. Co.*, 91 *U. S.* 603; *Dow v. Memphis & L. R. R. Co.*, 124 *U. S.* 652, 8 *Sup. Ct. Rep.* 673.

Where the proceeding is to foreclose a mortgage on railway property, a receiver should not be appointed where it is clear that the property would sell for enough to pay the debt, interest, and costs. *Pullan v. Cincinnati & C. A. L. R. Co.*, 4 *Biss. (U. S.)* 35.

* Appointment of receivers to collect rents and profits of mortgaged property, see note, 27 *AM. ST. REP.* 794.

Under Kan. Comp. Laws, § 3983, no order for the sale of mortgaged railroad property with a waiver of appraisal can be made until six months after the decree of foreclosure; and after such foreclosure the income of the road should be received by a trustee for the benefit of the bondholders until the time of sale; and the fact that certain bondholders are in possession to the exclusion of others is good reason for the appointment of a receiver. *Benedict v. St. Joseph & W. R. Co.*, 14 *Am. & Eng. R. Cas.* 609, 19 *Fed. Rep.* 173.—*EXPLAINING Hammock v. Loan & T. Co.*, 105 *U. S.* 86.

***217. When a receiver will be refused.**—Ordinarily a receiver ought not to be appointed unless the right to foreclose is clear and indisputable. *American L. & T. Co. v. Toledo, C. & S. R. Co.*, 29 *Fed. Rep.* 416.

A court of equity may interfere by injunction to prevent the waste or distribution of mortgaged railroad property before the right to a foreclosure has accrued, but it will not appoint a receiver to manage the property before that time. *American L. & T. Co. v. Toledo, C. & S. R. Co.*, 29 *Fed. Rep.* 416.

Whatever may be the powers of a court of equity to construct railroads, or to manage them through receivers, these powers must be exercised as an adjunct to the jurisdiction of enforcing some of the well-understood equitable rights of the parties in relation thereto. The court has no power to appoint a receiver for the management of the property merely upon a disagreement of those interested as to how it should be managed. *American L. & T. Co. v. Toledo, C. & S. R. Co.*, 29 *Fed. Rep.* 416.

Even after default in the payment of interest, a receiver will not be appointed if the company appears to have a reasonable excuse, or where the time of payment has been extended, at least until the right to foreclose has been determined. *American L. & T. Co. v. Toledo, C. & S. R. Co.*, 29 *Fed. Rep.* 416.

The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver unless there be a stipulation in the mortgage that the mortgagee shall have the rents. *Tysen v. Wabash R. Co.*, 8 *Biss. (U. S.)* 247.

Where a proceeding has been instituted to foreclose a mortgage on a division of a

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road, and receivers have been appointed, the property will not be turned over to such receivers at the application of the trustees where negotiations are pending for a sale of the entire railroad system under a general mortgage. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 25 *Fed. Rep.* 693.

Where a railroad charter empowers the company to confer upon its mortgagees the right of possession upon common law conditions, or upon any other conditions that may be agreed upon, as they already have a right of possession which they may enforce by ejectment, a court of equity will not grant a receiver to take possession pending a foreclosure. *Rice v. St. Paul & P. R. Co.*, 24 *Minn.* 464.

A provision in a railroad mortgage authorized the trustees upon default to take possession of the mortgaged property, and to have, hold, and use the same, "operating by their superintendents, managers, receivers, or servants, or their attorneys or agents." *Held*, that the receivers here mentioned were not technical receivers appointed by the court, but the receivers of the trustees. *Rice v. St. Paul & P. R. Co.*, 24 *Minn.* 464.—FOLLOWED IN *Rice v. First Div. St. P. & P. R. Co.*, 24 *Minn.* 473, *n.*

A decree of foreclosure of a railroad mortgage was entered by consent, and the property sold, and a new company organized which took charge of the road. After the sale the stockholders of the old corporation met and passed a resolution repudiating the action of the directors in consenting to the sale, and appointed a committee to take charge of their interests. Under this authority an appeal was taken, and pending the appeal a motion was made for a receiver. Without deciding whether a case might arise where the court would appoint a receiver—*held*, that it should not be done in this case. *Pacific R. Co. v. Ketchum*, 95 *U. S.* 1.

218. The application, notice, etc.—New York Act of 1883, ch. 378, which requires an application for the appointment of a receiver of a corporation to be made at a special term in the judicial district in which the principal office of the corporation is located, does not relate to the appointment of a receiver of property pending a foreclosure. It only relates to statutory receivers pending a suit to wind up a corporation and distribute its assets. *United States Trust Co. v. New York, W. S. & B. R.*

Co., 35 *Hun* (N. Y.) 341; *reversing* 67 *How. Pr.* 390, 6 *Civ. Pro.* 90.

And under the above statute notice to the attorney-general for the appointment of a receiver in a foreclosure suit is not necessary. Notice to the attorney-general is only necessary where the proceeding is to wind up a corporation, or to distribute its assets. *Whitney v. New York & A. R. Co.*, 66 *How. Pr.* (N. Y.) 436, 32 *Hun* 164, 5 *Civ. Pro.* 118.

219. Imposing terms or conditions upon appointing a receiver.—In appointing a receiver in a railroad foreclosure suit the court may impose such conditions as appear to be just and equitable, and the party asking for and accepting the appointment on such conditions will be bound thereby. *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 57 *Am. & Eng. R. Cas.* 174, 53 *Fed. Rep.* 182.—QUOTING *Fosdick v. Schall*, 99 *U. S.* 235.

Equitable conditions may be imposed upon the appointment of a receiver. The prayer of the mortgagees of a railroad to have the incomes and earnings anticipated and distributed to them as part and parcel of the mortgaged estate can be granted only upon the idea that their superior equities entitle them to that relief. They cannot demand it as a legal right. They cannot, therefore, be heard to complain that in granting them equitable relief as to those incomes and earnings the chancellor has imposed conditions unless those conditions are unjust and unreasonable. *Douglass v. Cline*, 12 *Bush* (Ky.) 608, 18 *Am. Ry. Rep.* 273.

When a court of chancery is asked by mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership of outstanding debts for labor, supplies, equipment, or permanent improvement of the property as may under the circumstances of the case appear to be reasonable. *Union Trust Co. v. Souther*, 11 *Am. & Eng. R. Cas.* 707, 107 *U. S.* 591, 2 *Sup. Ct. Rep.* 295.—DISTINGUISHED IN *American L. & T. Co. v. East & W. R. Co.*, 46 *Fed. Rep.* 101.

If no such order is made at the time the receiver is appointed, it may be done at any time during the progress of the cause, if re-

quired in the due administration of justice and the enforcement of the equities of the respective parties. *Addison v. Lewis*, 9 *Am. & Eng. R. Cas.* 702, 75 *Va.* 701. *Central Trust Co. v. St. Louis, H. & K. R. Co.*, 42 *Am. & Eng. R. Cas.* 26, 41 *Fed. Rep.* 551.—FOLLOWING *Fosdick v. Schall*, 99 *U. S.* 235; *Blair v. St. Louis, H. & K. R. Co.*, 22 *Fed. Rep.* 471.—FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 *Fed. Rep.* 182.—*Douglass v. Cline*, 12 *Bush (Ky.)* 608, 18 *Am. Ry. Rep.* 273.—FOLLOWING *Maysville & L. R. Co. v. Punnett*, 15 *B. Mon. (Ky.)* 47.

Where a company has been in default in the payment of interest on its mortgage bonds for more than a year before a bill is filed to foreclose, the receiver should be required to pay all the debts and liabilities of the company incurred in operating or improving the road for six months before the filing of the bill as a condition upon which he will be appointed. *Dow v. Memphis & L. R. R. Co.*, 17 *Am. & Eng. R. Cas.* 324, 20 *Fed. Rep.* 260.

And as further conditions for the appointment of a receiver in such case, a general license should be given to sue the receiver in any court for liabilities incurred in operating the road; and the debts which the receiver is required to pay, and debts and liabilities incurred in operating the road, should be made a first lien on the property, and the plaintiffs in the foreclosure suit should be required to prosecute it to a final decree with all diligence; otherwise the receiver should be discharged by the court on its own motion. *Dow v. Memphis & L. R. R. Co.*, 17 *Am. & Eng. R. Cas.* 324, 20 *Fed. Rep.* 260.

Where the court as a condition of appointing a receiver in foreclosure proceedings, instituted by a trustee of a railroad mortgage, required the trustee to consent that the debts due from the railroad company for ticket and freight balances, and for work, materials, machinery, fixtures, and supplies of every kind and character done, performed, or furnished in the construction, repair, equipment, or operation of the road and its branches, and liabilities incurred by said company in the transportation of freight and passengers, together with all debts and liabilities incurred by the said receiver in operating the road, should constitute a lien on said property, and all property appurtenant thereto, paramount to the lien of the mort-

gage set out in the bill, the bondholders were bound by such assent of the trustee, where it was apparent that the trustee had performed its duty fully and in good faith, and their motion to be made parties to the suit was properly denied. *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 57 *Am. & Eng. R. Cas.* 174, 53 *Fed. Rep.* 182.—QUOTING *Forbes v. Memphis, E. P. & P. R. Co.*, 2 *Woods (U. S.)* 323.

220. Receiver's title or possession.—When a receiver has been appointed pending the foreclosure of a mortgage upon a railroad, the receivership will be extended over a portion of the road upon which a prior lien is claimed on the application of the claimant. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 *Am. & Eng. R. Cas.* 469, 41 *Fed. Rep.* 8.

221. Duration of the receivership.—The modern practice of transferring corporate property to the custody of the courts to be held and managed for an indefinite period, to suit the convenience of parties, is regarded as a mischievous innovation. Such property should only be placed in the hands of a receiver during foreclosure proceedings for temporary preservation, and should pass to the owners with as little delay as possible. *Taylor v. Philadelphia & R. R. Co.*, 3 *Am. & Eng. R. Cas.* 177, 9 *Fed. Rep.* 1.

222. Powers and duties, generally—Control of court.*—The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay. In railway foreclosures, his duties, though more extensive, are primarily the same; the appointment is presumed to be for the benefit of the mortgagees and for the protection of their interests. *New Jersey Midland R. Co. v. Wortendyke*, 27 *N. J. Eq.* 658; *reversing* 27 *N. J. Eq.* 110.

A court of chancery, in the progress of a foreclosure suit against a railroad company, ought not to enter upon the work of building or completing a railroad unless there is an irresistible necessity to do so in order to prevent a great and certain sacrifice of the rights and securities of the parties in interest. *Kennedy v. St. Paul & P. R. Co.*, 5 *Dill. (U. S.)* 519.

* General powers and duties of receivers appointed in foreclosure proceedings, see note, 11 *L. R. A.* 480.

The receiver, appointed in a suit in equity to foreclose a mortgage of a railroad, cannot maintain a suit to recover earnings of the road accruing before his appointment. *Noyes v. Rich*, 52 Me. 115.—REFERRING TO *Mason v. York & C. R. Co.*, 52 Me. 82.

Where a road running through three states is mortgaged in each, and a foreclosure suit is brought in each state, and the same person is appointed receiver by each court, and receiver's certificates are issued, the action of the courts is concurrent in producing and creating the certificates, and each may direct them to be paid. *In re United States Rolling Stock Co.*, 57 How. Pr. (N. Y.) 16.

223. Powers and duties in the operation of the road.—Where a railroad company contracts to carry marble to a designated point, with a privilege of putting it off at an intermediate point to be dressed, and then reshipping without extra charge, a receiver appointed in a foreclosure suit cannot be compelled to carry it from the intermediate point to the place of destination, although the freight has been paid before the receiver was appointed. *Central Trust Co. v. Marietta & N. G. R. Co.*, 51 Fed. Rep. 15.—FOLLOWING *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191.

To require the receiver in such case to carry the marble from the intermediate point to the place of destination would be equivalent to requiring him to pay the shippers in money the amount of freight which had already been paid, and, as the shipper has no lien, such could not be done. *Central Trust Co. v. Marietta & N. G. R. Co.*, 51 Fed. Rep. 15.

While a receiver appointed *pendente lite*, in an action to foreclose a railroad mortgage, is charged with the duty of operating the road pending the action, the corporation is not dissolved by the appointment; the receiver does not represent the corporation in its individual or personal character, or supersede it in the exercise of its corporate powers, except so far as the mortgaged property is concerned, and in every respect except the possession and management of the mortgaged property the corporation is free to exercise its franchises. *Decker v. Gardner*, 48 Am. & Eng. R. Cas. 683, 124 N. Y. 334, 26 N. E. Rep. 814, 36 N. Y. S. R. 267.

224. Power to lease connecting lines.—When the business of a railroad

company consists, in part at least, of the through transportation of freight from a point beyond its terminus, it is within the power of the court to direct the receiver to lease a railroad connecting with such point without notice to the parties to the suit. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8.

225. Relation between receiver and bondholders.—Where a receiver is appointed in foreclosure for the benefit of bondholders, he is the agent of such bondholders and the mortgage trustees, and a judgment by a court of competent jurisdiction against the receiver binds the bondholders. *Turner v. Indianapolis, B. & W. R. Co.*, 8 Biss. (U. S.) 527.

226. Application of assets in hands of receiver, generally.—When the court orders a receiver of a railroad to pay certain claims for expenses, pending a foreclosure, the assignee of such a claim has the same right to payment as the original holder. *Union Trust Co. v. Walker*, 107 U. S. 596, 2 Sup. Ct. Rep. 299.

The fact that a receiver is appointed in a foreclosure suit without providing that it shall be upon condition that he pay current expenses of the road then due does not prevent the court from subsequently allowing such expenses. *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. Rep. 471.—APPLIED IN *Bound v. South Carolina R. Co.*, 47 Fed. Rep. 30. FOLLOWED IN *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 42 Am. & Eng. R. Cas. 26, 41 Fed. Rep. 551.

Where there are no surplus funds in the hands of a receiver, he will not be directed to pay certain expenses attending negotiations between bondholders looking toward a sale of the road and a reorganization of the company, where it does not certainly appear that the negotiations will result in any advantage. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 25 Fed. Rep. 69.

Where a town has no lien on a street-car company for the cost of grading and macadamizing the street along the track, a receiver in a foreclosure suit will not be directed to pay the cost of such work in obedience to an ordinance of the town trustees. *Union L. & T. Co. v. Southern Cal. Motor Road Co.*, 49 Fed. Rep. 267.—FOLLOWING *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1; *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191.

The receiver holds the rents, issues, and profits for the protection of the mortgagee, and the fund in his hands cannot be disposed of by the mortgagor in any way to the prejudice of the mortgagee. Nor can creditors of the mortgagor, by attachment or garnishment, secure a more favorable footing than that held by the debtor. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

227. — of income or earnings.—Where bondholders bring a suit to foreclose and ask the appointment of a receiver, the court may, in its discretion, require him to apply the net income of the road to the payment of employes and material-men who have furnished labor and materials necessary for the road before the receiver was appointed. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 377.—**QUOTING** Trotter v. Catawissa, W. & E. R. Co., (Pa.) Sup. Ct. Jan. Term 1860, No. 8.

Such claims may be paid by receiver's certificates bearing interest, and payable out of the future earnings, at such dates as the receiver may afterwards fix. *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. Rep. 377.

Claims against a railroad company for supplies furnished on a running account and under a continuous contract should be directed paid by a receiver out of the net income, instead of the corpus of the property. *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 Fed. Rep. 797.—**FOLLOWING** Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. Rep. 675.

Where a mortgaged railroad runs through several states, and an original bill is filed in one state to foreclose, and ancillary bills in the other states, a judgment creditor of the company who is seeking payment of his claim out of earnings on hand at the time the receiver was appointed should apply to the court where the original bill was filed. *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 30 Am. & Eng. R. Cas. 450, 30 Fed. Rep. 895.—**FOLLOWED IN** Easton v. Houston & T. C. R. Co., 39 Am. & Eng. R. Cas. 588, 38 Fed. Rep. 12; Clyde v. Richmond & D. R. Co., 56 Fed. Rep. 539.

There is a distinction between the net earnings of a railroad operated by a receiver and the ordinary rents and profits of lands and tenements. The receiver of a line of railways is not the mere passive agent or officer of the court charged with the single duty of preserving the property and collect-

ing the rents, etc. The net earnings depend very greatly upon his experience and skill as a railway operator, and upon the energy and fidelity he may display in the discharge of his duties. The mortgagees have no claim to or lien upon the experience, skill, energy, and fidelity of the court's receiver, who represents the interests as well of the mortgagor as of his creditors. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.

228. What debts are entitled to priority.—Debts which are given preference in the appointment of a receiver in foreclosure proceedings are generally those which have aided to conserve the property and have been contracted within some reasonable period; but just what debts aid to conserve the property and what length of time will bar them is not clear upon the authorities, and depends largely upon the circumstances of each case. There is no fixed rule barring preferential debts contracted more than six months before the appointment of a receiver. In other words, there is no "six-months' rule." *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182.—**FOLLOWING** Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. Rep. 675; Blair v. St. Louis, H. & K. R. Co., 22 Fed. Rep. 471; Central Trust Co. v. St. Louis, A. & T. R. Co., 41 Fed. Rep. 551; Central Trust Co. v. Wabash, St. L. & P. R. Co., 30 Fed. Rep. 332.

A court may order a receiver to make necessary repairs on a railroad, and, if necessary, may charge the expense thereof as a first lien on the property, in preference to existing mortgages. *Hoover v. Montclair & G. L. R. Co.*, 29 N. J. Eq. 4.

After the appointment of a receiver of an insolvent corporation, and proceedings in foreclosure, an agreement was entered into among the secured and general creditors of the corporation whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent., payable half yearly," and the interest was to be paid if the company should "be able to pay it by its income, after paying claims prior thereto, within the year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed. *Held*, that the committee had authority to consent that the bonds should be made payable at the option of the company on or before the ex-

piration of thirty years from the date of their issue; also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid. *Lehigh C. & N. Co. v. Central R. Co.*, 34 N. J. Eq. 88.

220. Apportionment of earnings to underlying mortgages.—In a suit to foreclose a mortgage by a railroad corporation of its whole railroad, franchise, lands, and property, which have since been put in the possession of a receiver, an intervening prior mortgagee of part of the lands is not entitled to have the amount of his mortgage paid out of the funds in the hands of the receiver, or out of the proceeds of a sale made pursuant to the decree of foreclosure, subject to his mortgage. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. Rep. 6.

Where a single corporation owns and operates a system of railroads which is covered by a general mortgage, with local mortgages on some of the branches, and the whole system goes into the hands of receivers in a suit to foreclose the general mortgage, as a rule the earnings of the entire system should be apportioned to the different divisions on a mileage basis, for the purpose of paying taxes and interest on the local mortgages; but this rule is not inflexible, and, where it is necessary, a larger proportion of the earnings may be expended upon certain divisions than on others. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 30 Fed. Rep. 332.

But where the bondholders in the local mortgages are represented in the general foreclosure proceeding of the entire system by their trustees, and a foreclosure decree is entered without objection and the property sold, it is then too late for the local bondholders to object to the manner in which the earnings of the system have been applied before the foreclosure decree. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 30 Fed. Rep. 332.

230. Charging income with rent and repairs of cars.—When a receiver is appointed pending foreclosure of a railroad mortgage, and both before and during such receivership improvements and equipments are made from current receipts, the income during the receivership may be charged with a claim for rent of cars, and if that is insufficient, the claim may be charged upon the proceeds of the property; yet the proceeds will not, in the

absence of special circumstances, be for such rent and for claims for lease of cars, etc., which accrued more than six months prior to the appointment of the receiver. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.—APPLIED IN *Bound v. South Carolina R. Co.*, 47 Fed. Rep. 30.

In the absence of sufficient evidence that the cars needed repairs, no claim having been made upon the receiver appointed pending foreclosure, a claim for such repairs by the lessor who intervened, made in an amended petition filed three years after the surrender of the cars, will be rejected. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.

Where a receiver appointed pending foreclosure agrees to keep cars leased for use on the road in good repair, such claim will be allowed. *Thomas v. Peoria & R. I. R. Co.*, 36 Am. & Eng. R. Cas. 381, 36 Fed. Rep. 808.

231. Sales by receiver.—Where the indebtedness of a company is more than double its assets, and it is without income to meet the cost of necessary repairs, and the property is of such a character as to materially depreciate in value during a protracted litigation, and it is clearly for the interest of all that the property be sold as soon as possible, and nearly all the first mortgage bondholders ask for such a sale, the court will order a sale by the receiver pending the litigation. *Middleton v. New Jersey W. L. R. Co.*, 26 N. J. Eq. 269; reversed on another point in 27 N. J. Eq. 557.

232. Adjusting the expenses of the receivership.—The mortgagee or lien holder who procures a receivership of a railroad thereby consents to the subjection of his interest in the property of which possession is taken at his instance to the discharge of liabilities and expenses incurred by the receiver under the orders of the court. But where receivers are appointed upon the petition of the insolvent debtor, the situation is different, and the administration of the trust and the adjustment of liabilities for past and current expenses must be upon principles different from what would otherwise govern. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26.

Where receivers were appointed solely at the instance and for the benefit of second

mortgage bondholders, and the trustees who sold the property were appointed to sell exclusively for the same parties, and not for the benefit of the first mortgage bondholders, upon no principle of justice or reason could the first mortgage bondholders be assessed to pay the commissions and the other expenses allowed, or any part of them, to such receivers and trustees. *Tome v. King*, 64 Md. 166.—DISTINGUISHING *White v. Bishop of Peterborough*, Jac. 402.

Where the plaintiff in foreclosure has procured the appointment of a receiver with power to control and operate the mortgaged road, he may not object to the depreciation of his security by expenses incurred for that purpose, but he may properly seek to have excluded any previous ones. *Metropolitan Trust Co. v. Tonawanda Valley & C. R. Co.*, 103 N. Y. 245, 8 N. E. Rep. 488, 2 N. Y. S. R. 69; reversing 40 Hun 80.

In a suit brought to enforce the specific execution of the terms and stipulations of a railroad mortgage, by which, on the happening of a specific event, to wit, default for one year in the payment of interest, the trustees, or the survivor of them, are entitled to take possession of the property mortgaged, hold it, receive and collect the income and profits arising from it, and apply such income and profits in a manner specified in the mortgage—held, that, upon default in the payment of such interest, a court of equity had power to appoint the surviving trustee a receiver, to take possession of the mortgaged property, and to authorize him, as such, to make provision for operating the road so as to secure an income and profits; and that the receiver, the road being without rolling stock or other equipments, had authority to purchase the same for the use of the road; that the expenses of the receiver and trustee, reasonably incurred in the discharge of his trust, should be allowed him, and were a lien upon the mortgaged property prior to that of the bondholders; that such expenses included reasonable fees for counsel employed by the receiver to aid him in the proper discharge of his trust, the cost of litigation, expenses incurred in taking care of, protecting, and repairing the property in his charge, and, under the circumstances of this case, money expended for rolling stock and machinery. *McLane v. Placerville &*

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S. V. R. Co., 26 Am. & Eng. R. Cas. 404, 66 Cal. 606, 6 Pac. Rep. 748.—APPLYING *Meyer v. Johnston*, 53 Ala. 348; *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 586. QUOTING *Rensselaer & S. R. Co. v. Miller*, 47 Vt. 152.

233. — expenses of company while contesting the foreclosure.—When the mortgaged property will not realize sufficient upon sale to pay the mortgage debt, an allowance out of funds in the hands of the receivers for the payment of the mortgagor's counsel cannot be made. *Mercantile Trust Co. v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 469, 41 Fed. Rep. 8.

Where a suit is instituted to foreclose a mortgage to pay bonds which are *prima facie* valid, and the bill alleges that the assets are not sufficient to pay the bonds, and the company in its defense attacks the validity of the bonds, as the bondholders are entitled to all of the assets, if necessary to pay their bonds, the court will not make an order pending the litigation directing the receiver to pay certain salaries, office expenses, and counsel fees on the application of the company. *Union L. & T. Co. v. Southern Cal. Motor Road Co.*, 51 Fed. Rep. 840.—REFERRING TO *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 10 Sup. Ct. Rep. 950.

234. Enforcement of claims after discharge of receiver.—Where the property in a foreclosure suit has been sold and ordered turned over to the purchaser, and the receiver discharged, and the court only retains jurisdiction of the case for the purpose of enforcing debts incurred by the receiver, suits to enforce unsatisfied claims, whether growing out of contract or tort against the receiver, and which, if established, would constitute a lien on the property, should be prosecuted against the purchasers upon notice, and not against the receiver. *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary (U. S.) 181, 7 Fed. Rep. 537.—FOLLOWED IN *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477.

But it is competent for the court to establish liens against the property in the hands of purchasers, and fix a time of payment, and, if not paid within the time, to order a sale of the property. And in establishing such claims they are to be tried with or without a jury, according to whether they are legal or equitable. *Farmers' L. & T.*

Co. v. Central R. Co., 2 McCrary (U. S.) 181, 7 Fed. Rep. 537.

7. The Sale.

a. When Proper; How Conducted; Effect.

235. When a sale is proper, and will be ordered.—In a proper case a court of equity has the power so to mould its decree as to order a sale of mortgaged premises to satisfy that part of the mortgage debt which is due, and preserve the lien upon the mortgaged premises in the hands of the purchaser as to the unmatured part of the debt. *Pennsylvania R. Co. v. Allegheny Valley R. Co., 48 Fed. Rep. 139.*—QUOTING *Christian v. Atlantic & N. C. R. Co., 133 U. S. 233, 10 Sup. Ct. Rep. 260.*

Where a railroad has been in the hands of a receiver for three years, and has been managed with great economy, but there has only been enough surplus earnings to pay interest on the oldest securities for two years, and nothing whatever has been paid on the junior securities, and nearly all the persons holding liens on the road are urging a sale, a sale will be ordered, although opposed by one class of security holders. *Bound v. South Carolina R. Co., 50 Fed. Rep. 853.*

Plaintiff company guaranteed the bonds and interest coupons of another company, or rather it indorsed the bonds and coupons, agreeing to purchase them at maturity at par, in which case it was to be substituted to the rights of the holders in the mortgage given to secure them. It purchased certain coupons and then filed a bill to foreclose before the bonds had matured. *Held*, that the contract should be construed so as to require the bondholders their mortgage lien until plaintiff had fully performed its obligations according to the tenor of its indenture, and that in the meantime its remedies upon purchased coupons should be kept in such a limit as to effect that object, and should not be permitted to foreclose so as to destroy the bondholders' security. *Pennsylvania R. Co. v. Allegheny Valley R. Co., 48 Fed. Rep. 139.*

But it appearing in such case that the interest of all parties concerned would be best subserved by a sale of the property, it was ordered to be made, subject to the mortgage lien, to secure the principal of the bonds and subsequent interest falling due. *Pennsylvania R. Co. v. Allegheny Valley R. Co., 48 Fed. Rep. 139.*

It appeared that the mortgagor was insolvent; that an execution purchaser under a junior encumbrance would do nothing to discharge the interest; that the operation of the road by the trustee would result in a loss; that the trustee had no proceeds with which to make repairs; and that the road, if unused, would necessarily decay. *Held*, that the court had power to order a sale of the property, although the mortgage did not in terms authorize a sale upon default in the payment of interest, and the bonds had not yet matured. *McLane v. Placerville & S. V. R. Co., 26 Am. & Eng. R. Cas. 404, 66 Cal. 606, 6 Pac. Rep. 748.*

236. When a sale will not be ordered.—A court of equity will never make an interlocutory order for an immediate sale of property upon terms discharging the lien of a mortgage not yet due unless it clearly appears, not only that in the end there must be a sale of the property, but a sale upon those terms. *Pennsylvania R. Co. v. Allegheny Valley R. Co., 42 Fed. Rep. 82.*

Income bondholders secured by a junior mortgage intervened and asked the court for an order to sell the property of an insolvent railway company in the hands of a receiver, pending the litigation, so as to cut off the lien of senior mortgages securing bonds not yet due. The validity of the senior mortgages was involved and undetermined, and the final result of other questions in litigation was uncertain. *Held*, that a sale on the terms asked for should be denied. *Pennsylvania R. Co. v. Allegheny Valley R. Co., 42 Fed. Rep. 82.*

Where the entire property of a railroad has been placed in the hands of a receiver pending a general foreclosure, but not a single right or claim has been established by decree, there is no authority for selling the property *pendente lite* by piecemeal except by consent of all persons interested. So an application under such circumstances to sell certain lands not needed for corporate purposes, the proceeds to be applied to the extinguishment of the oldest liens, will be denied where consent of all parties interested is not obtained, and the absence of counsel of some of the parties at a hearing of a motion to obtain leave to sell will not be construed as consent. *Bound v. South Carolina R. Co., 46 Fed. Rep. 315.*

237. When the road should be leased instead of sold.—An authority to mortgage a railroad and its property

must design a transfer of the right to operate the road; and in a suit to foreclose a mortgage upon a railroad and its franchises (which authorized a sale, upon the failure to pay either the interest or principal, to satisfy the amount claimed and due, but contained no provision that the principal should become due upon failure to pay interest, and the principal is not due), the bondholders have a right to a sale for the interest due. If the property is divisible, a sale should be ordered of so much as will satisfy the amount due. If not susceptible of division, it must be sold or leased as an entirety. In such case, where the property is worth much more than the amount of the debt and interest, it should be leased by public auction for the shortest term that will bring the amount due, and the accruing interest and principal as the same shall become due. If no one will take it for a term of years, then to be sold absolutely, the company to elect whether the property should be first offered for a term of years, the lessee or purchaser to give bonds, with good security, personal or real, for the purchase money, including the accruing interest and principal of the mortgage bonds; a lien on the property or term to be reserved as additional security. If leased, the lessee to give a covenant, with good security, to keep in good repair the road, cars, and other property not consumable by use, such as fuel and oil, and to return the same to the company at the end of the term in as good condition as when received. The court, before ordering a lease, to cause the inventory to be made of the property, its value, condition, etc., to be filed, and declared in the decree conclusive evidence of its condition and value at the time of the lease. *Bardstown & L. R. Co. v. Metcalfe, 4 Metc. (Ky.) 199.*

238. Ordering sale of consolidated road.—Where a road in the hands of the court is the property of a company constituted by the consolidation of three roads, all of which had before the consolidation issued their bonds and executed mortgages on their property to secure them, the court may direct the property of the consolidated company to be sold as a whole, and afterwards fix the amount to be paid to the several holders of the bonds and mortgages on the respective roads. *Gibert v. Washington City, V. M. & G. S. R. Co., 1 Am. & Eng. R. Cas. 473; 33 Gratt. (Va.) 586.*

239. Appraisement.—When a mortgage on a railroad is foreclosed, the property must be sold as real and personal, and the real estate must be sold according to the rules governing sales of real estate, and must, therefore, be appraised. *Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372.*

240. Conduct of the sale, generally.—A railroad with its fixtures, constituting an entire tract of real estate, divisible for the purpose of the sale, together with the franchise connected therewith, should be sold in foreclosure proceedings in like manner as an entire tract lying in two or more counties, and the proceedings incidental to the sale should be had in the county in which the action was brought. *Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372.*—QUOTED IN *Gooch v. McGee, 83 N. Car. 59, 35 Am. Rep. 558; Hill v. La Crosse & M. R. Co., 11 Wis. 214.*

With the real estate, and connected therewith, the franchise of a corporation to maintain a railroad, and demand compensation for the transportation of passengers and property, must be sold. *Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372.*

241. Sale in mass or in parcels.—Where a railroad as an entirety is mortgaged to secure bonds and their interest, and there is a default in the payment of interest, and it appears that the road cannot be sold in sections without loss to its value as a whole, the court may order a sale of the entire road before the principal of the bonds falls due. *Wilmer v. Atlanta & R. A. L. R. Co., 2 Woods (U. S.) 447.*

If a mortgage is given by a company upon its entire road to secure its bonds, and it procures the grading of only a part of the road in the middle, and then abandons the work, leaving each end of the road unfinished, and another company organizes and completes the road, on bill to foreclose the mortgage given by the first company it is erroneous to decree a sale of the middle portion of the road, leaving the two ends worthless. If any foreclosure can be had, the entire road must be sold and the proceeds distributed as between the bondholders of the original company and the new company in the proportion which the work done by the first company bears to the cost or value of the entire road as completed. *Chicago, D. & V. R. Co. v. Loewenthal, 93 Ill. 433.*—OVERRULED IN PART IN *Peoria & S. R. Co.*

v. Thompson, 7 Am. & Eng. R. Cas. 101, 103 Ill. 187.

Where a railroad, its appurtenances and franchises, are mortgaged as a whole, there is no power or authority to sell them separately, and such property, taken as a whole, not being, strictly speaking, either real or personal estate, when sold on a decree of foreclosure is properly sold without any right of redemption. The rule is founded partly upon considerations of public policy. *Peoria & S. R. Co. v. Thompson*, 7 Am. & Eng. R. Cas. 101, 103 Ill. 187.—QUOTED IN *Cushman v. Bonfield*, 36 Ill. App. 436.

To allow a railroad to be cut up into fragments, and separate portions sold at different sales, in the different counties through which it passes, to different purchasers, would not only sacrifice the rights and interests of creditors, but defeat the objects and intentions of the legislature in granting the charter. *Macon & W. R. Co. v. Parker*, 9 Ga. 377.—QUOTED IN *Georgia v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 434.

242. What property or franchises will pass.*—A railroad franchise includes the right of appropriating lands for the construction of necessary appurtenances, without which the road could not be successfully operated; and such a franchise is transferred in a marshal's sale of a railroad and its franchises to the purchaser, even if he is a natural person. *Lawrence v. Morgan's L. & T. R. & S. Co.*, 30 Am. & Eng. R. Cas. 309, 39 La. Ann. 427, 2 So. Rep. 69.

A company constructed part of its road through another state and mortgaged all its rights, etc., in the whole road; the trustee in the mortgage, being within the jurisdiction of the court, can be authorized and compelled to sell whatever interest of the company will pass under the terms of the mortgage. *McElrath v. Pittsburg & S. R. Co.*, 55 Pa. St. 189.

A provision in a charter that the charges for carrying passengers shall not exceed five cents per mile for each passenger is not a contract on the part of the state that passenger fares shall never be reduced below that rate. But if it were, the privilege conferred would not pass to the purchasers at a mortgage foreclosure sale, although the

mortgage purports to transfer the charter; and the reorganization by such purchasers after the adoption of the present constitution creates a new corporation, subject to legislative control. *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. Rep. 297.

Town lots held by a company do not pass by a sheriff's sale, upon a mortgage of the road, "with its corporate privileges and appurtenances," unless directly appurtenant to the railroad, and indispensably necessary to the enjoyment of its franchises. *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465.—REVIEWED IN *Morgan v. Donovan*, 58 Ala. 241.

Where a company mortgages its road then constructed or thereafter to be constructed, and it is subsequently authorized by an act of the legislature to mortgage a branch road, the statute expressly providing that the mortgage shall be a first lien on the branch, the original mortgage does not cover the branch, and a sale thereunder must be exclusive of the branch. *Randolph v. Wilmington & R. R. Co.*, 11 Phila. (Pa.) 502.

After a railroad had been in the hands of a receiver for several years it was sold under a decree directing a sale of "the road, the franchise of the company, the right of way, depots, rolling stock, tools, and all other property of the company, real, personal, and mixed." Held, that the purchaser was not entitled to money in the hands of the receiver arising from surplus earnings of the road, but he was entitled to cars, engines, and other property placed on the road by the receiver. *Strang v. Montgomery & E. R. Co.*, 3 Woods (U. S.) 613.

243. Time of sale—Postponement.—A court of equity, after a decree in foreclosure ordering the sale of a railroad, will take the responsibility, if necessary, of delaying the sale to await a better condition of the finances and business of the country than exists at the time of the decree. *Duncan v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 125.

A court of equity which has entered a final decree of foreclosure, from which an appeal has been taken, may postpone the day of sale fixed, for good reasons shown, without granting a *supersedeas*. And the postponement should be ordered where a sale might be disastrous to the purchaser, or where it might render a decision in favor of the appellants nugatory, if it could not be

* Franchises of road pass to purchaser at foreclosure sale, see notes, 30 AM. & ENG. R. CAS. 315; 36 *Id.* 275.

Exemption from taxation not transferable, see note, 13 AM. & ENG. R. CAS. 369.

rescinded. *Bound v. South Carolina R. Co.*, 55 Fed. Rep. 186.

The fact that a railroad begins after a period of financial adversity to show a prosperous state of earnings, indicating that in a few years it will be able to pay off an accumulation of overdue and unpaid interest, does not furnish ground for a postponement of its sale in foreclosure, especially if the company owning the railroad offers no guaranty that such prosperity will continue. *Duncan v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 125.

Where the rights of the several classes of creditors of a railroad have been declared, and the condition of the railroad demands an early sale, such sale will not be postponed until the interests of individual creditors have been adjusted, and the class to which their demands belong has been ascertained. *Hand v. Savannah & C. R. Co.*, 12 Am. & Eng. R. Cas. 488, 13 So. Car. 467.

244. Rights of bidders—Adjournments.—A court directed a foreclosure sale of a railroad, and the marshal advertised and offered the property for sale at public auction. Appellant bid on the property. Several adjournments of the sale were made, after one of which appellant advanced his bid to the full amount of the debt and costs, which was the highest and best bid. Appellant petitioned the court to have the sale confirmed to him on his bid, which was refused, and before the property was again offered under an adjournment the debt and costs were paid off. Held, that the marshal had the right to adjourn the sale if deemed best, and that the sale was incomplete until actually knocked down, and appellant's petition was properly refused. *Blossom v. Milwaukee & C. R. Co.*, 3 Wall. (U. S.) 196.

245. Deposit by bidder.—In order to prevent "straw" bids and delays a court of equity, in ordering a sale of valuable railroad property, including a railroad of some 200 miles, with its equipment, may require each bidder to deposit \$50,000. *Turner v. Indianapolis, B. & W. R. Co.*, 8 Biss. (U. S.) 380.

Where a foreclosure decree requires bidders to pay into court earnest money at the time of the sale, to be returned if the sale is not confirmed, and the decree is subsequently modified by consent so as to allow the deposit to be made by a certified check instead of in cash, and requiring the commissioner to deposit the same with a certain

trust company, the clerk of the court is not entitled to a fee thereon calculated as a certain percentage of the amount. *Easton v. Houston & T. C. R. Co.*, 44 Fed. Rep. 718. —DISTINGUISHING *Ex parte Prescott*, 2 Gall. (U. S.) 146; *Thomas v. Chicago & C. S. R. Co.*, 37 Fed. Rep. 548.

246. What may be taken for payment.—A provision in a railroad mortgage authorizing the trustees to sell in case of default, and to receive the mortgage bonds in payment, only applies to a sale made by the trustees, and the provision relating to taking the bonds in payment is not binding when a foreclosure sale is ordered by the court. *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 203, 6 Fed. Rep. 100.

But if the court decrees that the mortgage bonds may be received in part payment, it is not necessary to fix their value before the sale is confirmed. *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 203, 6 Fed. Rep. 100.

247. Expenses of sale, commissions, etc.—Where bills were filed in Georgia and Alabama to foreclose a mortgage on a railroad lying in both states, a sale of the railroad as a unit having been made by the receiver appointed by the courts of both states, the register is not entitled to commissions on such sale. *Rome & D. R. Co. v. Sibert*, 97 Ala. 393, 12 So. Rep. 69.

248. Confirmation.—The legislature has no power to confirm a fraudulent sale of the mortgaged property of a corporation. *White Mountains R. Co. v. White Mountains (N. H.) R. Co.*, 50 N. H. 50, 1 Am. Ry. Rep. 146.

b. Rights and Liabilities of Purchasers.

249. In general.—The purchaser of mortgaged railroad property, under a decree of the supreme court, is substituted in place of the mortgagee. *Youngman v. Elmira & W. R. Co.*, 65 Pa. St. 278.

A purchaser of a railroad at a foreclosure sale is not entitled to the net earnings of the road between the time of sale and possession by him, where the delay in delivering possession was due to his failure to comply promptly with the terms of sale; nor to a fund that came to the hands of a receiver by order of the court. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

Where railroad property is bid in by a

committee representing the bondholders, it is not necessary that it appear who are their principals. *Turner v. Indianapolis, B. & W. R. Co.*, 8 Biss. (U. S.) 380.

Where the property and franchise of the company had been sold on a decree of foreclosure of mortgages executed by it and purchased by a committee of the bondholders, and by such committee conveyed to a company organized under the general law of the state to operate the road, the purchaser at the foreclosure sale and the latter company took the railway free from this formal contract, especially as the purchaser had no notice of the agreement as to running to the depot. *People ex rel. v. Louisville & N. R. Co.*, (Ill.) 25 Am. & Eng. R. Cas. 235, 5 N. E. Rep. 379.—QUOTING *Menasha v. Milwaukee & N. R. Co.*, 52 Wis. 414.

Where the immovable property of a railroad is sold, the interest coupons of which are due, the purchaser at sheriff's sale must apply the surplus to the payment *pro rata* of all the matured interest coupons of other bonds of the same grade as the one upon which the seizure and sale was made which are presented and demanded; if he refuses, it is the duty of the sheriff to re-offer the property for sale the same day. *Branner v. Hardy*, 18 La. Ann. 537.—FOLLOWED IN *Gordon v. Vicksburg, S. & T. R. Co.*, 18 La. Ann. 550.

250. Rights of purchaser as regards payment of bid.—A party bidding at a foreclosure sale makes himself thereby a party to proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising affecting his bid which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. *Kneeland v. American L. & T. Co.*, 43 Am. & Eng. R. Cas. 519, 136 U. S. 89, 10 Sup. Ct. Rep. 950.—FOLLOWING *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. (U. S.) 655.

Where not concluded by the terms of the decree, any subsequent rulings which determine in what securities of diverse value the purchaser's bid shall be made good are matters affecting his interest in which he has a right to be heard in the trial court and by appeal in the appellate court. *Kneeland v. American L. & T. Co.*, 43 Am. &

Eng. R. Cas. 519, 136 U. S. 89, 10 Sup. Ct. Rep. 950.

If mortgage bondholders purchase the entire property at a foreclosure sale, they have the right, after paying the costs and charges of the litigation and of the trust, to pay the residue of their bid in bonds so far as to cover their own proportion of such residue. *Duncan v. Mobile & O. R. Co.*, 3 Woods (U. S.) 597.

251. Bond for price, and how enforced.—Where the purchaser of a railroad at foreclosure sale executed bonds pursuant to the decree of confirmation, which directed the commissioners to execute a deed to the purchasers, who "shall execute to the aforesaid commissioners their individual bonds, which shall be secured by a lien reserved in the conveyance," and the commissioners thereupon conveyed the property to the purchasers, "under the name of the W. & W. R. Co.," subject to lien for the balance of the purchase money as represented in the bonds, the bonds are the individual obligations of the grantors thereof, and are not the obligations of the railroad company, notwithstanding a statute which declares that upon the conveyance of the property of a company under a mortgage or decree the purchaser "shall forthwith be a corporation by any name which may be set forth in the said conveyance, or in any writing signed by him." *Holland v. Lee*, 40 Am. & Eng. R. Cas. 379, 71 Md. 338, 18 Atl. Rep. 661.

By the terms of the deed it was stipulated that the lien might be enforced against the purchaser, "or whoever may be in possession of the property hereby conveyed." *Held*, that the fact that no demand for payment was made upon the obligors when the first bond matured, but was made at the office of the railroad company and notice of foreclosure was served upon it only, is not sufficient to show that the obligors were not regarded as personally liable. *Holland v. Lee*, 40 Am. & Eng. R. Cas. 379, 71 Md. 338, 18 Atl. Rep. 661.

252. What title passes, generally.—The title of a purchaser at a foreclosure sale of a railroad is not affected by notice of an adverse claim under an invalid decree. *Central Trust Co. v. Florida R. & N. Co.*, 46 Am. & Eng. R. Cas. 370, 43 Fed. Rep. 751.

Where a company, under authority of

law, executes a mortgage or deed of trust upon all its property, both real and personal, including its franchise, and the same is duly recorded in the several counties through which the road runs, a purchaser of such property under a valid foreclosure of the mortgage will take the same free of all subsequent liens and encumbrances. The title of the purchaser, for the purpose of cutting off all intervening liens, will relate back to the date of the record of the mortgage. *Cooper v. Corbin*, 13 *Am. & Eng. R. Cas.* 394, 105 *Ill.* 224.

Where a right of way is conveyed to a company, the easement may be assigned or conveyed, and if there is no abandonment of the use, it will pass to the purchaser under a foreclosure of a mortgage executed by the company, embracing all of its rights and property. *Columbus, H. & G. R. Co. v. Braden*, 110 *Ind.* 558, 9 *West. Rep.* 193, 11 *N. E. Rep.* 357.—*REVIEWING* *Ingalls v. Byers*, 94 *Ind.* 134.

Under the statute authorizing a company to borrow money to construct, complete, improve, or operate its road, and to give mortgages therefor, a purchaser may acquire title to the road by sale made under a power conferred in such a mortgage, or title may be acquired by purchase under judicial sale to pay such indebtedness. After such a sale the corporate existence continues, and the purchaser becomes in effect a stockholder of the corporation. *Gulf, C. & S. F. R. Co. v. Morris*, 35 *Am. & Eng. R. Cas.* 94, 67 *Tex.* 692, 4 *S. W. Rep.* 156.

253. When purchaser gets a fee.

—A railroad mortgage made to trustees without words of inheritance, but empowering the trustees, on default, to sell the mortgaged premises, and to convey to the purchaser "all the estate, right, property, and interest, and to the same extent as the railroad company had therein at the date of the mortgage," etc., will be rectified so as to convey a fee. The court may direct the trustees to convey all their title to the purchaser at the foreclosure sale in aid of the execution. *Coe v. New Jersey Midland R. Co.*, 31 *N. J. Eq.* 105; *reversed in* 34 *N. J. Eq.* 266.

254. Purchaser of franchise takes cum onere.—A railroad was chartered to a designated place, and the township in which the place was situated voted a tax in aid of the railroad. Subsequently the road

was sold and defendant became the owner, and in forming a connection with other roads ceased to operate the last eleven miles of the road. *Held*, that the obligation to operate the road to its terminus was a part of the franchise, and defendant in purchasing the road at a foreclosure sale took it burdened with that obligation, and it was proper for the railroad commissioners to order it to operate the whole road. *State v. Central Iowa R. Co.*, 71 *Iowa* 410, 32 *N. W. Rep.* 409.—*DISTINGUISHING* *Muscatine Western R. Co. v. Horton*, 38 *Iowa* 33; *Covington & L. R. Co. v. Kenton County Court*, 12 *B. Mon. (Ky.)* 144.

255. Purchaser at sale made subject to liens.—The purchasers of railroad property, under a decree of foreclosure expressly providing that the purchasers should take subject to such liens as might be established in a reference to a master then pending, cannot contest the validity of such liens while retaining the property, though it be on the ground of fraud discovered after confirmation of the master's report fixing the amount of the liens. *Swann v. Wright*, 17 *Am. & Eng. R. Cas.* 345, 110 *U. S.* 590, 4 *Sup. Ct. Rep.* 235.—*DISTINGUISHED IN* *Williams v. Morgan*, 111 *U. S.* 684.

Where a foreclosure decree provides that the road shall be sold subject to certain undue receiver's certificates, including principal and interest, the purchasers of the road cannot insist that the lien exists only to the amount originally paid for such certificates. *Central Nat. Bank v. Hazard*, 30 *Fed. Rep.* 484, 24 *Blatchf. (U. S.)* 310.

Where a foreclosure decree constitutes certain classes of claims a lien on the road prior to that of the mortgage bonds, and directs a sale subject to such lien, a purchaser cannot object to the payment of a claim which belongs to one of the classes provided for. *St. Louis S. W. R. Co. v. Stark*, 55 *Fed. Rep.* 758.—*FOLLOWED IN* *St. Louis S. W. R. Co. v. Graham*, 56 *Fed. Rep.* 258.

Where a decree of foreclosure for the sale of a railroad contains a clause that the purchaser thereunder shall be liable for certain outstanding indebtedness or debentures secured by the mortgage foreclosed, and such condition is inserted in the sheriff's deed issued in pursuance of the sale created in said decree, the purchaser is liable *in personam* for the amount of in-

debtedness thus secured, and the action is not based on the decree. *Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. Rep. 419.

Bondholders purchased a railroad under a foreclosure decree providing that the property should be taken subject to the intervening claims then before the court which might, on further adjudication, be adjudged prior liens. Among the claims was one to reimburse a surety on an injunction bond, given by the railroad to enjoin an execution, which the surety had paid. *Held*, that the purchasers were bound to take notice of this claim, it having been presented by petition, and the property in their hands was held subject to the claim. *Union Trust Co. v. Morrison*, 33 Am. & Eng. R. Cas. 33, 125 U. S. 591, 8 Sup. Ct. Rep. 1004.

A decree of foreclosure of a railroad provided that the purchasers should take the property subject to all claims that might be presented in six months. The decree of confirmation made them liable for claims, omitting the six-months' limitation. *Held*, as this decree was not objected to, nor appealed from, that the purchasers were bound for a claim not presented in six months. *Olcott v. Headrick*, 141 U. S. 543, 12 Sup. Ct. Rep. 81.

A defendant in a foreclosure suit in a federal court obtained leave to establish a vendor's lien on the road in a state court, and the records in both courts fully showed the proceedings had and that the lien was established. *Held*, that the purchaser of the road at a subsequent foreclosure sale was charged with notice of what was done in the courts touching such lien. *Loomis v. Davenport & St. P. R. Co.*, 3 McCrary (U. S.) 489, 17 Fed. Rep. 301.

256. Purchaser at sale under foreclosure of junior mortgage.—County bonds issued to aid a company were payable upon construction of the railroad through the county by 1892. Before that the company received the bonds and executed a first mortgage to secure the county against the interest and the bonds in case the road was not constructed by 1892. The company hypothecated part of the bonds. Under second and third mortgages afterwards executed, in a general creditor's suit, the railroad was sold subject to the first mortgage. The proceeds were partly applied to redeem the hypothecated county

bonds. *Held*, that the purchasers are not entitled to the redeemed bonds unless they first refund to the general creditors as much of the proceeds of the sale as went to redeem them. *Washington, O. & W. R. Co. v. Lewis*, 30 Am. & Eng. R. Cas. 468, 83 Va. 246, 2 S. E. Rep. 746.

257. Purchaser accounting with senior mortgagee.—Where there is a foreclosure sale under a subsequent mortgage while a prior mortgagee is in possession, and the sale is subject to the prior mortgage, the purchaser is presumed to have bid only the amount actually due on the mortgage, and is entitled to an accounting with the senior mortgagee to ascertain what is actually due. *Lafayette Co. v. Neely*, 17 Am. & Eng. R. Cas. 242, 21 Fed. Rep. 738.

And in ascertaining the amount actually due the mortgagee should be allowed for all permanent improvements and necessary expenses during the time he was in possession, and also the amount of all encumbrances paid before the sale. *Lafayette Co. v. Neely*, 17 Am. & Eng. R. Cas. 242, 21 Fed. Rep. 738.

258. Purchaser takes subject to lien for taxes.—A purchaser of a railroad at a foreclosure sale takes it subject to a lien for taxes thereon, and cannot demand payment of such taxes out of the fund in court. *Osterberg v. Union Trust Co.*, 93 U. S. 424.

Under Tenn. Act of 1877, ch. 12, authorizing purchasers of a railroad at a foreclosure sale to form a new corporation, the company thus organized takes the property and franchises subject to the same taxation as applied to the former company, and this is so though the second company take additional steps to perfect the new organization. *Chesapeake, O. & S. W. R. Co. v. Lauderdale County*, 16 Lea (Tenn.) 688, 1 S. W. Rep. 48.

259. How far purchaser must take notice of rights of landowners along line of road.*—The purchaser of a railroad, whether at a judicial sale or otherwise, is bound to take notice of the rights of landowners along the line to private crossings, cattle-ways, etc., in use by them under contract, oral or otherwise, with the company

* Liability of purchaser at foreclosure sale to compensate landowner, see note, 44 Am. & Eng. R. Cas. 72.

which built the road, and cannot interfere to destroy or impair such rights. *Swan v. Burlington, C. R. & N. R. Co.*, 72 Iowa 650, 34 N. W. Rep. 457.—DISTINGUISHED IN *Hunter v. Burlington, C. R. & N. R. Co.*, 76 Iowa 490, 41 N. W. Rep. 305. FOLLOWED IN *Rock Island & P. R. Co. v. Dimick*, 144 Ill. 628.

A parol agreement made by the president of a railroad company to make a certain farm crossing, and to maintain a fence of a certain description through a tract of land, is not binding on a subsequent purchaser of the road at a foreclosure sale. *Hunter v. Burlington, C. R. & N. R. Co.*, 76 Iowa 490, 41 N. W. Rep. 305.—DISTINGUISHING *Swan v. Burlington, C. R. & N. R. Co.*, 72 Iowa 650.

Where a right of way is granted to a railroad company in consideration of a free pass over the road to the grantor, the consideration is a part of the purchase money, and the company remains personally responsible for its fulfilment; but the purchaser of the road at a foreclosure sale is not liable in damages for a failure to grant a free pass, although the land may remain subject to the lien to secure the performance of the condition of the grant. *Helton v. St. Louis, K. & N. W. R. Co.*, 25 Mo. App. 322.

260. Liability for debts of mortgagor company.*—Purchasers of the property and franchises of a railroad at a foreclosure sale do not thereby become liable for the debts and contracts of the company, in the absence of any law or decree directly making them liable. *Hoard v. Chesapeake & O. R. Co.*, 123 U. S. 222, 8 Sup. Ct. Rep. 74.—FOLLOWING *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176.

Where a consent foreclosure decree provides that the purchaser shall "pay, satisfy, and fully discharge all debts and liabilities of such receivership of every kind now remaining unpaid," the purchaser is bound to discharge a judgment against the company on a claim for damages which exists against the receiver. *Wabash R. Co. v. Stewart*, 41 Ill. App. 640.

Mich. Act 96 of 1859 permits the purchasers on a foreclosure sale of the track and appurtenances of a railway company to ex-

ercise the charter powers of the corporation on certain conditions, and frees them from liability for any debts embraced in the foreclosure. *Cook v. Detroit, G. H. & M. R. Co.*, 9 Am. & Eng. R. Cas. 443, 43 Mich. 349, 5 N. W. Rep. 390.

A common law action for the debt of a railway corporation cannot be maintained against those who have obtained control of its franchises by a purchase of its track and appurtenances on foreclosure of a mortgage securing other indebtedness. *Cook v. Detroit, G. H. & M. R. Co.*, 9 Am. & Eng. R. Cas. 443, 43 Mich. 349, 5 N. W. Rep. 390.

A mortgagee of railway property purchasing at his own foreclosure sale, made under a mortgage executed subject to the provisions of Tenn. Act of 1877, in a proceeding to which the claimants given priority by that act were not parties, is not protected, as an innocent purchaser, against such preferred claims. *Frazier v. East Tenn., V. & G. R. Co.*, 40 Am. & Eng. R. Cas. 358, 88 Tenn. 138, 12 S. W. Rep. 537.

261. Liability as respects mechanics' liens.—Where a party who has furnished materials to be used in the construction and repair of a railroad intervenes in a foreclosure suit and asks to be paid out of the earnings of the road, but expressly states in his petition that no mechanics' lien is claimed, a purchaser at a foreclosure sale is not bound to take notice of the claim for such lien. *Hale v. Burlington, C. R. & N. R. Co.*, 2 McCrary (U. S.) 558, 13 Fed. Rep. 203.

262. Position of mortgagor's president as purchaser.—Where property is sold at a public foreclosure sale at which all persons are authorized to bid, the mere fact that the president of the company, in his individual right, purchases the property will not in itself create a trust relation between him and bondholders so as to give the bondholders the right to treat the president as holding as trustee. *Credit Co. v. Arkansas C. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. Rep. 46.

263. Rights of bondholders as purchasers.—A foreclosure decree of a railroad permitting the mortgage bondholders to bid in the property and pay in their bonds is not only allowable, but often highly advantageous. Such bondholders may combine to buy the property, but not to prevent others from buying. *Ketchum v. Duncan*, 96 U. S. 659.—DISTINGUISHED IN

* Purchasers at foreclosure sale not liable for debts of company, see notes, 30 AM. & ENG. R. CAS. 155; 17 Id. 242.

South Covington & C. St. R. Co. v. Gest, 34 Fed. Rep. 628.

264. Purchaser, when trustee for creditors.—Where directors of a road enter into an arrangement with persons to purchase the road at much below its actual value, by which the directors escape liability as indorsers for the company, the creditors of the company may hold the purchasers liable as trustees to the full value of the property after deducting certain claims due to themselves from the company; and they may be charged with interest on any balance found due the creditors from the day of sale to the time a decree is entered setting aside the sale. *Drury v. Cross*, 7 Wall. (U. S.) 299.

The circumstance that purchasers of the effects of a corporation sold under foreclosure proceedings have surrendered them to another corporation created with the same or similar powers does not by itself warrant the inference of an agreement before the sale thus to convey it. *Allen v. Montgomery R. Co.*, 11 Ala. 437.

265. Compensation for improvements by purchaser in bad faith.—In Louisiana, where a railroad, in a state of complete dilapidation and ruin, was sold under a mortgage, under circumstances importing some fraud in the purchasers which induced the court to set the sale aside and order a resale, such purchasers, though deemed possessors in bad faith, are entitled by the spirit of article 508 of the Civil Code to compensation for reconstructing and repairing the road and putting it in working order. *Jackson v. Ludeling*, 99 U. S. 513.

Whatever question may exist about compensation for intrusion or inseparable ameliorations and improvements made by a possessor in bad faith, there is no question about his right to be reimbursed for necessary repairs, both according to the general civil law and the 2314th article of the Civil Code of Louisiana. *Jackson v. Ludeling*, 99 U. S. 513.

It seems to be held in Louisiana, contrary to former decisions, that compensation will not be allowed to the possessor in bad faith for inseparable improvements to land, such as clearing and ditching; but the reconstruction and putting in working order of a railroad, thereby restoring it to its normal condition, partake so much of the nature of repairs that compensation therefor is required by an equitable construction of arti-

cle 508 of the Civil Code. *Jackson v. Ludeling*, 99 U. S. 513.

The rule of compensation in such a case is to allow credit to the possessors for the value of the materials of the improvements yet in existence, and the cost of the labor bestowed thereon; but not for the improvements which have been consumed in the use, and not to exceed the value of the improvements when delivered up. Interest on the outlay of the possessors will also be allowed to an amount not exceeding the net earnings or fruits received from the improvements. They will be accountable, however, for all fruits received by them from the property. *Jackson v. Ludeling*, 99 U. S. 513.

For any balance found to be due them on such an accounting the possessors will have a lien on the property. *Jackson v. Ludeling*, 99 U. S. 513.

266. Rights of purchaser in litigation subsequent to sale.—A successful bidder at a railway foreclosure sale becomes so far a party to the suit as to entitle him to be heard in matters affecting his interest subsequently arising. *Davis v. Mercantile Trust Co.*, 152 U. S. 590, 14 Sup. Ct. Rep. 693.

If the decree of sale requires the purchasers to pay down a specified sum in cash, and to pay such further portions of their bid in cash as may be necessary to meet such other claims as the court may adjudge to be prior in equity to the mortgages, the purchasers have no interest in the application of the sums which the court requires to be paid in cash, whether the payments are to be made for the benefit of the bondholders, or partly for the benefit of the bondholders and partly for the benefit of persons holding claims against the mortgagor, and they are not entitled to appeal from a decree requiring payment of a claim for rentals and for the purchase price of rolling stock. *Central Trust Co. v. Grant Locomotive Works*, 43 Am. & Eng. R. Cas. 503, 135 U. S. 207, 10 Sup. Ct. Rep. 736.

Where a foreclosure sale is ordered before the rights of intervening claimants are determined, and the court reserves the power to determine the rights of the parties after the sale, and to declare certain claims liens prior to the mortgage, upon confirmation of the sale the purchaser should make himself a party by filing a petition of intervention or a supplemental bill; and if he is a

non-resident, he should appear by attorney; and if he fails thus to make himself a party, the court should make him a party anyhow. *Fitzgerald v. Evans*, 49 Fed. Rep. 426, 4 U. S. App. 154, 1 C. C. A. 307.

Where a street railroad had been sold under a decree foreclosing a mortgage to secure its bonds, and the decree provided that the bonds as paid should be filed in the case, the purchaser, who was also a creditor, cannot be compelled, on motion of a party from whom he had received certain bonds to use in making said purchase, but who was not a party, to produce and file the bonds which said creditor who made the motion had received back from the purchaser, and had in his own possession. A controversy between the purchaser and such holder of bonds as to their debit and credit account cannot be settled on such a motion, but is a subject for a separate litigation. *Euston v. Pendleton St. R. Co.*, 2 Cin. Super. Ct. 64.

A purchaser at a receiver's sale of a railroad, on the ground of the interest thereby acquired, was admitted a defendant in a suit to foreclose a first mortgage on the property of the railroad, but with the right only to appear at the taking of the account of the amount due on the mortgage, and to be notified of the taking of the account. A decree had been made that the complainants were entitled to a sale of the mortgaged premises to pay the amount due thereon. Before the master's report was made the purchaser had lost all his interest in the mortgaged premises by reason of a sale thereof under foreclosure of a second mortgage. *Held*: (1) that he had no interest in the suit to entitle him to have the final decree therein opened, and the execution set aside, because he was not notified of the taking of the account; (2) that any interest he might have by reason of his ownership of any bonds secured by complainants' mortgage could be protected by proceedings to prevent injustice in the distribution by the trustees of the proceeds of sale. *Ward v. Montclair R. Co.*, 26 N. J. Eq. 260.

267. Writ of assistance.—Where railroad property has been sold under a foreclosure decree, and the court has directed the receiver to turn it over to an assignee of the purchaser, the court reserving the right to resume possession if the assignee should fail to pay in any part of the purchase money, this brings the assignee within a rule

of court providing that every person not a party to a cause in whose favor an order has been made shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause, and such assignee may have a writ of assistance against another company which refuses to surrender the road. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

After a foreclosure suit had been instituted the company leased to another company the joint use of a part of the road for a term of twenty years; but the foreclosure decree provided that the purchaser should be at liberty to disclaim any lease or contracts entered into by the company after the beginning of the suit. *Held*, that the right of the purchaser to abandon the lease was not affected by receiving rent by the receiver during the pendency of the suit. In such case all right of possession in the lessee company ceased when it was notified that the purchaser intended to abandon the lease. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

Soon after such sale the purchaser notified the lessee company that it would abandon the lease and forbid the use of the road after thirty days from the time of giving the notice. *Held*, that the receipt of rent for the thirty days was not such a consent to the lessee's possession as to constitute it a tenant from year to year, especially when the rent was received with an express statement that it should be without prejudice to the rights of the purchaser. The case would not come within Ind. Rev. St. 1881, §§ 5207, 5208, providing that all general tenancies, where the premises are occupied with the consent, expressed or implied, of the landlord, shall be deemed from year to year, and only determined on three months' notice. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

In such case, where the indisputable facts show that the purchaser never waived its right to abandon the lease, a federal court which had jurisdiction of the foreclosure sale may issue a writ of assistance in favor of the purchaser, even where a temporary injunction has issued from a state court to restrain the purchaser from interfering with the lessee's possession, and the purchaser has appeared in the state court. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 44 Fed. Rep. 653.

c. Distribution of Proceeds.

268. In general.—Such liens on the property as are created by statute should be paid in preference to mortgage bonds; but equitable liens payable from the earnings of the property should be paid after the bonds. *Blair v. St. Louis, H. & K. R. Co.*, 25 Fed. Rep. 232.

The trustees in a railroad mortgage cannot act against a non-assenting bondholder justifying the application of funds in their hands to the securities created under a scheme of reorganization, upon the ground that the scheme of reorganization was tantamount to and took the place of a distribution after foreclosure, and that, as a court of equity would, on such distribution, prefer certain debts and obligations over the mortgage bonds, the trustees were justified in giving a similar preference. *Hollister v. Stewart*, 38 Am. & Eng. R. Cas. 599, 111 N. Y. 644, 19 N. E. Rep. 782.—REVIEWING *Dunham v. Cincinnati, P. & C. R. Co.*, 1 Wall. (U. S.) 254.

Claims against the receiver of an insolvent railroad corporation for moneys, services, supplies, damages, and necessary expenses of the management cannot be paid out of the proceeds of the mortgaged property, which were insufficient to pay the mortgage debt. Unless specially authorized by the court to contract debts on the faith of the property, a receiver is restricted to the income and profits of the road. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.—DISTINGUISHING *Cowdrey v. Galveston, H. & H. R. Co.*, 1 Woods (U. S.) 336; *Myer v. Western Car. Co.*, 102 U. S. 13.

269. Distribution among bondholders, generally.—The mortgagees of a railroad as between them and the company would in foreclosure proceedings be authorized to receive the proceeds of the sale, but the company would have the right to require that, upon or before payment of the proportion payable upon any bond, it should be produced, and, if paid in full, canceled, or, if paid in part, such payment to be credited; but any question as to the party entitled to receive the money on a bond, or as to the proportion payable on any bond lost or destroyed, or questions which may arise between the mortgagees and any bondholder, need not be anticipated by any order to be made in the action between the parties to the foreclosure, but should be disposed

of when they arise in another action, or in a supplementary proceeding; and an order made requiring the bondholders to prove their claims, and state the amount paid for the bonds, was erroneous. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.—QUOTED IN *Lane v. Baughman*, 17 Ohio St. 642.

A railroad company before its consolidation with another company issued 200 first mortgage bonds. Subsequently the consolidated company issued its bonds, and set apart 200 of them to be exchanged for the 200 bonds issued by one of the original companies. The holders of only 130 of these bonds agreed to exchange and did so exchange them. Default having been made in the payment of interest on the new bonds, the mortgage was foreclosed, and the decree made the outstanding seventy of the first bonds a first lien on the road or the proceeds of the sale. After the foreclosure six of the bonds first issued, purchased from the financial agent of the consolidated company, were presented for payment, which was refused by the purchaser of the road on the ground that they were a part of the 130 bonds exchanged, and were therefore fully paid and satisfied. Held, that, there being nothing to show that these six bonds were not a part of the seventy outstanding, or that the owner was not a bona fide holder, they are entitled to be paid out of the proceeds of the sale. *Kneeland v. Lawrence*, 46 Am. & Eng. R. Cas. 319, 140 U. S. 209, 11 Sup. Ct. Rep. 786.

The president of a railroad company, who was not a stockholder, loaned the company \$81,000 to aid in the construction of its road, and the board of directors directed the treasurer to deliver him as security \$810,000 worth of the company's bonds. Held, that he had a right in a foreclosure suit to prove the full amount of the bonds, and share in the distribution up to the amount of his claim, in the absence of any proof of fraud or of undue advantage, or of the insolvency of the company at the time. *Duncomb v. New York, H. & N. R. Co.*, 13 Am. & Eng. R. Cas. 84, 88 N. Y. 1; affirming 23 Hun 291, mem.

Such president, under an arrangement with the board of directors, agreed with the contractors to deposit the bonds with trustees on condition that the trustees should receive other bonds then held by a trustee, to be used in completing the road, but the bonds held by the president not to be used until the others had been exhausted,

and to be returned if the contractors failed to fulfil their contract. *Held*, that the president did not thereby waive his claim to the bonds, and was entitled to dividends on those not used; and this was so though the trustee was ignorant of the condition on which the bonds were deposited. *Duncomb v. New York, H. & N. R. Co.*, 13 *Am. & Eng. R. Cas.* 84, 88 *N. Y.* 1; *affirming* 23 *Hun* 291, *mem.*

Such company borrowed \$25,000 from an individual and pledged \$250,000 of bonds as security, and gave a note for another \$6000 to the same party for interest and commissions, which was secured by \$20,000 in bonds, and indorsed by the president. Subsequently the holder of the note took judgment thereon, which was settled by the president by paying half the principal and the interest, and taking an assignment to himself of the judgment and the securities. *Held*, that the president was entitled to dividends on the bonds so assigned up to the full amount paid by him, and interest. *Duncomb v. New York, H. & N. R. Co.*, 13 *Am. & Eng. R. Cas.* 84, 88 *N. Y.* 1; *affirming* 23 *Hun* 291, *mem.*

An agreement was made among certain holders of the first mortgage bonds of an insolvent company to purchase at a judicial sale "for the benefit of the first mortgage bondholders," and to form a new corporation, etc. *Held*, that all first mortgage bondholders were entitled to participate in the benefit of the arrangement, and that it was not confined to the persons who had signed the power of attorney given the agent who made the purchase. *Walker v. Whelen*, 4 *Phila. (Pa.)* 389.

A. sold land to the company; as part of the consideration he was to receive bonds secured by a second mortgage to be issued. He delivered the deed; judgment was confessed by the company, after which the mortgage was executed. The bonds were tendered to A.; he refused them because of the judgments. The bonds were then otherwise appropriated by the company. *Held*: (1) that the setting apart of the bonds to A. gave him no claim for their amount in the distribution; (2) that in the distribution it was a question of lien, and A. had no lien; (3) the mortgage having been given to secure the bonds and A. not owning them, he had no lien, equitable or legal, through the mortgage for the purchase money for which the bonds were to be de-

livered to him. *Rice's Appeal*, 79 *Pa. St.* 168.

After A.'s rejection of the bonds he had no further claim on them: the company could dispose of them as they pleased. He had only a right of action against the company for the purchase money. *Rice's Appeal*, 79 *Pa. St.* 168.

In the distribution of a fund arising from the sale of a railroad, the question in dispute was as to the ownership of fifteen first mortgage bonds. The bonds were delivered to T. by G. and D. to dispose of them in certain specified ways upon the fulfilment or non-fulfilment of two certain conditions. T. had transferred the bonds to the Pennsylvania R. Co., which claimed under them in the distribution. *Held*, that, on the failure of the Pennsylvania R. Co. to show when and how and for what consideration they obtained the bonds, the fund must go to G. and D., in accordance with the provisions of the trust, by virtue of which they were held by T., the other of the two contingencies not having occurred. *McElrath v. Pittsburgh & S. R. Co.*, 15 *Phila. (Pa.)* 236.

270. Holders of bonds as collateral.—Where a mortgage to secure negotiable bonds is foreclosed, persons holding bonds which have been transferred as collateral security may prove the entire amount of bonds held, but should only be allowed to recover the amount of the original debt, with interest. *Morton v. New Orleans & S. R. Co.*, 79 *Ala.* 590. *Newport & C. Bridge Co. v. Douglass*, 12 *Bush (Ky.)* 673, 18 *Am. Ry. Rep.* 221. *Duncomb v. New York, H. & N. R. Co.*, 4 *Am. & Eng. R. Cas.* 293, 84 *N. Y.* 190; *reversing* 23 *Hun* 291.—REVIEWED IN *Morton v. New Orleans & S. R. Co.*, 79 *Ala.* 590.—*Rice's Appeal*, 79 *Pa. St.* 168.

A bank loaning money to a railroad, expecting payment from a sale of bonds, is only a common creditor, and is not entitled to be paid from a fund arising from a foreclosure sale in preference to bondholders because the company was heavily indebted at the time of the loan, and used its current earnings to keep down interest and to make permanent improvements. *Penn v. Calhoun*, 121 *U. S.* 251, 7 *Sup. Ct. Rep.* 905.

Holders of first mortgage bonds contracted with certain brokers to sell the bonds, and, when only a portion of them had been delivered to the brokers, fraudu-

lently procured, through the brokers, the bonds to be listed on a stock exchange, which, together with the standing of the brokers and their representations, gave them a fictitious value. Persons who loaned money to the brokers on such bonds were afterwards compelled to buy in the bonds. *Held*, that this was not such fraud as entitled them to priority in the application of the proceeds of a foreclosure sale to satisfy the bonds. *Coe v. East & W. R. Co.*, 52 *Fed. Rep.* 531.

271. Distribution pro rata.—A railroad mortgage to secure bondholders was foreclosed, and, the fund arising therefrom being insufficient to pay all the bonds in full, the court ordered a distribution *pro rata* among such bondholders as had come in and proved their claims. After some had been paid other bondholders came in, proved their claims, and participated in the distribution of the remainder of the funds. *Held*, that this was error. The only way in which the other bondholders could come in was to recast the whole account and to declare a smaller dividend, requiring each one who had been paid to refund a *pro rata* share. *Pinkard v. Allen*, 75 *Ala.* 73.

The principle which prevails at law as to the distribution of money among execution creditors is not always applied in equity. So where a railroad mortgage is foreclosed to secure first and second mortgage bondholders, the money should be distributed *pro rata* among the bondholders entitled to a first lien, and the residue among the holders entitled to a second lien, without regard to the time at which their several liens accrued. *Morton v. New Orleans & S. R. Co.*, 79 *Ala.* 590.

272. Priority among coupons.—In directing the distribution of the proceeds of the sale of a railroad mortgaged to secure registered coupon bonds, unpaid coupons or interest belonging to a class in which a part of the coupons or of the interest had been paid should be paid before coupons or interest falling due at a later period, and before the principal of any of the bonds; and coupons detached, and in the hands of others than the holders of the bonds from which they were detached, should be paid before such bonds. *Stevens v. New York & O. M. R. Co.*, 13 *Blatchf. (U. S.)* 412.—REVIEWING *Dunham v. Cincinnati, P. & C. R. Co.*, 1 *Wall. (U. S.)* 254.

273. Money loaned to pay interest on coupon bonds.—For money borrowed by the company to pay interest on coupon bonds the lender is not entitled to be paid out of funds in the hands of the receiver appointed at the instance of the mortgagees. As the lender is not entitled to be treated as an assignee of the interest coupons taken up with the money loaned by him, he is not entitled to be subrogated to the rights of the holder of such coupons. *Newport & C. Bridge Co. v. Douglass*, 12 *Bush (Ky.)* 673, 18 *Am. Ry. Rep.* 221.

274. Secured and unsecured debts.—The rule charging operating expenses of a railroad, debts due from it to connecting lines growing out of an interchange of business, debts due for the occupation of leased lines, and, generally, debts created under special circumstances which make an equity in favor of the unsecured debtor upon the gross income of the road before a fund arises for the payment of mortgage interest, is not applicable to a fund realized from a sale of the road under foreclosure of a mortgage; and, as a general rule, unsecured debts of the company cannot, in such case, take precedence over debts secured by prior and express liens in the distribution of the proceeds of the sale of the mortgaged property. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.*, 33 *Am. & Eng. R. Cas.* 16, 125 *U. S.* 658, 8 *Sup. Ct. Rep.* 1011.—DISTINGUISHED IN *Toledo, D. & B. R. Co. v. Hamilton*, 43 *Am. & Eng. R. Cas.* 476, 134 *U. S.* 296.

275. Liens surrendered under agreement to pay them.—A railroad receiver agreed to pay a claim that was a lien on part of the road out of the proceeds of a foreclosure sale of that part of the road, and thereupon the lienor surrendered his lien. On a sale the receiver bid in the property as an entirety. *Held*, that it was proper to pay the claim out of the proceeds of the sale as an entirety. *Farmers' L. & T. Co. v. Newman*, 127 *U. S.* 649, 8 *Sup. Ct. Rep.* 1364.

In such case a provision in the decree that the mortgage bondholders might pay in bonds, instead of cash, would not defeat the right of the lienor to payment in cash; and if payment was not made in a reasonable time, he could move to sell the entire road again. *Farmers' L. & T. Co. v. Newman*, 127 *U. S.* 649, 8 *Sup. Ct. Rep.* 1364.

276. Holders of preferred stock.

—Where one company buys the road of another, paying therefor in preferred stock, the holders thereof, who have acquiesced in the sale for years, and have received interest on the stock, are not entitled to be paid first out of the proceeds of the whole road when sold to pay mortgages. *Branch v. Atlantic & G. R. Co.*, 3 Woods (U. S.) 481.

277. Judgment creditors, generally.—An insolvent railroad made an arrangement by which it foreclosed a mortgage on the road and sold so as to pay the mortgage debts and leave sixteen per cent.

to be paid the stockholders. *Held*, that a judgment creditor of the company whose claim was not secured had a right in equity to subject said sixteen per cent. to payment of his judgment whether it had been paid to the stockholders or not. *Chicago, R. I. & P. R. Co. v. Howard*, 7 Wall. (U. S.) 392.—APPLIED IN *Farmers' L. & T. Co. v. Missouri, I. & N. R. Co.*, 17 Am. & Eng. R. Cas. 314, 21 Fed. Rep. 264. DISTINGUISHED IN *Hancock v. Toledo, P. & W. R. Co.*, 11 Biss. (U. S.) 148; *Vose v. Cowdrey*, 49 N. Y. 336; *People v. Erie R. Co.*, 56 How. Pr. (N. Y.) 122; *Stewart's Appeal*, 72 Pa. St. 291.

278. Judgments for damages to property.—A judgment by default against a railroad company for damage to private property adjacent to its road is not binding, as to the amount of damages, upon the mortgagees of the company and its bondholders secured thereby. And on a contest between the holders of such bonds and the owners of property damaged by the construction of the road as to priority of payment out of the proceeds of a sale of the road on foreclosure, it is not error for the court to open such judgment, and to require a reassessment of damages by the jury.

Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35, 31 N. E. Rep. 138.

A railway company having but a part of its road completed gave its mortgage upon its entire line, part of which was only projected, to secure its bonds. The mortgage recited that the bonds were to be issued at the rate of \$10,000 a mile as the projected road should be completed. At the terminus of the road the tracks were laid in a public street, under leave of the city authorities, without the payment of any damages to the owners of the lots abutting upon the street. Afterward such owners brought suits against the company alone for damages to their

lots, in which they recovered judgments, the mortgagee and bondholders not being made parties. On bill filed by the judgment creditors to enforce payment of the judgment, the mortgagee and bondholders filed a cross-bill to foreclose the mortgage, claiming a prior lien under the mortgage, which had been recorded long before the recovery of the judgments. The court opened the judgment, and allowed a defense to be made to the suits at law. After trial and judgment the court, by its decree foreclosing the mortgage, gave the judgment creditors the priority in payment. *Held*, that the court did not err in decreeing that the damages to the abutting lot owners, the plaintiffs in the judgments, should have priority of payment out of the proceeds of the sale of the road under the decree of foreclosure. *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 31 N. E. Rep. 138.

A valid claim for damages against a receiver is entitled to satisfaction out of the current receipts applied to satisfy mortgage creditors, or to the improvement of the railway property; and the court appointing the receiver has authority to apply such portion of the proceeds of the mortgage sale as would equal such applied current receipts, or the value of such improvements, to satisfy such claim for damages. *Ryan v. Hays*, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.

279. Advances to save property from sale for taxes.—Where a decree for foreclosure and sale provides that the proceeds shall be brought into court to await the further order of the court as to its distribution, saving the rights of all persons in the fund for future determination, a party may, on petition, after such sale and before a distribution is made, have an order to pay him out of the fund any moneys which he may have advanced to save the mortgaged property from sale for taxes due thereon, which were a prior lien, before payment to the other creditors. *Humphreys v. Allen*, 100 Ill. 511.

280. Money furnished to build extension of road.—The receiver was authorized by a consent order, without a reference, to construct an extension of the railroad at a cost not to exceed an amount stated, to be paid for out of surplus income, and the extension to stand pledged for such payment. The extension was built at a greater cost, and then sold as a part of the entire road. *Held*, that the receiver acted

only as agent of the consenting bondholders, but that the extension was covered by a lien, superior to existing liens, in favor of those who furnished the money to build it, and that they were entitled to such ratable proportion of the proceeds of sale as the value of the extension bore to the value of the entire road, considered only in reference to the purchase money of the whole. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

But a bondholder refusing to consent to the extension, and whose interest was expressly excepted in the consent order, is entitled to his full share of the whole proceeds of sale. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

281. Claimants for materials and supplies furnished.—Necessary supplies purchased on credit by the receiver of a railroad, appointed in foreclosure proceedings, may be ordered to be paid out of the funds arising from the sale of the road in preference to the mortgage bondholders. *Kneeland v. Bass F. & M. Works*, 48 Am. & Eng. R. Cas. 675, 140 U. S. 592, 11 Sup. Ct. Rep. 857.—**DISTINGUISHING** *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 138 U. S. 509.

Persons who furnish materials to an insolvent road have no specific lien on the property, and are not entitled to payment in preference to mortgage bondholders; and a promise of payment by a receiver cannot give a prior lien. *Denniston v. Chicago, A. & St. L. R. Co.*, 4 Biss. (U. S.) 414.

282. Costs and fees, generally.—Counsel fees and costs should be adjusted on circuit. The costs and fees of all the attorneys, properly chargeable for successful services, should be paid out of the common fund. *Hand v. Savannah & C. R. Co.*, 17 So. Car. 219.

Where a decree of foreclosure had been obtained by the bondholders, and a sale of the road had taken place thereunder, at which a certain corporation not a party to the foreclosure was the bidder, and the transfer of its bid to the trustees of the bondholders was subsequently approved by the court rendering the decree—*held*, that the officer's fees for the sale should be the same as if the execution plaintiffs had been the immediate purchasers. *Gilman v. Des Moines Valley R. Co.*, 42 Iowa 495.

283. Attorneys' fees.—A court may decree payment of an attorney's fee, for services in protecting the property and col-

lecting claims, out of a fund arising from the sale of a railroad, in preference to the debts secured by mortgage; but a claim for services for counsel to officers and stockholders not resulting in benefit to the mortgage creditors is not entitled to preference. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. Rep. 405.

A lawyer who is retained as counsel for a railroad company at a fixed salary is not entitled to payment in preference to the mortgage bondholders; but where the order appointing a receiver directs him to pay all wages due to employes for labor and services performed within ninety days of the appointment of the receiver, such attorney is an "employe" within the meaning of the order, and is entitled to compensation earned within the ninety days. *Finance Co. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 526.

The rule which allows counsel fees to a trustee who sues for the benefit of those whom he represents, or where one sues for the joint benefit of himself and others, does not extend to counsel who represent a mere pledgee of bonds. *Morton v. New Orleans & S. R. Co.*, 79 Ala. 590.

The mortgagees of a railroad, with power to sell, must be regarded in foreclosure proceedings as proceeding on that part of the instrument which operates as a mortgage, and not under the power to sell, and therefore the court would not be authorized in such action to charge upon the proceeds realized by a sale an allowance for the trouble of such mortgagees, who acted as trustees, or the fees of their counsel. *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.

d. Proceedings to Restrain or Vacate.

284. Grounds for setting aside, generally.—The fact that a railroad receiver has filed a bill against third parties to set aside certain deeds of lands which he claims belong to the company, but which such third parties claim as their own, under a title adverse to the company, is no ground for allowing a bondholder to file a bill of review to set aside a sale of the road. The title to the lands cannot be determined in the foreclosure proceeding. *Farmers' L. & T. Co. v. Green Bay & M. R. Co.*, 10 Biss. (U. S.) 203, 6 Fed. Rep. 100.

In a suit to foreclose a mortgage upon railroad property, the answer set out the substance of an alleged fraudulent contract

which would make the foreclosure proceedings invalid, and this answer was withdrawn. A stockholder of the company, without whose knowledge the foreclosure of the mortgage could not have taken place, and who by the exercise of ordinary diligence would have discovered the allegations made in the answer thus withdrawn, failed for ten years after the foreclosure to object to the operation of the road by the purchasers at such foreclosure sale, the parties to the alleged fraudulent contract having died in the meantime. He then brought suit to annul the foreclosure decree, and alleged that he was ignorant of the fraudulent transactions until within a short time of bringing his suit. *Held*, that such stockholder was guilty of laches, which would prevent him from maintaining his bill. *Foster v. Mansfield, C. & L. M. R. Co.*, 57 *Am. & Eng. R. Cas.* 245, 146 *U. S.* 88, 13 *Sup. Ct. Rep.* 28.

In a case of this kind, where the plaintiff seeks to annul a long-standing decree, it is a circumstance against him that he does not show a probability of advantage to himself by the success of his suit, as a court of equity is not called upon to do a vain thing, and will not entertain a bill simply to vindicate an abstract principle of justice, or compel the defendants to buy their peace, and the decree will stand if it appears that the parties really in interest wish it to stand. *Foster v. Mansfield, C. & L. M. R. Co.*, 57 *Am. & Eng. R. Cas.* 245, 146 *U. S.* 88, 13 *Sup. Ct. Rep.* 28.

Defendant company leased a road and agreed to pay a certain lien thereon. Subsequently the company acquired the road as a part of its own line and mortgaged the whole line. Afterwards the road was placed in the hands of a receiver, who, under orders of the court, contracted to purchase the lien on the leased road, and to pay therefor from the proceeds of a sale of the road. The claim not being paid, the holder of the lien applied to the court for an order to set aside the sale. *Held*, that the court was bound to enforce a contract made by its orders, and therefore would order the sale set aside, and again place the receiver in possession. *Farmers' L. & T. Co. v. Burlington & S. W. R. Co.*, 32 *Fed. Rep.* 805.

285. Combinations among bidders.—The creditors of a mortgaged railroad may fairly combine to purchase the property, where other bondholders and

creditors are not thereby deprived of the right to bid, at a foreclosure sale; and the fact of such combination affords no ground for setting aside the sale. *Kropholler v. St. Paul, M. & M. R. Co.*, 1 *McCrary (U. S.)* 299, 2 *Fed. Rep.* 302.

One of a number of bondholders who had entered into an agreement for the purchase of the mortgaged premises at the foreclosure sale applied for an order setting aside the sale (the property had been bought by the combination at the sale) on the ground that the purchasing committee had, contrary to the agreement under which the combination was formed (that is, after the time limited in the agreement for coming in), let in other bondholders; also, that they had stifled competition at the sale by purchasing after an adjournment of the sale and before the sale took place, for the account of a railroad company which came in subsequently and after the limited time, the bonds of a person who was a determined bidder when the property was first put up for sale. *Held*, that the objection that other bondholders were let into participation in the benefits of the combination agreement after the time limited therein could not, under the circumstances, find favor in equity, and that the alleged stifling of competition was the act of the agents of the petitioner, and it did not appear that it had affected his interest injuriously in any way. *Walker v. Montclair & G. L. R. Co.*, 30 *N. J. Eq.* 525.

286. Fraud or collusion.—Where a railroad corporation suffers default in the payment of its bonds secured by mortgage on its road and franchises, and in consequence the mortgage is foreclosed, and property sold, the sale cannot be attacked on the ground that the directors of the corporation were actuated by corrupt motives in suffering the default, and that this was known to the trustee, in the absence of any claim of collusion between him and the directors. *Harpending v. Munson*, 12 *Am. & Eng. R. Cas.* 408, 91 *N. Y.* 650, *mem.*

The principle that a court of equity will not aid parties in the perpetration or consummation of a fraud, nor give assistance whereby either of the parties connected with a betrayal of a trust can derive any advantage therefrom, applied in a case where the receiver of a road entered into a combination with other parties, the receiver to furnish information, and the other parties to

buy the bonds of the railroad to be used in purchasing the road at a coming foreclosure sale for all thus combining, but which agreement such parties resolved to carry out, and the receiver filed a bill to compel them to allow him to share in the benefits of the sale. *Farley v. St. Paul, M. & M. R. Co.*, 4 *McCrary* (U. S.) 138, 14 *Fed. Rep.* 114.

A railroad company executed a mortgage to secure \$2,000,000 of its bonds, but less than \$200,000 thereof was held by *bona fide* purchasers, the remainder having been bought at nominal prices, and being held or controlled by a new company, which had foreclosed for the non-payment of six months' interest. Held, that the transaction would be treated as a fraud on the mortgagor and its other creditors, and the sale would be set aside, and the mortgage directed to stand as security for the *bona fide* holders of mortgage bonds. *James v. Milwaukee & M. R. Co.*, 6 *Wall.* (U. S.) 752.

287. Inadequacy of price.—A court will not reopen a foreclosure sale in the absence of clear proof of fraud or unfairness; and the fact that the road in the hands of the purchasers has become successful and profitable, and therefore has arisen in value, is no ground for setting aside a sale. *Leavenworth County v. Chicago, R. I. & P. R. Co.*, 22 *Am. & Eng. R. Cas.* 61, 25 *Fed. Rep.* 219.

Mere inadequacy of price is not alone sufficient to set aside a sale, and the expression of opinion, though well founded, that the property on a resale would bring a much higher price, is not sufficient. The fact that bondholders of a railway were known to have authorized bids up to \$400,000, which deterred others from bidding, is not ground for setting aside the sale, though it was made for \$225,000 to such bondholders. *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 54 *Fed. Rep.* 26.

If property sells at an inadequate price, the inadequacy must be so great as to shock the conscience and excite the suspicion of the court, or there must be an inadequacy of price, with additional circumstances against the unfairness of the sale, growing out of fraud, accident, or some trust relation of the parties, to justify the court in interfering. *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 54 *Fed. Rep.* 26. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss.* (U. S.) 380.

And a sale will not be set aside for inade-

quacy of price unless it appears that some responsible person will make an advance bid if a resale is granted. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss.* (U. S.) 380.

288. Parties to bill to set aside.—It is a rule in equity that all persons who would be affected by a decree should be made parties. So where certain dissatisfied stockholders and bondholders file a bill to set aside a foreclosure sale of a railroad, which has been made under an agreement between a majority of the stockholders and creditors, the trustees in the mortgages should be made parties; otherwise the bill will be fatally defective. *Ribon v. Chicago, R. I. & P. R. Co.*, 16 *Wall.* (U. S.) 446, 4 *Am. Ry. Rep.* 285. *Harwood v. Cincinnati & C. A. L. R. Co.*, 17 *Wall.* (U. S.) 78.

Holders of second mortgage bonds of a railroad cannot maintain a bill to rescind a foreclosure sale by the first mortgage bondholders, or have it declared in trust for both classes, where there is no charge of collusion or inadequacy of price, and where it appears that complainants might have intervened in the first suit, but could not have prevented the sale. *Robinson v. Iron R. Co.*, 46 *Am. & Eng. R. Cas.* 383, 135 *U. S.* 522, 10 *Sup. Ct. Rep.* 907.

289. Sufficiency of the bill.—Where a suit is brought to set aside a decree in a former suit foreclosing a railroad mortgage on account of fraud, and the bill is heard on demurrer, the record in the former suit cannot be referred to where it is not made part of the bill; but the relief will be granted if the charges in the bill are sufficient to warrant it. *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 *U. S.* 505, 4 *Sup. Ct. Rep.* 583; reversing 3 *Fed. Rep.* 772, 1 *McCrary* (U. S.) 647.

Charges in a bill by a corporation to set aside a decree in a former suit foreclosing a railroad mortgage, that no real defense was made in that suit by reason of the fraud and unfaithfulness of the solicitor and directors, are sufficient to give a court of equity cognizance. *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 *U. S.* 505, 4 *Sup. Ct. Rep.* 583.

290. When the remedy is by motion, not by bill.—Pending the foreclosure of a mortgage given by a corporation to secure its bonds, a receiver was appointed, and after due notice he was directed to issue receivers' certificates for the benefit

of the property. At the foreclosure sale the property sold for less than the amount of the receivers' certificates. Afterwards a bondholder filed a bill for relief against the sale. *Held*, that, if he had any remedy, it was by application to the court rendering the decree, and not by an independent bill. *Kent v. Lake Superior Ship C. R. & I. Co.*, 144 U. S. 75, 12 Sup. Ct. Rep. 650.—FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182.

291. Who may move to vacate.—One who obtains an equitable interest in railroad bonds after a foreclosure of the mortgage given to secure them has not such interest as will allow him to appear and seek to set aside the sale. *Ex parte Fleming*, 2 Wall. (U. S.) 759.

If mortgage trustees combine with others to defraud the bondholders, or any of them, or if they do not act in good faith, a bondholder may, by a suit properly brought, in which the necessary persons are made parties, correct the matter; but, as bondholders are usually represented by their trustees, a bondholder cannot interpose by a mere motion to set aside a sale for the above reasons. *Meyer v. Utah & P. V. R. Co.*, 3 Utah 280, 3 Pac. Rep. 393.—QUOTING *Shaw v. Little Rock & Ft. S. R. Co.*, 100 U. S. 605.

292. Waiver of right to move to vacate.—Where an appeal has been taken from a decree foreclosing a railroad mortgage, and a motion to dismiss the appeal has been made and overruled, a motion for a mandamus to vacate the foreclosure decree will be overruled also. *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 443, n.

The supreme court modified a decree of foreclosure of railroad property, giving the mortgagor the right to have an account taken against the party in possession of the road up to the date of the master's deed, or up to the time of the rendition of a new decree in case the sale was set aside, and giving the mortgagor leave to move the court below to vacate the sale, and the mortgagor came into court and requested it not to set aside the sale, but to have an account stated up to the time the master made the deed. *Held*, that this was a waiver of the right afterwards to insist upon a motion to vacate the sale. *Racine & M. R. Co. v. Farmers' L. & T. Co.*, 86 Ill. 187.—QUOTING *Fergus v. Woodworth*, 44 Ill. 374.

293. When judgment should be vacated before setting aside sale.—

A railroad company took a mortgage on certain lands, which it assigned, and then acquired a certain portion of the land for a right of way, etc., which by a sale passed to defendant company. Defendant answered a foreclosure bill, and set up such facts as to entitle it to relief, but failed to appear and prove the allegations, and a decree was taken for the sale of the whole of the premises, and at a subsequent term the company appeared and moved to set aside the sale as to its roadbed and right of way. *Held*, that it was error to grant the motion so long as the judgment was not vacated. *Hartshorn v. Milwaukee & St. P. R. Co.*, 23 Wis. 692.

It was likewise error to refer the case to a commissioner to ascertain the value of the company's interest in the land, exclusive of improvements put on it, and to direct its property discharged from the lien of the mortgage upon paying such value. *Hartshorn v. Milwaukee & St. P. R. Co.*, 23 Wis. 692.

294. Effect of laches of party aggrieved.*—A bill to set aside a foreclosure sale of a railroad, by interested parties, on account of fraud and collusion between the mortgage trustee and others who procured the sale, filed five years after the sale, will not be entertained where it appears that plaintiffs had knowledge of the facts attending the sale, and no excuse is offered for the delay, and where new rights and interests have been acquired under the sale. *Harwood v. Cincinnati & C. A. L. R. Co.*, 17 Wall. (U. S.) 78.

Where a bill to set aside a foreclosure sale of a railroad, for fraud and collusion, is not filed for ten years after the sale, the delay raises a presumption of laches, which plaintiff must rebut. He must show that he was ignorant of the fraud, and used reasonable diligence to inform himself; and especially is this so where plaintiff is a stockholder of the railroad, and lived in the neighborhood of the alleged fraud. *Foster v. Mansfield, C. & L. M. R. Co.*, 57 Am. & Eng. R. Cas. 245, 146 U. S. 88, 13 Sup. Ct. Rep. 28.

A bill by a stockholder to set aside a railroad mortgage and foreclosure was

* Setting aside sale. Laches, see note, 36 AM. & ENG. R. CAS. 297.

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properly dismissed on demurrer on the ground of laches where it was filed fourteen years after the making of the mortgage, ten years after the commencement of the bankruptcy proceedings, nine years after the entry of the decree of foreclosure, and seven years after the foreclosure became absolute and the road was conveyed to the new corporation. *Graham v. Boston, H. & E. R. Co.*, 25 *Am. & Eng. R. Cas.* 53, 118 *U. S.* 161, 6 *Sup. Ct. Rep.* 1009; *affirming* 14 *Fed. Rep.* 753.—*QUOTED IN* St. Paul, S. & T. F. R. Co. *v.* Sage, 49 *Fed. Rep.* 315, 4 *U. S. App.* 160, 1 *C. C. A.* 256.

After a railroad mortgage has been foreclosed and the sale confirmed bondholders will not be allowed to be made parties at a subsequent term for impeaching the sale as fraudulent, although the court in confirming the sale expressly reserved the power to make further orders. *Wetmore v. St. Paul & P. R. Co.*, 1 *McCrary* (*U. S.*) 466, 3 *Fed. Rep.* 177, 5 *Dill.* 531.

Where all persons are authorized to bid at a foreclosure sale, the fact that the property is bought by the president of the company in his individual right will not in itself raise a trust relation so as to make the president a trustee for bondholders, especially if they were in possession of all the facts at the time of the sale, and had opportunity afterwards to take the property, but stood by until the purchaser had expended money of his own, and the establishment of certain railroad connections, and other things, had made the property much more valuable. *Credit Co. v. Arkansas C. R. Co.*, 5 *McCrary* (*U. S.*) 23, 15 *Fed. Rep.* 46.

295. Restraining the sale.—A second mortgagee, who is not a party to a foreclosure of a first mortgage on a railroad, cannot be affected by a sale, and therefore is not entitled to an injunction to restrain a sale. *Searles v. Jacksonville, P. & M. R. Co.*, 2 *Woods* (*U. S.*) 621.

c. Matters of Review.

296. Jurisdiction on appeal or error—Amount.—Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, the supreme court of the United States has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed \$5000. So where a mortgage bondholder files a bill

on behalf of himself and other bondholders to foreclose, and another bondholder intervenes, and separate decrees are rendered in favor of each, but for one of them in a sum less than \$5000, the court has jurisdiction as to both parties. *New Orleans Pac. R. Co. v. Parker*, 143 *U. S.* 43, 12 *Sup. Ct. Rep.* 364; *affirming* 33 *Fed. Rep.* 693.—*REVIEWING* *Rodd v. Heartt*, 17 *Wall.* (*U. S.*) 354; *The Connemara*, 103 *U. S.* 754; *Shields v. Thomas*, 17 *How.* (*U. S.*) 3.

Mortgaged railroad property was ordered sold subject to such liens for back pay and supplies as might be established. The master reported a large number of separate and distinct claims, which the court ordered the purchasers to pay. *Held*, that the amount of each claim determined the jurisdiction of the U. S. supreme court, and no writ of error would lie at the suit of the purchasers from the allowance of any claim less than \$5000. *Farmers' L. & T. Co. v. Waterman*, 12 *Am. & Eng. R. Cas.* 398, 106 *U. S.* 265, 1 *Sup. Ct. Rep.* 131.

297. Who may appeal.—Purchasers of a railroad at a foreclosure sale may appeal from a subsequent decree adjudging a claim a superior lien to the mortgage. *Louisville, E. & St. L. R. Co. v. Wilson*, 138 *U. S.* 501, 11 *Sup. Ct. Rep.* 405.

Where a railroad mortgage is foreclosed, and the bondholders become the purchasers and form a new company, a bondholder who has become a stockholder in the company cannot appeal from the order confirming the sale. *Crawshaw v. Soutter*, 6 *Wall.* (*U. S.*) 739.

Where railroad property is sold under a mortgage foreclosure decree directing it sold, subject to such liens for back pay and supplies as might be established, the trustee in the mortgage has no interest in a subsequent decree directing the purchasers to pay such liens, and therefore he cannot appeal therefrom. *Farmers' L. & T. Co. v. Waterman*, 12 *Am. & Eng. R. Cas.* 398, 106 *U. S.* 265, 1 *Sup. Ct. Rep.* 131.

A railroad company cannot appeal from a decree refusing it the privilege to file a cross-bill in a suit to foreclose a mortgage on its road, where none of its rights are lost thereby. Such refusal rests in the discretion of the court. *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 14 *Am. & Eng. R. Cas.* 606, 109 *U. S.* 168, 3 *Sup. Ct. Rep.* 108.

In a foreclosure suit pending in the cir-

cult court—the mortgaged property being in possession of its receivers—the state of Georgia presented a petition in which, declining to become a party to the suit, it asked that the receivers be required to withdraw from the possession of a part of the property in their hands, upon some of which executions for state taxes had been levied prior to their appointment. The petition was denied and dismissed. *Held*, that the action of the court could not be reviewed upon the appeal of the state, for the reason, if there were no others, that the order did not conclude any right it had in virtue of the executions or of the levies made thereunder. *Georgia v. Jesup*, 12 *Am. & Eng. R. Cas.* 419, 106 *U. S.* 458, 1 *Sup. Ct. Rep.* 363.

Part of an incompleated mortgaged railroad was sold. Afterwards the mortgage was foreclosed, with the privilege to the purchasers to remove from the right of way any ties, rails, or other structures placed thereon by them after they purchased. The mortgage covered all the property of the company. *Held*, that the company alone could not complain of the decree, as its only effect was to lessen the security of the creditors, in which the company had no interest. *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 14 *Am. & Eng. R. Cas.* 606, 109 *U. S.* 168, 3 *Sup. Ct. Rep.* 108.

A bondholder filed a bill to avoid a foreclosure sale on the ground that the mortgage trustee had obtained the foreclosure for interest due and for principal not due, in violation of a condition of the mortgage which required the written request of the holders of one third in amount of the bonds to declare the principal due for failure to pay interest; but it appeared that plaintiff had appeared before the master and had proved more than one third in amount of all the bonds issued. *Held*, that the trustee might file a bill to foreclose for such interest due; and by so appearing before the master plaintiff ratified the action of the trustee as to the principal. And further, that, as the court had jurisdiction, a decree for more than was due was error which must be corrected by appeal; and, as the error was that of the trustee, it bound both him and the bondholders whom he represented. *Credit Co. v. Arkansas C. R. Co.*, 5 *McCrary (U. S.)* 23, 15 *Fed. Rep.* 46.—DISTINGUISHING *Chicago, D. & V. R. Co. v. Fosdick*, 106 *U. S.* 47, 1 *Sup. Ct. Rep.* 10.

298. Waiver of right to appeal.—

Where the trustee in a second mortgage who is a party to a suit to foreclose the first mortgage in which a decree has been entered and a sale made executes a release of errors in the proceedings, and a waiver of the right of appeal in good faith and at the request of a majority of the second mortgage bondholders, other bondholders who are not parties to the suit, and who have declined to contribute to the cost of the litigation, will not be allowed to prosecute an appeal in the name of the trustee. *Etwell v. Fosdick*, 43 *Am. & Eng. R. Cas.* 450, 134 *U. S.* 500, 10 *Sup. Ct. Rep.* 598.—FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 *Fed. Rep.* 182.

299. What decrees are final and reviewable.—A decree in a suit in a circuit court for the foreclosure of a railroad mortgage, fixing the compensation to be paid to the trustees under the mortgage from the fund realized from the sale, is a final decree within the meaning of the law relating to appeals. *Williams v. Morgan*, 17 *Am. & Eng. R. Cas.* 217, 111 *U. S.* 684, 4 *Sup. Ct. Rep.* 638.

A decree in a railroad foreclosure suit which ascertains the amount due, and directs payment within a fixed time, and provides for an order of sale if payment is not made in the time fixed, is a final decree for the purposes of an appeal. *Milwaukee & M. R. Co. v. Soutter*, 2 *Wall. (U. S.)* 440.

Where a decree to foreclose a railroad mortgage fixes the priority of liens by classes, according to the nature of the claims, and a subsequent decree, after a sale, adjudges who are the holders of the liens, and fixes their amount, the priority of liens can be raised on appeal from the latter decree. *Porter v. Pittsburg Bessemer Steel Co.*, 30 *Am. & Eng. R. Cas.* 472, 120 *U. S.* 649, 7 *Sup. Ct. Rep.* 741.

A decree ascertaining the debts due, and ordering them paid by a certain time, but which does not settle the priority of liens, nor fully identify the property, nor provide for an order of sale and form of advertisement, is not such a final order as to be appealable. *Parsons v. Robinson*, 122 *U. S.* 112, 7 *Sup. Ct. Rep.* 1153.

In a proceeding to foreclose two railroad mortgages where there was a conflict of claims, the court, at the request of the trustees and a majority of the bondholders, decreed a sale of the property, leaving the

priority of the liens to be settled by a further decree. *Held*, that the decree was a final one so as to be reviewed on appeal, and that there was no error therein. *First Nat. Bank v. Shedd*, 30 Am. & Eng. R. Cas. 439, 112 U. S. 74, 7 Sup. Ct. Rep. 807.

300. Time within which to appeal.—A final foreclosure decree directing the sale of a railroad takes effect from its date, and the fact that a commissioner is not appointed until some time afterwards to execute the decree will not extend the time in which an appeal must be taken. *Duncan v. Atlantic, M. & O. R. Co.*, 4 Hughes (U. S.) 125.

301. What will be reviewed on appeal.—In a suit for foreclosure of a railroad mortgage, commenced in a state court, and removed to the circuit court of the United States, a motion to remand the cause was made and overruled. Subsequently a final decree of sale was passed. Upon appeal merely from the order confirming the sale the final decree not disclosing, affirmatively, a want of jurisdiction, this court will not examine the record, prior to such final decree, to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different states; but, assuming that the final decree was within the power of the circuit court to render, will only examine the decree to ascertain whether the sale was had in conformity with its provisions. *Turner v. Farmers' L. & T. Co.*, 9 Am. & Eng. R. Cas. 580, 106 U. S. 552, 1 Sup. Ct. Rep. 519.

The supreme court cannot review a decree fixing the amount due bondholders in a railroad foreclosure suit, on an objection that the allowances were not supported by the evidence, where the evidence has not been sent up, nor any objection made in the lower court to any evidence. *Indiana Southern R. Co. v. Liverpool, L. & G. Ins. Co.*, 14 Am. & Eng. R. Cas. 606, 109 U. S. 168, 3 Sup. Ct. Rep. 108.

302. Affirmance.—Where a suit to foreclose a railroad mortgage has been appealed, and is sent back with a mandate that the complainant shall be at liberty, when further instalments of interest should become due and unpaid, to apply for an order of sale, a decree entered in accordance with this mandate will be affirmed. *Fleming v. Souther*, 6 Wall. (U. S.) 747.

303. Reversal.—A bill filed to foreclose a mortgage given to secure bonds alleged that the bonds were payable in gold. The decree of foreclosure was for payment in lawful money. *Held*, not sufficient variance to justify a reversal. *Wallace v. Loomis*, 97 U. S. 146.

VII. EXTINGUISHMENT.

304. In general.—The modification of a mortgage does not extinguish it, nor is its lien affected by the substitution of a new note or bond for the original note or bond secured by it. *Ames v. New Orleans, M. & T. R. Co.*, 2 Woods (U. S.) 206.

A court of chancery will uphold a mortgage for the benefit of a party who has advanced money upon it when equity requires it, and it is not indispensable for this purpose that the creditor in the mortgage should be a party to the agreement that the mortgage should be kept on foot. *Miller v. Rutland & W. R. Co.*, 40 Vt. 399.

Where a firm of bankers who acted as financial agents of a railroad company surrendered coupons of the first and general mortgages of the company, and received in exchange bonds secured by an income or third mortgage of the road for sixty per cent. of their par value, which were guaranteed to a certain extent by a third and solvent party, and were issued to pay the floating and accruing indebtedness of the company, the transaction operates as a satisfaction of the coupons surrendered, and the bankers are not entitled to the benefit of the lien of the first and general mortgages. *Fidelity, I., T. & S. D. Co. v. Shenandoah Valley R. Co.*, 38 Am. & Eng. R. Cas. 559, 86 Va. 1, 9 S. E. Rep. 759.

A statute authorized a railroad to sell its bonds to raise money to "assist" a subsidiary road. The company took the money and bought an existing mortgage on the other road, taking an assignment to itself. *Held*, that the purchase of the mortgage did not operate as a gift of the money to the indebted company so as to discharge the mortgage. *Grand Trunk R. Co. v. Lees*, 9 U. C. C. P. 249.

Several of the different classes of creditors of a corporation entered into a compromise agreement, the object of which was to wipe out all the debts and securities which existed against it and substitute therefor a third mortgage, under which

bonds were to be issued to the creditors for the amount of their debts respectively, and thus to place all, or substantially all, the creditors on a common footing as to security. *Held*, that a substantial departure from the terms of this agreement, in carrying it out, absolved signers thereof from its obligations, and left them to stand on their original rights under the first mortgage. *Miller v. Rutland & W. R. Co.*, 40 *Vt.* 399.

305. Cancellation of record.—The cancellation of a mortgage on the record is only *prima facie* evidence of its discharge, and the owner may prove that the cancellation was done by fraud, accident, or mistake; and if he does this, his rights will not be affected by the improper cancellation of it. *Crumlish v. Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 577, 32 *W. Va.* 244, 9 *S. E. Rep.* 180.

An entry of satisfaction by the mortgagee, after he had parted with his interest in the security, will not discharge the mortgage in favor of one who had acquired an interest in the land before the discharge was made. *Crumlish v. Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 577, 32 *W. Va.* 244, 9 *S. E. Rep.* 180.

The cancellation of the mortgage, as follows: "This mortgage has been canceled on the original by the receipt of Charles McVea, liquidator, as far as the state is concerned," is not a cancellation of the mortgage as to other creditors. In making such inscription on the face of the mortgage the liquidator acted only on behalf of the state, under a special statute, and his act did not affect the other mortgage creditors of the insolvent corporation, which he did not represent. *Clinton & P. H. R. Co. v. Lee*, 22 *La. Ann.* 287.

306. Extinguishment by sale.—A wife was bound *in solido* with her husband in a mortgage to secure a subscription to the capital stock of a railroad to which mortgage the state of Louisiana was subrogated. The state afterwards caused the property to be sold under execution against the husband as a defaulting tax collector, and the wife, through the intervention of a third person, became the purchaser at the sale. *Held*, that such a sale did not extinguish the mortgage of the state. *Hawkins v. McVea*, 14 *La. Ann.* 338.—REVIEWING New Orleans Gas Light Co. v. Bennett, 6 *La. Ann.* 457.

307. Merger of mortgage in fee.—In equity a mortgage interest does not necessarily merge in the fee when that is acquired by the mortgagee; but it will be held to have merged, or otherwise, according to the actual or presumed intention of such mortgagee. *Aiken v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 469.

A railroad company took a mortgage on a tract of land, which it assigned, but the assignment was not recorded, and afterwards the company obtained the fee to a part of the same land, which it mortgaged, in connection with its other property, to secure its bonds, and the mortgage was recorded. The general mortgage was foreclosed and defendant company succeeded to the property. Subsequently suit was instituted to foreclose the mortgage on the tract of land. *Held*, that the two interests never met in the same person; therefore there was no merger of the mortgage in the fee. *Aiken v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 469. —FOLLOWING *Morgan v. Hammett*, 34 *Wis.* 512. QUOTING *Compton v. Oxenden*, 2 *Ves. Jr.* 261; *Forbes v. Moffatt*, 18 *Ves. Jr.* 384.

It was the duty of the grantees in the trust deed or mortgage, if they desired that deed to be unaffected by the mortgage, to go beyond the record and ascertain from other sources whether there had been a merger in fact. *Aiken v. Milwaukee & St. P. R. Co.*, 37 *Wis.* 469.

308. Payment.—The fact that certain of the Clinton & Port Hudson bonds were kept in the same safe where the liquidator of the company kept its papers, books, and assets did not operate as a payment of the bonds nor an extinction of the mortgage. *Clinton & P. H. R. Co. v. Brown*, 21 *La. Ann.* 248.

Where the sheriff held an execution issued in favor of the company directing the sale of the mortgaged property, nothing short of a payment into the sheriff's hands would operate as a payment or satisfy the mortgage. *Clinton & P. H. R. Co. v. Brown*, 21 *La. Ann.* 248.

309. Release.—Where the release of a mortgage states that it was recorded in Book 30 when no such book existed, but was a mistake of the scrivener for Book 20, the error is immaterial. *Com. ex rel. v. Wilmington & N. R. Co.*, (Pa.) 17 *Atl. Rep.* 5.

A mortgage was executed by a railroad company on its property, to secure bonds to

be issued thereunder, which provided that upon the full payment of all said bonds at maturity the trustee should release the same. Before the maturity of the bonds they were surrendered to the trustee upon an agreement that other bonds to be issued under a subsequent mortgage should be substituted for them. The trustee, without substituting such other bonds, executed a release of the mortgage, stating therein that all the bonds "had been surrendered." The railroad was not in a condition to anticipate the payment of its bonds, and had executed several mortgages to take up bonds issued under former mortgages. *Held*, that these facts and circumstances were sufficient to charge a subsequent mortgagee with notice of the terms and conditions upon which the bonds under said released mortgage had been surrendered, and he took subject to the rights of those entitled to the bonds under said agreement. *Crumlish v. Shenandoah Valley R. Co.*, 38 *Am. & Eng. R. Cas.* 577, 32 *W. Va.* 244, 9 *S. E. Rep.* 180.

VIII. REDEMPTION.

310. Jurisdiction of suit to redeem.—A company mortgaged its entire railroad, franchises, and property to the commonwealth, under Mass. St. 1854, ch. 226, and 1860, ch. 202, to secure the payment of a loan made by the commonwealth; and subsequently surrendered the same to the commonwealth, under St. 1862, ch. 156, § 2, which provided that "the right of redemption" should not be barred until a certain time after the completion of the road by the commonwealth. *Held*, that the court had no jurisdiction, either under Gen. St. ch. 63, § 128, ch. 113, § 2, or ch. 140, §§ 13-35, of a bill in equity brought by the railroad corporation against the commonwealth to enforce this right of redemption. *Troy & G. R. Co. v. Com.* 127 *Mass.* 43.

311. Right to redeem, generally.—The statutes of Illinois giving the right to redeem mortgaged lands sold under decree do not embrace the real estate of a railroad mortgaged in connection with its franchises and personal property. Its real estate, personalty, and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute. The chattel mortgage statute is also inapplicable to an ordinary railway mortgage. *Hammock v. Farmers' L. & T.*

Co., 7 *Am. & Eng. R. Cas.* 465, 105 *U. S.* 77.—*EXPLAINED IN* *Benedict v. St. Joseph & W. R. Co.*, 14 *Am. & Eng. R. Cas.* 609, 19 *Fed. Rep.* 173. *QUOTED IN* *McFadden v. May's Landing & E. H. C. R. Co.*, 49 *N. J. Eq.* 176.

The rule laid down by the supreme court of the United States that the law of Illinois relating to foreclosure of mortgages on real estate is a rule of property in a circuit court of the United States sitting in that state which gives a right of redemption does not apply to the sale of railroad property under foreclosure proceedings, and under the practice adopted by such circuit court no redemption is allowed. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss. (U. S.)* 380.—*DISTINGUISHING* *Brine v. Hartford Fire Ins. Co.*, 96 *U. S.* 627.

In the absence of any statute to the contrary, the foreclosure of a railroad mortgage cuts off all the rights and interests of the mortgagor or the railroad corporation in the mortgaged property, and nothing is left for the general creditors and stockholders save their interests in the surplus after satisfying the mortgage. *Vatable v. New York, L. E. & W. R. Co.*, 17 *Am. & Eng. R. Cas.* 268, 96 *N. Y.* 49; *reversing* 11 *Abb. N. Cas.* 133.—*FOLLOWED IN* *Carpenter v. New York, L. E. & W. R. Co.*, 99 *N. Y.* 607.

The riparian commissioners made a grant to a railroad company, with a covenant that if the state had not power to vest title in case of a grant to another company before made the state would release to the railroad company the previously granted premises free from any encumbrance thereon. The trustees of public schools, who held a mortgage given in part payment of the prior grant, and the executors of a surety on the bond secured by the mortgage, asked for a sale of the property. The railroad company, one of the complainants, asked that the sale be restrained. *Held*, that the covenant contained in the grant to the railroad company would create an equity in the complainants to be allowed to redeem the mortgage and be subrogated to the rights of the mortgagees so far as to give protection against a sale under a decree pending the litigation of the titles of the parties respectively, subject, however, to the equities of the personal representatives of the surety on the bond; but that it could not be made available to the complainants against the equity of the mortgagees, and of the personal

representatives of the surety on the bond, to have the mortgage and the liability of the surety taken out of this litigation. *American D. & I. Co. v. Trustees, etc.*, 35 N. J. Eq. 181.

312. Redemption by junior mortgagee.—A second mortgagee who is not a party to a foreclosure of a first mortgage may redeem at any time by payment or tender of the amount due on the first mortgage; and if interest only is due, he may redeem by tendering that amount only. *Searles v. Jacksonville, P. & M. R. Co.*, 2 Woods (U. S.) 621.

313. Redemption by purchaser at judicial sale.—When a company owning a railroad lying in two different states, under charter from each of those states, mortgages the whole road and franchise, and their right to redeem in one state is sold on execution, the purchaser of the equity is entitled to redeem the whole road from the mortgage. *Wood v. Goodwin*, 49 Me. 260.

The mortgagee in a second mortgage was made a party to a suit to foreclose a first mortgage, but the decree failed to foreclose the lien of the second mortgage. The court held, on a cross-bill to foreclose the second mortgage and to redeem, that the purchaser succeeded to the rights of the original owner as to the power of redemption. *Held*, that such purchaser had a direct interest in the amount due upon the second mortgage, and was, therefore, entitled to present, and be heard upon all objections that could fairly be made to the validity of the bonds sought to be recovered upon, under the provisions of the second mortgage. *Simmons v. Taylor*, 38 Fed. Rep. 682.—DISTINGUISHING *Graham v. La Crosse & M. R. Co.*, 102 U. S. 148.—QUOTED IN *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176.

In such case the second mortgage covered the main line of the road and also a division. After the first mortgage was foreclosed certain bondholders of the second mortgage bonds filed a bill to enforce redemption against the division; and a settlement was effected, in which the plaintiffs reserved their rights against the company and its members, but released all claims against the purchaser at the first mortgage sale, or against any of its property, by reason of said second bonds, and subsequently the suit was dismissed. *Held*, that this barred the right to enforce a redemption of any prop-

erty which passed to such purchasers under the foreclosure sale. *Simmons v. Taylor*, 38 Fed. Rep. 682.

The utmost right that the second mortgage bondholders are entitled to upon the failure of the purchaser company to pay the amount found due them is the right to redeem from the sale already had, and on failure to redeem within the time limited in the decree their right will be forever barred. (Shiras, J., dissenting.) *Simmons v. Taylor*, 38 Fed. Rep. 682.

314. Time within which to redeem.—On a bill to foreclose for non-payment of the interest on mortgage bonds, a reasonable time will be allowed for defendants to redeem. *Drexel v. Pennsylvania & N. Y. C. & R. Co.*, 6 Phila. (Pa.) 503.

By the laws of Vermont mortgagors are entitled to time to redeem on foreclosure, and to one year, unless the security is inadequate, or there are other special reasons why the time should be shortened; and this is a right of property which attaches to a mortgage, which must be recorded and preserved in a foreclosure suit in a federal court sitting in that state. *Jackson & S. Co. v. Burlington & L. R. Co.*, 24 Blatchf. (U. S.) 194, 29 Fed. Rep. 474.

315. Parties to bill to redeem.—All who have been so connected with the mortgage of a railroad sought to be redeemed as to render them liable for income under it should be made parties defendant. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

Where a bill brought against a railroad corporation in possession, and a portion of its members, to redeem a railroad from a mortgage, alleged that all the individuals named as defendants fraudulently combined together in all the transactions set forth in the bill, of which the plaintiffs complain, and that they are all partakers of the income of the road which should equitably go in payment of the mortgage debt, and the defendant corporation took possession under the mortgage—*held*, there was no misjoinder of defendants. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

316. Requisites of bill.—Where a mortgagor company files a bill against another company which is in possession to redeem the road from a mortgage, the bill must allege that the defendant holds or has some title in the mortgage, or must aver

information or belief to that effect; and it must allege a formal offer to pay such amount as may be found due; and a mere prayer asking to be let in to redeem on payment is not sufficient. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

317. Payment necessary to effect redemption.—Where a railroad is mortgaged to secure principal and interest of bonds, with the right of possession and foreclosure on default in paying either, if default is made in paying interest, the trustees in the mortgage or any bondholder may file a bill to foreclose, and will be entitled to a decree *nisi* to ascertain the amount of interest due, and giving a reasonable time for payment. If not paid, a sale may be ordered and the proceeds applied to payment of both interest and principal; but the debtor may redeem at any time before confirmation by paying the past due interest and costs. *Chicago, D. & V. R. Co. v. Fosdick*, 7 Am. & Eng. R. Cas. 427, 106 U. S. 47, 1 Sup. Ct. Rep. 10.—EXPLAINED IN *Com. v. Susquehanna & D. R. Co.*, 36 Am. & Eng. R. Cas. 269, 122 Pa. St. 306. FOLLOWED IN *Jackson & S. Co. v. Burlington & L. R. Co.*, 29 Fed. Rep. 474, 24 Blatchf. (U. S.) 194. QUOTED IN *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176; *Central Trust Co. v. New York C. & N. R. Co.*, 33 Hun (N. Y.) 513.

The provision of U. S. Rev. St. § 828, that "for receiving, keeping, and paying out money, in pursuance of any statutes or order of the court," there shall be paid to the clerk "one per cent. of the amount so received, kept, and paid," applies to a foreclosure sale in a federal court, and a person offering to redeem may be required to pay the one per cent. to the clerk, in addition to the amount required to redeem. *Blair v. Chicago & P. R. Co.*, 11 Biss. (U. S.) 320, 12 Fed. Rep. 750.

Defendants having condemned a part of lands covered by a mortgage without making the mortgagee a party, the latter afterwards foreclosed without making them parties, bought the lands for a price which left a large balance due, and then brought suit to compel them to redeem. *Held*, that they could not redeem by paying a portion of the mortgage debt proportionate to the value of their land to the whole tract. *Mutual Life Ins. Co. v. Easton & A. R. Co.*, 17 Am. & Eng. R. Cas. 78, 38 N. J. Eq. 132.

318. Procedure.—In a suit to redeem a receiver will not be appointed so long as there is a balance due to the mortgagee unless the mortgagee is mismanaging the property. *Boston & P. R. Corp. v. New York & N. E. R. Co.*, 12 R. I. 220.

A petition by certain holders of bonds secured by mortgages of the property of a railway company to a trustee for such bondholders to compel their trustee to redeem certain property of the company, which had been sold under prior mortgages—denied, under the circumstances of the case; the necessities of the trust estate not being regarded by the court such as to make it its duty to make the order; and an agreement which was the foundation of the application being held to be merely executory, essentially outside of the main issues in the cause, and practically for the benefit of only the parties who may enter into it, without regard to the interests of others interested in the trust estate. *Williamson v. New Jersey Southern R. Co.*, 27 N. J. Eq. 225.

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1. INTERPRETATION OF CONSTITUTIONAL PROVISIONS.

1. In general.*—The decision of the highest court of a state, construing the constitution of the state relative to municipal bonds in aid of railroads, is not binding upon the U. S. supreme court as affecting the rights of citizens of other states in litigation here, when it is in conflict with previous decisions of this court, and when the rights which it affects here were acquired before it was made. *Carroll County v. Smith*, 15 Am. & Eng. R. Cas. 606, 111 U. S. 556, 4 Sup. Ct. Rep. 539.—DISAPPROVING *Hawkins v. Carroll County*, 50 Miss. 735. FOLLOWING *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 664; *Cass County v. Johnston*, 95 U. S. 360.

An act of the legislature authorizing a city to subscribe to the stock of a railroad, and to issue its bonds in payment, is not a general law, within the meaning of a provision of the state constitution requiring general laws to be published before taking effect; and such bonds are valid though issued before the statute was published. *Luling v. Racine*, 1 Biss. (U. S.) 314.

The city making such subscription and issuing bonds cannot deny the constitutional power of the legislature to declare, in the statute, that it should take effect immediately. *Luling v. Racine*, 1 Biss. (U. S.) 314.

The provision of the Illinois constitution of 1870 relating to municipal subscriptions to railroads or private corporations took effect on July 2 of that year, as described by the supreme court of that state, which the U. S. courts follow. *Wade v. Walnut*, 105 U. S. 1.—FOLLOWING *Schall v. Bowman*, 62 Ill. 321; *Richards v. Donagho*, 66 Ill. 74; *Wright v. Bishop*, 88 Ill. 304.—*Schall v. Bowman*, 62 Ill. 321.—FOLLOWED IN *Wade v. Walnut*, 105 U. S. 1; *Richards v. Donagho*, 66 Ill. 73; *Wade v. LaMoille*, 112 Ill. 79.—*People ex rel. v. Bishop*, 111 Ill. 124. *Wade v. LaMoille*, 112 Ill. 79.—FOLLOWING *Schall v. Bowman*, 62 Ill. 321.

A county has a constitutional right to assist in the construction of a railroad within its limits. *Dubuque County v. Dubuque &*

P. R. Co., 4 Greene (Iowa) 1.—DISAPPROVED IN *Hanson v. Vernon*, 27 Iowa 28. FOLLOWED IN *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. OVERRULED IN *Stokes v. Scott County*, 10 Iowa 166; *State ex rel. v. Wapello County*, 13 Iowa 388.

County and municipal subscriptions for stock in railroads affording peculiar local benefits to the people affected by such subscriptions, when made in pursuance of legislative authority, may now be regarded as of unquestionable constitutionality, in view of the numerous and uniform decisions of this court sustaining them. *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.

The constitution of New York, art. 8, § 9, authorizes the legislature to restrict the power of cities and villages as to the power to borrow money, contract debts, and loan their credit; but it does not restrain the legislature from conferring upon municipal authorities the power to subscribe to the stock of railroads and to pay the same by taxation. *Bank of Rome v. Rome*, 18 N. Y. 38; affirming 27 Barb. 65.—FOLLOWING *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Clarke v. Rochester*, 24 Barb. 474.—NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. 446. REVIEWED IN *Burnes v. Mayor, etc., of Atchison*, 2 Kan. 454.

The provision of Ohio constitution that "the general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money or loan its credit to or in aid of any such company, corporation, or association" is not violated by the statute of March 4, 1869, which authorizes municipal corporations to make improvements on their own account and with their own means. *Walker v. Cincinnati*, 21 Ohio St. 14, 2 Am. Ry. Rep. 84.—DISTINGUISHED IN *Taylor v. Ross County Com'rs*, 23 Ohio St. 22.

Wis. Const. art. 11, § 3, which makes it the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, clearly recognizes the fact that such corporations may be authorized to borrow money, etc., as a power cannot be restricted unless it exists. *Bushnell v. Beloit*, 10 W's. 195.

* Constitutional provisions prohibiting municipal subscriptions, see note, 12 AM. & ENG. R. CAS. 597.

Special questions of constitutional provisions considered, see note, 59 AM. DEC. 785.

2. Inhibitions applicable to states, but not to counties and cities.—The prohibition of a state constitution that "the credit of the state shall not be given to or in aid of any individual, association, or corporation" applies to the state, but not to counties or cities. *Robertson v. Rockford*, 21 Ill. 451.—FOLLOWING *Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.

That provision is not violated by a law authorizing municipal subscriptions to railroads and levying taxes to pay the same. *Dunnovan v. Green*, 57 Ill. 63. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

The provisions of Neb. Const. that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works," and that the debts of the state "shall never in the aggregate exceed fifty thousand dollars," refer to the state alone, and not to the municipal corporations, and do not prohibit them from issuing bonds in aid of a railroad. *Hallenbeck v. Hahn*, 2 Neb. 377.

3. When amendments are retroactive.—Where the vote on a corporate subscription to a railway was had and the subscription made prior to the adoption of the present constitution, the constitution must govern, although the bonds were not issued until after the adoption of the new constitution. *Decker v. Hughes*, 68 Ill. 33.

The authority given by the charter of the Laclede & Fort Scott R. Co. (Mo. Laws 1859, p. 438) to a county to subscribe to the capital stock of said company without the assent of the majority of the resident voters voting at an election thereon was repealed by section 2 of the act of March 23, 1861 (Laws 1860-61, p. 60), and by the provisions of the constitution of 1865. *Wilson v. Polk County*, 112 Mo. 126, 20 S. W. Rep. 469.

Said repeal was not, as to future subscriptions, violative of the provisions of the United States constitution prohibiting a state from passing "a law impairing the obligation of contracts." *Wilson v. Polk County*, 112 Mo. 126, 20 S. W. Rep. 469.

The Tenn. Act of Feb. 8, 1870, authorizing a certain town to subscribe to the stock of a railroad, was abrogated by the new constitution adopted March 26, 1870, and rendered bonds invalid issued under an election held after the adoption of the constitution. *Norton v. Brownsville*, 129 U. S.

479, 9 Sup. Ct. Rep. 322.—APPROVED IN *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781. FOLLOWED IN *Brownsville v. Loague*, 129 U. S. 493.—*Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.—APPROVING *Norton v. Brownsville*, 129 U. S. 479; *Aspinwall v. Daviess County Com'rs*, 22 How. 374.—*Aspinwall v. Daviess County Com'rs*, 22 How. (U. S.) 364.—APPROVED IN *Moran v. Miami County Com'rs*, 2 Black (U. S.) 722; *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781; *Norton v. Shelby County*, 118 U. S. 425. FOLLOWED IN *Concord v. Robinson*, 121 U. S. 165. REVIEWED IN *List v. Wheeling*, 7 W. Va. 501.—*List v. Wheeling*, 7 W. Va. 501.—REVIEWING *Aspinwall v. Daviess County Com'rs*, 22 How. 364.

4. When amendments are not retroactive.—A provision in a legislative railway charter authorizing counties to subscribe for its stock and issue their bonds in payment is a "privilege" of the company, which is not taken away by a subsequent constitution. *Thomas v. Scotland County*, 3 Dill. (U. S.) 7.—FOLLOWING *State ex rel. v. Sullivan County*, 51 Mo. 522; *Smith v. Clark County*, 54 Mo. 58; *State ex rel. v. Greene County*, 54 Mo. 540.

An amendment, passed in 1859, to the charter of a city granting to the mayor and council authority, on the recommendation of a majority of citizens, either in public meeting or by public election, to subscribe for the stock of railroads, to borrow money on the faith and credit of the city to pay the same, and to impose a special tax not exceeding one half of one per cent. in any one year to meet such debt created, was not repealed by that provision in the constitution of 1868 which declares that: "No law shall be passed by which a citizen shall be compelled, against his consent, directly or indirectly, to become a stockholder in, or contribute to, any railroad, * * * except in the case of the inhabitants of a corporate town or city. In such cases the general assembly may permit the corporate authorities to take such stock or make such contribution * * * after a majority of the qualified voters of such town or city, voting at an election held for the purpose, shall have voted in favor of the same, but not otherwise." Another provision of the constitution expressly saves local acts passed for

the benefit of cities and towns not inconsistent with the supreme law nor with the constitution itself. *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370.

The Ill. Constitution of 1870, prohibiting future municipal subscriptions to the stock of private corporations, but saving the right to make such as had been authorized by a vote "under existing laws," did not deprive a city of the right to make a subscription under a prior vote which was not authorized, but which had been validated by the legislature before the adoption of the constitution. *Jonesboro v. Cairo & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 615, 110 U. S. 192, 4 Sup. Ct. Rep. 67.—DISAPPROVED IN *Williams v. People ex rel.*, 132 Ill. 574. DISTINGUISHED IN *Deland v. Platte County*, 54 Fed. Rep. 823.

But the obligations assumed by municipal corporations under then existing laws, prior to the adoption of the constitution of 1870, cannot, since its adoption, be enlarged or materially changed either by the action of the people of the municipality or its corporate authorities. *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562.—DISTINGUISHING *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268.—FOLLOWED IN *Moultrie County v. Fairfield*, 105 U. S. 370; *Concord v. Robinson*, 121 U. S. 165.

The saving clause in the section of the constitution of 1870, which prohibits municipal subscription or donation to private corporations, applies only when the subscription or donation had been authorized by vote under then existing laws prior to the adoption of that instrument. *Lippincott v. Pana*, 92 Ill. 24.—FOLLOWED IN *Moultrie County v. Fairfield*, 105 U. S. 370.

The provision of the Missouri Constitution of 1865, prohibiting public loans or subscriptions to stock, except with the assent of the voters, acts prospectively only; and the charter of a company which is in existence before the adoption of the constitution is not affected by it, but the powers given by it remain as if no constitution existed. *Callaway County v. Foster*, 93 U. S. 567.—APPROVING *State ex rel. v. Cape Girardeau & S. L. R. Co.*, 48 Mo. 468.—FOLLOWED IN *Scotland County v. Thomas*, 94 U. S. 682; *Ray County v. Vansycle*, 96 U. S. 675.—*State ex rel. v. Macon County Court*, 41 Mo. 453.—DISTINGUISHING *St. Joseph & D. C. R. Co. v. Buchanan County Court*, 39 Mo.

485. FOLLOWING *Cass v. Dillon*, 2 Ohio St. 607; *State ex rel. v. Union Tp.*, 8 Ohio St. 394. REVIEWING *City & County of St. Louis v. Alexander*, 23 Mo. 483.—APPROVED IN *Nicolay v. St. Clair County*, 3 Dill. (U. S.) 163; *Huidekoper v. Dallas County*, 3 Dill. 171. FOLLOWED IN *Chillicothe & B. R. Co. v. Mayor, etc., of Brunswick*, 44 Mo. 553; *Smith v. Clark County*, 54 Mo. 58; *Ray County v. Vansycle*, 96 U. S. 675; *Louisiana v. Taylor*, 105 U. S. 454; *Ralls County v. Douglass*, 105 U. S. 728. REVIEWED IN *State ex rel. v. Saline County Court*, 51 Mo. 350.

To same effect as to Minn. Const. as amended in 1872. *State ex rel. v. Clark*, 23 Minn. 422.

And in Ohio. *State ex rel. v. Union Tp.*, 8 Ohio St. 394.—FOLLOWING *Cass v. Dillon*, 2 Ohio St. 607; *State ex rel. v. Van Horn*, 7 Ohio St. 327.—FOLLOWED IN *State ex rel. v. Macon County Court*, 41 Mo. 453; *Knox County Com'rs v. Nichols*, 14 Ohio St. 260.—*Knox County Com'rs v. Nichols*, 14 Ohio St. 260.—FOLLOWING *Cass v. Dillon*, 2 Ohio St. 607; *State ex rel. v. Union Tp.*, 8 Ohio St. 400. REVIEWING *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.—FOLLOWED IN *State ex rel. v. Mayor, etc., of Perrysburg*, 14 Ohio St. 472.—*State ex rel. v. Mayor, etc., of Perrysburg*, 14 Ohio St. 472.—FOLLOWING *Cass v. Dillon*, 2 Ohio St. 607; *Knox County Com'rs v. Nichols*, 14 Ohio St. 260.

Where the right of a company to municipal bonds has become vested, and it has commenced the construction of its road, the right to such bonds is not affected by the subsequent adoption of a new constitution, which takes away the power to issue such bonds. *State ex rel. v. Lancaster County Com'rs*, 6 Neb. 214.

II. POWERS OF THE LEGISLATURE.

5. In general.—The question whether the legislature possesses the power to authorize counties to grant aid to railroad companies by subscribing for stock therein, and issuing bonds in payment therefor, when it comes to the court is purely a legal question, and the courts have nothing to do with the wisdom or policy of such legislation. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.

Local legislatures were not restricted by

the decree "Property and civil rights in the Province" to legislation respecting bonds held therein; and where debts or other obligations are authorized to be contracted under a local act, passed in relation to a matter within the power of the local legislature, such debts may be dealt with by subsequent acts of the same legislature, notwithstanding that by a fiction of law they may be domiciled out of the province. *Jones v. Canada C. R. Co.*, 46 U. C. Q. B. 230.

6. In absence of constitutional inhibition, legislature has the power.

—State legislatures, unless prohibited by some constitutional provision, possess the power to authorize municipal corporations to aid a railroad company in constructing such an improvement for the general benefit of the citizens of the municipality. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.—FOLLOWED IN Leavenworth County Com'rs v. Miller, 7 Kan. 479.—*Queensbury v. Culver*, 19 Wall. (U. S.) 83. *Taylor v. Ypsilanti*, 12 Am. & Eng. R. Cas. 549, 105 U. S. 60. *Butler v. Dunham*, 27 Ill. 474.—FOLLOWING *Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.—*Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.—FOLLOWED IN *Robertson v. Rockford*, 21 Ill. 451; *Johnson v. Stark County*, 24 Ill. 75; *Butler v. Dunham*, 27 Ill. 474; *Platt v. People ex rel.*, 29 Ill. 54.—*Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259. *State ex rel. v. Linn County Court*, 44 Mo. 504. *Hallenbeck v. Hahn*, 2 Neb. 377.—QUOTING *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 142; *Ex parte Selma & G. R. Co.*, 45 Ala. 696.—*Reineman v. Corington, C. & B. H. R. Co.*, 7 Neb. 310. *People ex rel. v. Henshaw*, 61 Barb. (N. Y.) 409. *Walker v. Cincinnati*, 21 Ohio St. 14, 2 Am. Ry. Rep. 84.—DISTINGUISHING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167; *People ex rel. v. Salem Tp.*, 19 Mich. 11. QUOTING *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147. REVIEWING *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.—*San Antonio v. Lane*, 32 Tex. 405.—DISTINGUISHING *Henderson v. San Antonio & M. G. R. Co.*, 17 Tex. 560. FOLLOWING *San Antonio v. Jones*, 28 Tex. 19.—APPROVED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200. FOLLOWED IN *San Antonio v. Mehaffy*, 96 U. S. 312. NOT FOLLOWED IN *Peck v. San Antonio*, 51 Tex. 490.—*Bushnell v. Beloit*, 10 Wis. 195.

They may be so authorized because the enterprise, if connected with the municipality, tends to improve the means of travel and transportation, and consequently to promote one of the primary objects for which the municipality was created. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

In the absence of a constitutional provision making a distinction between municipal subscriptions to stock of railroads and municipal donations, it is competent for a legislature to authorize either at the discretion of the municipal authorities. *New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73.

The legislature has no inherent power, but all its power is derived from the people through the constitution of the state. The people in their primary capacity possess all the political power of the state, and may themselves authorize counties to grant aid to railroad companies; or they may, if they choose, delegate this power to the legislature, and allow the legislature to grant such authority to counties. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.—APPROVING *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine*, 1 Wall. 384; *Thomson v. Lee County*, 3 Wall. 327; *Rogers v. Burlington*, 3 Wall. 654; *Riggs v. Johnson County*, 6 Wall. 166; *Weber v. Lee County*, 6 Wall. 210; *United States ex rel. v. Council of Keokuk*, 6 Wall. 514; *Benbow v. Iowa City*, 7 Wall. 313; *Lee County v. Rogers*, 7 Wall. 181; *Stewart v. Polk County Sup'rs*, 30 Iowa 9; *King v. Wilson*, 1 Dill. (U. S.) 555. DISAPPROVING *State ex rel. v. Wapello County*, 13 Iowa 388; *Chamberlain v. Burlington*, 19 Iowa 395; *McClure v. Owen*, 26 Iowa 243; *Sweet v. Hurlbut*, 51 Barb. (N. Y.) 312; *Hanson v. Vernon*, 27 Iowa 35; *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167; *People ex rel. v. Salem Tp.*, 20 Mich. 452.

The power of the legislature to pass an act granting municipal aid to railroad companies must be found in the general grant of legislative power, under section 1, art. 2, of the Kansas constitution, which provides that the legislative power of the state shall be vested in the legislature, or not at all. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

As it was the intention of the people that the constitution should give to the legislature the power to pass acts authorizing municipal aid to railroads, that instrument

must be so construed by the courts; and the courts have no power to amend it, or change any of its provisions, or insert any new provisions in it, through the means of judicial construction or interpretation. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

Section 2 of article xii. of the Nebraska constitution is to be taken as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness in aid of railroads and other internal improvements. It fixes a boundary beyond which the legislature cannot go, but within which its authority is still supreme. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

Whether the prior decisions in this state holding that the legislature has power, under the constitution, to authorize municipal corporations to subscribe for and hold stock in railroad corporations, and to issue their bonds in payment therefor, were, in effect, overruled by the case of *People ex rel. v. Batchellor*, 53 N. Y. 128, *quare* (Andrews, Folger, and Rapallo, JJ., holding that they were not; Church, C. J., and Allen, J., holding that they were, and that the power does not exist; Miller, J., not voting). *Williams v. Duanesburgh*, 66 N. Y. 129.

Where, however, in pursuance of legislative enactment, municipal bonds have been issued and transferred to purchasers for value, prior to the decision in *People v. Batchellor*, they are protected by the earlier decisions, and, as far as their validity depends upon the constitutional power of the legislature, will be sustained. *Williams v. Duanesburgh*, 66 N. Y. 129.

When the authority given a city is to construct a line of railroad having one of its *termini* in such city, it does not affect the question of power that the road when constructed will lie mainly outside of the state of Ohio. It is the corporate interest of the municipality which determines her right of taxation, and not the location of the road, which may well be constructed with the consent of the state into or through which it may pass. *Walker v. Cincinnati*, 21 Ohio St. 14, 2 Am. Ry. Rep. 84.

By acts of assembly a county was authorized to subscribe to the stock of a railroad, to issue bonds with interest, and deliver them to the company in payment for the stock; the company was authorized to receive them on the terms of paying to the

county or its creditors holding the bonds interest equal to the interest on the bonds. *Held*, that this was a premium to induce the county to subscribe, and the legislature could grant to both corporations power so to contract. *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.—FOLLOWED IN *Pittsburg & S. R. Co. v. Allegheny County*, 79 Pa. St. 210.

7. Exercise of such power inhibited by state constitution.—Under Colo. Const. art. 11, § 2, neither the state, nor any county, city, town, township, or school district, can make any donation or grant to, or in aid of, or become a subscriber or shareholder in, any corporation or company. *Colorado C. R. Co. v. Lea*, 5 Colo. 192.

The constitution of Iowa confers no power upon the legislature to authorize counties and cities to become stockholders in railroad corporations, and to borrow money upon their bonds for the purpose of payment for such stock. *McClure v. Owen*, 26 Iowa 243.—CRITICISING *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 202. FOLLOWING *State ex rel. v. Wapello County*, 13 Iowa 389; *Myers v. Johnson County*, 14 Iowa 47; *McMillan v. Boyles*, 14 Iowa 107; *Rock v. Wallace*, 14 Iowa 593; *Smith v. Henry County*, 15 Iowa 385; *Ten Eyck v. Mayor of Keokuk*, 15 Iowa 486; *Chamberlain v. Burlington*, 19 Iowa 395.—FOLLOWED IN *Hanson v. Vernon*, 27 Iowa 28. NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479. QUOTED AND REVIEWED IN *King v. Wilson*, 1 Dill. (U. S.) 555.

Under the laws of Michigan the legislature has no power to authorize a municipality to submit to its electors a proposition to issue bonds in aid of a railroad. *Risley v. Howell*, 57 Fed. Rep. 544.—FOLLOWING *People ex rel. v. Salem Twp.*, 20 Mich. 452; *People ex rel. v. State Treasurer*, 23 Mich. 499.

Said legislature passed an act authorizing a village to vote bonds to make "public improvements" in the village, the money to be expended under the direction of the council "for the purpose aforesaid." After a favorable vote the council passed an ordinance declaring a certain railroad "a public improvement in the village," and directed a delivery of the bonds to the company. *Held*, that such action was unlawful, and the bonds invalid. *Risley v. Howell*, 57 Fed. Rep. 544.

Each of said bonds was marked on its

face "Improvement Bond," but also referred by date to the above ordinance as one source of authority for its issuance. *Held*, that this was sufficient notice of the invalidity of the ordinance to render the bonds void in the hands of innocent purchasers. *Risley v. Howell*, 57 *Fed. Rep.* 544.

Section 6, article 8, of the Ohio Constitution declares that "the general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association." What the general assembly is thus prohibited from doing directly it has no power to do indirectly. *Taylor v. Ross County Com'rs*, 23 *Ohio St.* 22.

8. To authorize aid by counties.—The legislature has power to authorize a county, as a body corporate, to subscribe for stock in a railroad company, if the people choose to do so by a popular vote to that effect. And for the payment for stock so subscribed the county, as a corporation, may be authorized and required to issue bonds of the county, and to deliver them to the railroad company in which the stock is so subscribed for, in the manner prescribed by law. *Ex parte Selma & G. R. Co.*, 45 *Ala.* 696.—FOLLOWED IN *Chambers County v. Clews*, 21 *Wall. (U. S.)* 317; *Hart v. Floyd*, 54 *Ala.* 34. QUOTED IN *Hallenbeck v. Hahn*, 2 *Neb.* 377.—*Richeson v. People ex rel.*, 115 *Ill.* 450, 5 *N. E. Rep.* 121. *Leavenworth County Com'rs v. Miller*, 7 *Kan.* 479, 1 *Am. Ry. Rep.* 259. *People ex rel. v. Mitchell*, 35 *N. Y.* 551; *affirming* 45 *Barb.* 208.—QUOTED IN *Duanesburgh v. Jenkins*, 57 *N. Y.* 177.—*State ex rel. v. Chester & L. R. Co.*, 5 *Am. & Eng. R. Cas.* 220, 13 *So. Car.* 290.—DISTINGUISHED IN *Floyd v. Perrin*, 30 *So. Car.* 1.

By the general grant of legislative power the general assembly of Indiana is empowered to authorize counties to subscribe to railroad stock, and art. 10, section 6, of the state constitution recognizes the power, but so limits it as to prevent such subscription unless the stock be paid for in money at the time of the subscription. A county cannot subscribe for such stock without affirmative legislation authorizing it. *Lafayette, M. & B. R. Co. v. Geiger*, 34 *Ind.* 185.

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The authority granted by the act of May 12, 1869 (Acts 1869, p. 92), is a legitimate exercise of the power conferred on the legislature by the constitution; and the means provided in said act to raise the money with which to pay for said stock are appropriate, plainly conducive to the end proposed, and not prohibited by the constitution or inconsistent with the letter or spirit thereof. *Lafayette, M. & B. R. Co. v. Geiger*, 34 *Ind.* 185.—FOLLOWED IN *John v. Cincinnati, R. & Ft. W. R. Co.*, 35 *Ind.* 539.

The fact that a vote of the inhabitants of the county is required to be taken before the county officers shall make a subscription does not affect the validity of the law. *Lafayette, M. & B. R. Co. v. Geiger*, 34 *Ind.* 185.—QUOTED IN *Alvis v. Whitney*, 43 *Ind.* 83.

The general assembly of Missouri has authority to authorize counties to subscribe to the stock of railroads in other states terminating at or near the boundaries of such counties, even though the road terminates on the opposite side of a river and in another state, the object being to promote the trade of the county, which, in a frontier county, is essentially accomplished when the road terminates at or near its boundary. *St. Joseph & D. C. R. Co. v. Buchanan County Court*, 39 *Mo.* 485.

It is competent for the legislature, while authorizing the counties by the General Railroad Law of 1853 (Laws 1853, p. 121) to subscribe to the capital stock of railroads, and to impose special taxes for the purpose of paying such subscription, to declare whether the stock subscribed for should belong to the county in its corporate capacity or to the taxpayers. *Mastin v. Pacific R. Co.*, 83 *Mo.* 634.

Nor would it have been incompetent for the legislature to give the stock in such case to the taxpayers, although the charter of the railroad to which the subscription was made was granted prior to the General Railroad Law of 1853, and such charter gave the absolute ownership of the stock subscribed by the county to the latter in its municipal character. *Mastin v. Pacific R. Co.*, 83 *Mo.* 634.

Section 10 of article 8 of the Nevada Constitution, which prohibits counties, cities, and towns from becoming stockholders in corporations, or loaning their credit in aid of any corporations except railroad companies, though it does not confer any right

upon such organizations, does not prevent the legislature from authorizing a county to aid a railroad, either by loaning its credit, by donation, or otherwise. *Gibson v. Mason*, 5 Nev. 283.

Wis. Const. art. 11, § 3, which authorizes the legislature to restrict the powers of cities and incorporated villages as to the power of "taxation, assessment, borrowing money, contracting debts, and loaning their credit," does not apply to counties; therefore the legislature may authorize counties to subscribe to railroad stock and to issue their bonds in payment. *Portage County Sup'rs v. Wisconsin C. R. Co.*, 121 Mass. 460.

Where the legislature could have conferred on the board of supervisors, in the first instance, power to exchange lands and tax certificates of the county for capital stock of a railroad, for the purpose of aiding in its construction, it may, by a subsequent act, legalize the unauthorized act of the board in doing so. *Single v. Marathon County*, 38 Wis. 363.

An act of the legislature which confers such a power upon a single county does not violate article 4, section 23, of the state constitution, which provides that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." *Single v. Marathon County*, 38 Wis. 363.

9. To authorize aid by cities, villages, and townships.—The legislature has power under the Missouri Constitution of 1865 to authorize municipal townships to subscribe to the stock of railroad companies, but subject to the restrictions contained in section 14, article 11, which prohibits the making of such subscriptions without the assent of two thirds of the qualified voters. (By Hough, J.) *State ex rel. v. Brassfield*, 67 Mo. 331.—FOLLOWED IN *Ranney v. Bader*, 67 Mo. 476.

By N. Y. Const. art. 8, § 9, it is the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit; and the question whether such power has been sufficiently restricted is for the legislature, and is not reviewable by the courts. *Bank of Rome v. Rome*, 18 N. Y. 38; affirming 27 Barb. 65.

An act of the legislature which authorizes the trustees of a village to incur a debt

and to issue bonds in payment, provided two thirds of the electors of the same shall approve thereof, is not unconstitutional as a delegation of legislative power. *Bank of Rome v. Rome*, 18 N. Y. 38; affirming 27 Barb. 65.—DISTINGUISHING *Barto v. Himrod*, 8 N. Y. 483.

Under the North Carolina constitution the general assembly may empower a township, with the sanction of its qualified voters, to aid in the construction of a railroad by levying taxes and contracting a debt to raise money for that purpose. *Brown v. Hertford County Com'rs*, 100 N. Car. 92, 5 S. E. Rep. 178.

A township has corporate existence, and the legislature may invest it with pertinent corporate powers, as to subscribe for the capital stock of a railroad company. *Jones v. Person County Com'rs*, 107 N. Car. 248, 12 S. E. Rep. 69.

The right of the legislature, with the consent of the local authorities, to tax a particular city for a local improvement is as clear as the right to lay a general tax for any public purpose whatever. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

In view of the former decisions sustaining the power of the legislature to authorize municipal subscriptions to railroad stock, and the pecuniary interests which are involved and are dependent upon such decisions, such power is sustained; otherwise a majority of the court would not favor the power. *Phillips v. Albany*, 28 Wis. 340, 5 Am. Ry. Rep. 46.—FOLLOWING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 186.—FOLLOWED IN *Rogan v. Watertown*, 30 Wis. 259. QUOTED IN *Lawson v. Milwaukee & N. R. Co.*, 30 Wis. 597.

10. To authorize municipal aid where state aid is inhibited.—The provision of Wis. Const. art. 8, § 3, providing that "the credit of the state shall never be given or loaned in aid of any individual, association, or corporation," and the further provision of section 10 that "the state shall never contract any debt for works of internal improvement, or be a party in carrying on such works," only apply to the finances of the state, and do not relate to towns, counties, and cities. *Bushnell v. Beloit*, 10 Wis. 195.

Wis. Const. art. 9, § 3, authorizing the legislature "to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment,

borrowing money, contracting debts, and loaning their credit," authorizes the legislature, within proper limits, to empower municipal corporations to levy taxes in aid of internal improvements, where the state itself would be prohibited from doing so under other provisions of the constitution. *Bushnell v. Beloit*, 10 Wis. 195.

11. To authorize aid by school districts.—Under the constitution and laws of Illinois "a congressional township" exists only for public school purposes, and, in the absence of a special grant, has no power to subscribe to the stock of railroads, or tax the people to pay bonds issued therefor. *Weightman v. Clark*, 103 U. S. 256.

The constitution of 1848, art. 9, § 5, providing that "the corporate authorities of counties, townships, school districts, cities, towns, and villages may be invested with power to assess and collect taxes for corporate purposes," does not confer the power on the legislature to authorize a school district to issue bonds and collect a tax to aid in the construction of a railroad, such a tax not being for "corporate purposes." *People ex rel. v. Trustees of Schools*, 78 Ill. 136.

12. To create new districts for purpose of giving such aid.—The legislature may create a district for the purpose of taxation or assessment without reference to the existing civil or political districts. *Shelby County Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225.

13. To limit municipal powers.—The legislature may grant power to a town to subscribe to the stock of a railroad which may be either general or special, and in granting it may impose as many conditions, limitations, and restrictions as it shall deem proper. *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574.

A provision in a city charter that no tax shall be levied or money borrowed beyond necessary "legitimate municipal purposes," unless sanctioned by a majority of the voters, is not a limitation upon the city's power to levy a tax or contract debts, within the meaning of Wis. Const. art. 11, § 3, which authorizes the legislature to restrict the power of municipal corporations as to taxation, assessment, borrowing money, or contracting debts. *Foster v. Keno-sha*, 12 Wis. 616.

14. To compel issuance of stock to taxpayers.—Where counties in Indiana, under authority of the act of May 12, 1869,

have subscribed and paid for stock in railroads, it is competent for the legislature to pass a law requiring certificates of stock to issue to each taxpayer for the amount of taxes paid in purchase of the stock held by the county, and if such certificates were not claimed by a certain date, then they should issue for the benefit of the school fund, and upon the issue of such certificates the stock held by the counties should cease. *Tippecanoe County Com'rs v. Lucas*, 93 U. S. 108.

The provision contained in an act of subscription that each taxpayer should receive a remuneration in the shape of stock in the railroad company equivalent to the amount of his tax assessment is not in conflict with either the first or twenty-fourth clause of the Florida "Declaration of Rights." *Cotten v. Leon County Com'rs*, 6 Fla. 610.

The provision of the act which authorizes the counties to issue bonds for the purpose of raising money to pay for the stock to be purchased does not contravene the letter or spirit of the thirteenth clause of the thirteenth article of the constitution, which prohibits the general assembly from pledging the faith and credit of the state to raise funds in aid of corporations. *Cotten v. Leon County Com'rs*, 6 Fla. 610.

15. To compel municipalities to subscribe.—The legislature has the power to compel a county to subscribe to the stock of a railroad company in cases where the road has been completed as well as where such road has not been built. *Napa Valley R. Co. v. Napa County Sup'rs*, 30 Cal. 435. —FOLLOWED IN *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147.

The legislature has not the constitutional power to create a corporate indebtedness of a county or city in favor of a railway company by declaring that an illegal vote to subscribe to the capital stock of such railway company is valid. It is not within the power of the legislature to compel a municipal corporation, without its own consent legally expressed, to enter into or assume obligations to others. *Choisser v. People ex rel.*, 140 Ill. 21, 29 N. E. Rep. 546.—QUOTING *Marshall v. Silliman*, 61 Ill. 218.—*Barnes v. Lacon*, 84 Ill. 461.

The provisions of Mich. Const. of 1850, art. 14, §§ 7-9, which expressly prohibit the state from being a party to, or interested in, any work of internal improvement, or from engaging in carrying on any such work ex-

cept in the expenditure of grants made to it, and from subscribing to, or being interested in, the stock of any company, association, or corporation, or loaning its credit in aid of any person, association, or corporation, construed to prevent the state from requiring townships to do any of the acts above enumerated. *People ex rel. v. State Treasurer*, 23 Mich. 499, 1 Am. Ry. Rep. 96.—FOLLOWED IN *Risley v. Howell*, 57 Fed. Rep. 544.

Municipal corporations exist for public purposes, and may be required by the legislature to provide for the construction of improvements strictly of a public character, such as highways; but railroads owned and operated by corporations for the benefit of individual stockholders are so far of a private character that a municipal corporation cannot be compelled to impose a tax in aid thereof without the consent of the taxpayers. *People ex rel. v. Batchellor*, 53 N. Y. 128, 5 Am. Ry. Rep. 25.—APPLYING *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. St. 185; *Bailey v. Mayor, etc., of N. Y.*, 3 Hill (N.Y.) 531. DISTINGUISHING *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. (U. S.) 678; *People ex rel. v. Mayor of Brooklyn*, 4 N. Y. 419; *Guilford v. Chenango County Sup'rs*, 13 N. Y. 143. REVIEWING *People ex rel. v. Richmond County Sup'rs*, 28 N. Y. 112.—APPROVED IN *Thompson v. Perrine*, 103 U. S. 806. DISTINGUISHED IN *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. Rep. 24, 24 N. Y. S. R. 6, 4 L. R. A. 685. FOLLOWED IN *Horton v. Thompson*, 71 N. Y. 513.

Although the legislature cannot compel a municipal corporation to subscribe for railroad stock, and to issue its bonds in payment therefor, yet, where, under a mandatory act, the municipality has voluntarily, and without the compulsion of judicial process, subscribed for and taken the stock, and issued its bonds, the latter are not invalidated by the compulsory character of the act; it operates as an authority and permission to do the acts; and, having been done, they will be considered as having been done voluntarily. *Williams v. Duaneburgh*, 66 N. Y. 129.

16. To bind future legislatures.—Under Wis. Act of 1872, ch. 182, § 11, providing that "if any county, town, city, or village shall issue and deliver to any railroad company any bonds * * * it shall not thereafter issue or deliver any bonds or incur any

liability in aid of the construction of the railroad of such company by virtue of the authority of any other law of this state," the words "other law of this state" must be limited to laws existing at the time, as one legislature cannot bind future legislatures; and a subsequent act in conflict with such chapter would be construed as a repeal thereof. *Oleson v. Green Bay & L. P. R. Co.*, 36 Wis. 383.

17. Where municipal indebtedness is limited by law.—A provision of law that a city shall not increase its debt above \$500,000 only prohibits the city from exceeding that amount without further authority, but does not prohibit the legislature from authorizing the city by a subsequent act to subscribe to the stock of a railroad and issue its bonds in payment, which will increase the debt of the city above \$500,000. *Amey v. Allegheny City*, 24 How. (U. S.) 364.

18. Cannot confer unlimited power of taxation.—An act of the legislature to confer upon municipal corporations unlimited power to levy taxes and raise money for other objects than legitimate municipal purposes would be in conflict with art. 11, section 3, of the Wisconsin Constitution, which requires the legislature to restrict the power of such corporations as to taxation, assessment, borrowing money, and contracting debts. *Foster v. Kenosha*, 12 Wis. 616.—DISTINGUISHED IN *Smith v. Fond du Lac*, 10 Biss. (U. S.) 418, 8 Fed. Rep. 289.

19. Public character of the improvement.—The power of the legislature to authorize municipal corporations to levy taxes to aid in the construction of local improvements or public works is limited to such as are strictly of a public character, and does not extend to aid in the construction of a railroad which is owned and operated by a private corporation. *People ex rel. v. Salem Tp.*, 20 Mich. 452.—DISAPPROVED IN *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Hallenbeck v. Hahn*, 2 Neb. 377. FOLLOWED IN *Risley v. Howell*, 57 Fed. Rep. 544. QUOTED BUT DISAPPROVED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.—*Chamberlain v. Burlington*, 19 Iowa 395.—REVIEWING *Gelpcke v. Dubuque*, 1 Wall. 205.—FOLLOWED IN *McClure v. Owen*, 26 Iowa 243. NOT FOLLOWED IN *Leavenworth*

* Railroads considered as "a public use," justifying municipal aid, see note, 14 L. R. A. 479.

County Com'rs *v.* Miller, 7 Kan. 479. REVIEWED IN King *v.* Wilson, 1 Dill. (U. S.) 555.

Aid can be extended to railroad corporations, turnpike companies, etc., by counties or cities only upon the theory that such internal improvements are for the local public benefit, conducive to the prosperity and common welfare of the local public. *Hawkins v. Carroll County*, 50 Miss. 735.

A railroad is a public improvement and a proper object for public aid; and the mere fact that private individuals are to own it and receive the tolls in no wise impairs or diminishes the advantages to be derived from it to the public. *Gibson v. Mason*, 5 Nev. 283.—QUOTING Beekman *v.* Saratoga & S. R. Co., 3 Paige (N. Y.) 45.

The legislature cannot delegate to a township the power to tax for a public purpose within its limits unless the tax be also for a corporate purpose; but the legislature, by the exercise of its own power, may impose a tax for a public purpose affecting a township, although such purpose is not corporate. And a railroad is so far a public purpose as to a township through which it passes that the legislature may impose a tax upon the property of a township, provided the legislature is satisfied that the inhabitants have consented to be taxed for such purpose. *State ex rel. v. Neely*, 30 So. Car. 587, 9 S. E. Rep. 664.

The construction of a railroad through a county or municipal corporation purpose within the meaning of Tenn. Const. art 2, § 29, conferring upon the legislature "the power to authorize the several counties and incorporated towns of the state to impose taxes for county and corporation purposes." *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 637.—DISTINGUISHED IN *Green v. Dyersburg*, 2 Flipp. (U. S.) 477.

A statute authorized a town to issue bonds in aid of a railroad upon the written assent of a majority of the taxpayers, and it was objected to the validity of such bonds that the town could only be bound by a vote at a town meeting. *Held*, that, the town being the creature of legislation, and only existing for public purposes, it was competent for the legislature to enable it to issue such bonds in any manner that the legislature might deem fit. *First Nat. Bank v. Concord*, 50 Vt. 257.—FOLLOWED IN *First*

Nat. Bank v. Arlington, 16 Blatchf. (U. S.) 57.

20. Improvement need not be entirely within taxing district.—A municipal corporation may be legally authorized by legislative act to subscribe to stock of a railroad whose line extends or whose operations are carried on beyond the limits of such municipal corporation, or even outside the state, if such aid be for the corporate interest. *Bass v. Mayor, etc., of Columbus*, 30 Ga. 845. *Pattison v. Yuba County Sup'rs*, 13 Cal. 175.

To authorize a municipal corporation to take stock in, or aid in the construction of, a railroad outside of the limits of such corporation there must be an express grant of power. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

Bonds were voted to a road that was to be built "to" a town. The road was built to within a fraction of a mile from the town. The bonds were not issued until after the location of the road, and were delivered without objection, and interest paid from time to time. *Held*, a sufficient compliance with the vote, and no defense to payment of the bonds. *Johnson County Com'rs v. Thayer*, 94 U. S. 631.

21. No vested rights till subscription is actually made.—Where a statute gives county authorities power to donate its bonds in aid of a railroad, upon a popular vote in favor of the same, but does not bind it to do so, a popular vote favoring the donation, and the building the road on the faith of the same, do not give the company such a vested right to the bonds as will prevent the legislature from repealing the law authorizing their issuance, and thus defeat them. *Wadsworth v. Eau Claire County Sup'rs*, 102 U. S. 534.—APPROVED IN *Norton v. Shelby County*, 118 U. S. 425; *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781. FOLLOWED IN *Concord v. Robinson*, 121 U. S. 165.

A railroad corporation has no vested right in a municipal subscription to its capital stock until the subscription is actually made; and until that event occurs the legislature may alter the method whereby such subscription is to be made without infringing any vested right. (Hough and Napton, JJ., dissenting.) *State ex rel. v. Garroulte*, 67 Mo. 445.—REVIEWING *Smith v. Clark County*, 54 Mo. 58.—FOLLOWED IN *Wagner v. Meety*, 69 Mo. 150.

22. When invalid subscription may be cured by a retrospective act.*—A state legislature, when not restricted by its constitution, may by subsequent statute legalize unauthorized acts of municipal corporations in subscribing to the stock of railroads in any case where such acts might have been previously authorized by the legislature. *Stone v. Illinois C. R. Co.*, 23 *Am. & Eng. R. Cas.* 597, 116 *U. S.* 347, 6 *Sup. Ct. Rep.* 348, 388, 1191.—APPROVED IN *Illinois C. R. Co. v. People*, 143 *Ill.* 434.—*Watson v. Mercer*, 8 *Pet. (U. S.)* 88.—FOLLOWED IN *Gelpcke v. Dubuque*, 1 *Wall.* 175; *St. Joseph Tp. v. Rogers*, 16 *Wall.* 644.—*Thomson v. Lee County*, 3 *Wall. (U. S.)* 327.—FOLLOWING *McMillen v. Lee County Judge*, 6 *Iowa* 391.—FOLLOWED IN *St. Joseph Tp. v. Rogers*, 16 *Wall.* 644; *Leavenworth County Com'rs v. Miller*, 7 *Kan.* 479.—*White Water Valley Canal Co. v. Vallette*, 21 *How. (U. S.)* 414.—FOLLOWED IN *Gelpcke v. Dubuque*, 1 *Wall.* 175.—*Gelpcke v. Dubuque*, 1 *Wall. (U. S.)* 175.—FOLLOWING *McMillen v. Boyles*, 6 *Iowa* 305; *McMillen v. Lee County Judge*, 6 *Iowa* 393; *Wilkinson v. Leland*, 2 *Pet.* 627; *Satterlee v. Matthewson*, 2 *Pet.* 380; *Baltimore & S. R. Co. v. Nesbit*, 10 *How.* 395; *White Water Valley Canal Co. v. Vallette*, 21 *How.* 425; *Watson v. Mercer*, 8 *Pet.* 88.—*St. Joseph Tp. v. Rogers*, 16 *Wall. (U. S.)* 644, 2 *Am. Ry. Rep.* 105.—FOLLOWING *Cowgill v. Long*, 15 *Ill.* 203; *Keithsburg v. Frick*, 34 *Ill.* 405; *Thomson v. Lee County*, 3 *Wall.* 327; *Kenosha v. Lamson*, 9 *Wall.* 477; *Watson v. Mercer*, 8 *Pet.* 111; *Bissell v. Jeffersonville*, 24 *How.* 295.—APPLIED IN *Duanesburgh v. Jenkins*, 57 *N. Y.* 177.—*Unity v. Burrage*, 2 *Am. & Eng. R. Cas.* 560, 103 *U. S.* 147. *Jonesboro v. Cairo & St. L. R. Co.*, 15 *Am. & Eng. R. Cas.* 615, 110 *U. S.* 192, 4 *Sup. Ct. Rep.* 67. *Otoe County v. Baldwin*, 15 *Am. & Eng. R. Cas.* 563, 111 *U. S.* 1, 4 *Sup. Ct. Rep.* 265. *Grenada County Sup'rs v. Brogden*, 112 *U. S.* 261, 5 *Sup. Ct. Rep.* 125. *Anderson v. Santa Anna Tp.*, 116 *U. S.* 356, 6 *Sup. Ct. Rep.* 413.—DISTINGUISHED IN *Deland v. Platte County*, 54 *Fed. Rep.* 823. FOLLOWED IN *Bolles v. Brimfield*, 120 *U. S.* 759, 7 *Sup. Ct. Rep.* 736.—DISAPPROVING *Marshall v. Silliman*, 61 *Ill.* 226. DISTINGUISHING *People ex rel.*

v. Mayor, etc., of Chicago, 51 *Ill.* 17; *People ex rel. v. Salomon*, 51 *Ill.* 37; *People ex rel. v. Chicago*, 51 *Ill.* 58; *Harward v. St. Clair & M. L. & D. Co.*, 51 *Ill.* 130. FOLLOWING *Burgess v. Seligman*, 107 *U. S.* 33; *Carroll County v. Smith*, 111 *U. S.* 563; *Anderson v. Santa Anna Tp.*, 116 *U. S.* 356.—DISTINGUISHED IN *Deland v. Platte County*, 54 *Fed. Rep.* 823. FOLLOWED IN *Dows v. Elmwood*, 34 *Fed. Rep.* 114.—*Rogers v. Keokuk*, 18 *Law Ed. (U. S.)* 74. *Quincy v. Cooke*, 12 *Am. & Eng. R. Cas.* 645, 107 *U. S.* 549, 2 *Sup. Ct. Rep.* 614. *Bridgeport v. Housatonic R. Co.*, 15 *Conn.* 475.—APPROVED IN *Nichol v. Mayor, etc., of Nashville*, 9 *Humph. (Tenn.)* 252; *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 *Ohio St.* 77. FOLLOWED IN *McMillen v. Lee County Judge*, 6 *Iowa* 391; *Talbot v. Dent*, 9 *B. Mon. (Ky.)* 526; *Bank of Rome v. Rome*, 18 *N. Y.* 38. NOT FOLLOWED IN *Hanson v. Vernon*, 27 *Iowa* 28.—*McMillen v. Boyles*, 6 *Iowa* 304.—FOLLOWED IN *Gelpcke v. Dubuque*, 1 *Wall.* 175. REVIEWED IN *Stokes v. Scott County*, 10 *Iowa* 166.—*McMillen v. Lee County Judge*, 6 *Iowa* 391.—FOLLOWING *Bridgeport v. Housatonic R. Co.*, 15 *Conn.* 475.—FOLLOWED IN *Gelpcke v. Dubuque*, 1 *Wall.* 175; *Thomson v. Lee County*, 3 *Wall.* 327.—*Shelby County Court v. Cumberland & O. R. Co.*, 8 *Bush (Ky.)* 209. *Steines v. Franklin County*, 48 *Mo.* 167. *Belo v. Forsythe County Com'rs*, 76 *N. Car.* 489. *Redd v. Henry County Sup'rs*, 31 *Gratt. (Va.)* 695.

But where a bill is filed to sustain such subscription it ought to aver such ratification; but an answer which puts in issue such ratification may supply the place of such averment in the bill. *Putnam v. New Albany*, 4 *Biss. (U. S.)* 365.

Ratification by a legislature of a loan of the credit of a city in aid of a railroad is equivalent to original authority, and cures any want of authority that may have existed when the loan was made. *Kenosha v. Lamson*, 9 *Wall. (U. S.)* 477.—FOLLOWED IN *Kenosha v. Lamson*, 19 *Law Ed. (U. S.)* 730; *St. Joseph Tp. v. Rogers*, 16 *Wall. (U. S.)* 644.—*National Bank v. Yankton County*, 2 *Dak.* 365, 101 *U. S.* 129.

It is not necessary that a subsequent act of the legislature validating an illegal subscription to stock should do so in express terms. It may be by implication. *Campbell v. Kenosha*, 5 *Wall. (U. S.)* 194.

Where a city is authorized to borrow money and pledge its property as securi'y,

* Retroactive statutes validating void subscriptions, see note, 15 *AM. & ENG. R. CAS.* 621.

to be expended for municipal purposes, but it expends the money in paying for stock in a railway, a subsequent act of the legislature which recites the disposition made of the money, and authorizes another loan, is a ratification of the disposition made of the money. *Winn v. Macon*, 21 Ga. 275.

When it is omitted in the act authorizing a county to issue bonds to pay its subscription to a railroad, by whom the bonds are to be signed and issued, a succeeding legislature has the power to amend the act in this particular, *nunc pro tunc*, and thus render valid the action of those who issued the bonds without express authority. *Alexander v. McDowell County Com'rs*, 70 N. Car. 208.

Where a state legislature passes two acts, one authorizing a city to subscribe a limited amount to the stock of a railroad, and the other authorizing it to subscribe an unlimited amount, and the former act is constitutional, and the other is not, and the city goes on and makes the limited subscription, but acts in conformity with the unconstitutional act which authorized the unlimited subscription, a subsequent act of the legislature recognizing the subscription validates it. *Campbell v. Kenosha*, 5 Wall. (U. S.) 194.

A city subscribed for stock in a railroad, the ordinance reciting that it was made by authority of existing law, and upon the petition of three fourths of the legal voters of the city. After the subscription was made, but before the bonds were issued, the supreme court of the state decided that cities could not make such subscriptions. Subsequently the legislature passed a law authorizing cities to ratify such subscriptions. This was done, and the bonds in question were issued. *Held*: (1) that this fully authorized the bonds; (2) and it appearing that the council had determined that the requisite three fourths had signed the petition, and so recited in the bonds, oral evidence was not admissible to show that three fourths of the legal voters had not so petitioned, in a suit by innocent holders. *Bissell v. Jeffersonville*, 24 How. (U. S.) 287.—APPROVED IN *Moran v. Miami County Com'rs*, 2 Black (U. S.) 722. FOLLOWED IN *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Venice v. Murdock*, 92 U. S. 494. QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186; *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294.

23. When invalid subscription may not be cured by a retrospective act.—When a municipal corporation submits an unauthorized proposition to issue its corporate bonds in aid of a railway company, which is carried, and which therefore imposes no liability on the corporation, it is not within the constitutional power of the legislature to validate such vote so as to compel the issue of the bonds voted. *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505. *Wiley v. Silliman*, 62 Ill. 1.

Where an election on the question of municipal subscription to the stock of a private corporation is void, because called and ordered by persons not authorized to call the same, and consequently not a valid authority for the creation of corporate indebtedness or liability, the legislature is powerless, under the constitution, to validate such election by subsequent enactment and require the issuing of bonds peremptorily. *Gaddis v. Richland County*, 92 Ill. 119.

An act professing and attempting to validate a contract of a county to make a donation to a railway company, such contract being utterly void for want of power to enter into the same, and thus impose upon the county an indebtedness to which it has never assented, is null and void, being in violation of the constitution. *Choisser v. People ex rel.*, 140 Ill. 21, 29 N. E. Rep. 546.

The Miss. Act of March 16, 1872, to validate municipal subscriptions to the stock of the Selma, Marion & Memphis railroad "not made in violation of the constitution of the state"—*held*, too vague and uncertain in its expressions to validate an issue of bonds under an election held without any law to authorize it. *Hayes v. Mayor, etc., of Holly Springs*, 114 U. S. 120, 5 Sup. Ct. Rep. 785.

The Miss. Constitution of 1869, art. 12, § 14, provides that "the legislature shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation," unless upon a two-thirds vote of the qualified voters therein. On April 26, 1870, a town subscribed to the stock of a railroad and issued bonds without any vote. In 1872 the legislature passed a law to legalize such subscriptions to the road. *Held*, that the bonds were illegal as issued, and that the legislature had no power to pass such an act. *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947.

III. CONSTITUTIONALITY OF STATUTES.

24. Cases decided in federal courts.*—(1) *In general.*—A statute authorizing a county to subscribe for stock in a railroad upon a vote, and appointing five commissioners to issue the bonds, does not violate a provision in the state constitution that "all county officers whose election or appointment is not provided for by the constitution, shall be elected by the electors of the respective counties, or appointed by the board of supervisors." Such commissioners are not county officers. *Sheboygan County v. Parker*, 3 Wall. (U. S.) 93.

Where a county has issued its bonds in aid of a railway, and a portion of its territory is subsequently taken to form other counties, but with a provision that the taxpayers and property cut off shall remain liable as before, an act which authorizes the county court to issue new bonds in a settlement with the bondholders, and to levy and collect a tax on the whole property originally in the county, is constitutional. *Sinton v. Carter County*, 23 Fed. Rep. 535; affirmed in 120 U. S. 517, 7 Sup. Ct. Rep. 650.

The fact that a railroad is owned by a foreign corporation, and terminates in another state at a place from which it runs boats to a city, is no constitutional objection to a grant of power by the legislature to the city to subscribe to the stock of the company and issue its bonds in payment. *Moulton v. Evansville*, 25 Fed. Rep. 382.

A statute authorizing the submission of the question of subscribing to the stock of a railroad "to all the male taxpayers of the county" is not in conflict with a provision of the state constitution requiring such questions to be submitted "to a vote of the people," on the ground that the power is thus delegated to a class of the people instead of the whole people. *Baltimore & O. R. Co. v. Jefferson County*, 29 Fed. Rep. 305.—FOLLOWING *Slack v. Maysville & L. R. Co.*, 13 B. Mon. (Ky.) 1.

(2) *Laws Impairing the Obligation of Contracts.*—Where the law authorizes a city to subscribe for stock in a railroad, and to issue bonds in payment, and to levy a special tax to pay interest and the principal when due, the power thus given cannot be withdrawn until the bonds are paid, and a subsequent

law which impairs the power to tax is void as impairing the obligation of the contract with the bondholders. *Van Hoffman v. Quincy*, 4 Wall. (U. S.) 535.—REVIEWED IN *Richmond v. Richmond & D. R. Co.*, 21 Gratt. (Va.) 604.

Where municipal bonds issue for stock in a railroad, a provision of the law under which they issue, providing the manner of levying and collecting taxes to pay the same, enters into and becomes a part of the contract, and any subsequent law making the collection less effective impairs the obligation of the contract within the meaning of the United States constitution. *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. Rep. 1190. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398.

A law passed after a county has issued its bonds for stock in a railroad taking away the power of the county to levy taxes to pay the same is unconstitutional, and the courts by mandamus may require the county to levy a tax under the law in force when the bonds issued. *Reels County Court v. United States*, 105 U. S. 733.

After municipal bonds have issued for stock in a railroad under a law providing for a tax on real estate only to pay the same, the legislature may amend the law so as to tax personal property also, and the law will not impair the "obligation of a contract" within the meaning of the United States constitution. *Cape Girardeau County Court v. Hill*, 118 U. S. 68, 6 Sup. Ct. Rep. 951.

It is not within the power of a legislature to repeal a city charter so as to cancel bonds issued by the city in aid of a railway. Such legislation would be in conflict with that provision of the federal constitution which prohibits laws impairing the obligation of contracts. *Milner v. Pensacola*, 2 Woods (U. S.) 632.

25. Alabama.—The act of Dec. 31, 1868, authorizing counties to subscribe to the stock of railroads, and issue their bonds in payment—held, constitutional. *Chambers County v. Clews*, 21 Wall. (U. S.) 317.—FOLLOWING *Ex parte Selma & G. R. Co.*, 45 Ala. 696; *Lockhart v. Troy*, 48 Ala. 579; *Limestone County Com'rs Court v. Rather*, 48 Ala. 433.—*Opelika v. Daniel*, 59 Ala. 211.

The act of Feb. 8, 1858, "to authorize the corporate authorities of Mobile to aid in the construction of a railroad, upon a vote of the citizens" (Sess. Acts 1857-58, p. 165),

* See also *post*, 53, subd. (2).

and the act supplemental thereto, approved Nov. 29, 1859 (Sess. Acts 1859-60, p. 294), are not violative of any constitutional provision, being neither an illegal exercise of the taxing power, nor a taking of private property without just compensation. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410. FOLLOWING *Stein v. Mayor, etc.*, of Mobile, 24 Ala. 591.

In the Ala. Act, approved Dec. 7, 1866, entitled "An act to authorize the city of Montgomery to aid in building and equipping the South and North Alabama R. R. from Montgomery to Limekiln," the failure to set out at length, or in substance, the propositions which had been agreed on between the directors of the railroad and the city council, and on which a vote of the citizens was to be taken, under the provisions of said act, to ascertain whether aid should be extended by the city to said railroad, does not affect the validity of the act, there being no constitutional provision then in force, and no prescribed mode of legislative procedure, which required their insertion, and the omission not causing any doubt or uncertainty in the act itself. *Winter v. Montgomery City Council*, 7 Am. & Eng. R. Cas. 307, 65 Ala. 403.

20. California.—The act of April 25, 1863, providing for a subscription by the city and county of Sacramento to the capital stock of the Central Pac. R. Co., upon a vote by the electors of the county in favor of the proposition, is in its main features constitutional, and authorizes the making of the subscription and issuance of bonds as therein directed. *Robinson v. Bidwell*, 22 Cal. 379.

The proposed Central Pac. railroad, leading from the city and county of Sacramento to the eastern portion of the state, is so far a public improvement, and sufficiently for the apparent interest of the city and county, that a law authorizing the municipality to become a stockholder in the railroad corporation is not unconstitutional as imposing a tax upon a local community for an improvement in which it has no peculiar interest. *Robinson v. Bidwell*, 22 Cal. 379.

The act of April 22, 1863, authorizing supervisors of the city and county of San Francisco to subscribe a certain sum to the capital stock of certain railroads, and exempting the city and county from liability for the debts of the companies beyond the

amount of stock subscribed, is constitutional. *French v. Teschemaker*, 24 Cal. 518. —EXPLAINED IN *People ex rel. v. Coon*, 25 Cal. 635.

The act of 1863, p. 145, authorizing the county of Placer to subscribe to the capital stock of a certain railroad, and which provides that the taxes may be paid by the company to the county from time to time, and go into a railroad fund created by the act, is unconstitutional so far as it relates to the school tax of the county, as it would exempt the company from the school tax, and thus violate the provision of the constitution which requires taxes to be equal and uniform. *Crosby v. Lyon*, 37 Cal. 242.

The act of April 1, 1870, authorizing the city of Stockton to aid in the construction of a certain railroad, is constitutional; and a mandamus is the proper remedy to compel the common council of the city to levy a tax to pay interest on the debt created. *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147, 3 Am. Ry. Rep. 102.

27. Connecticut.—The legislature has the constitutional power to authorize towns to aid in the construction of railroads. *Douglas v. Chatham*, 41 Conn. 211.

28. Georgia.—The act of 1855 authorizing the county of Dougherty to subscribe to the stock of the Georgia & Florida railroad, and to issue bonds in payment therefor, is constitutional and valid. *Powers v. Dougherty County Inferior Court*, 23 Ga. 65.

The Ga. Act of 1870 providing for subscription to stock of railroads by the city of Rome, as amended, by authorizing a subscription to the stock of a railroad especially named, does not violate the constitutional provision that no act shall pass which refers to more than one subject-matter. *Black v. Cohen*, 52 Ga. 621.

Where it appears from the whole of a legislative act that the great purpose and object was to create a corporation to lay out and construct a railroad between certain points, any instrumentality authorized by the act in aid of, to conduce to, and to assist the one great purpose of the act is not a different subject-matter; and the act is not unconstitutional as containing more than one subject-matter, or matter different from that expressed in the title. Therefore the inclusion in the act of 1872 to incorporate the Gainesville, J. & S. railroad, and for other purposes therewith connected, of a

provision that any corporate town or city of said state interested in the construction of said road might subscribe to the capital stock of the company by an election to be held for that purpose, and that the subscription of the city of Gainesville to the Gainesville & Jefferson railroad is legalized and confirmed as a subscription to the Gainesville, J. & S. R. Co., did not render it unconstitutional. *Hope v. Mayor, etc., of Gainesville*, 72 Ga. 246. — DOUBTING Board of Public Education v. Barlow, 49 Ga. 232. QUOTING Union Tp. v. Rader, 39 N. J. L. 509. — QUOTED IN Atlanta v. Gate City St. R. Co., 80 Ga. 276, 4 S. E. Rep. 269.

29. Illinois.—(1) *In general.*—An act authorizing trustees of schools to hold elections, subscribe stock, and issue bonds in aid of a railroad is unconstitutional. *Trustees of Schools v. People ex rel.*, 63 Ill. 299.

The act of February 18, 1857, entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," is void, no entry of its passage appearing on the senate journal, and municipal bonds issued thereunder are unauthorized. *South Ottawa v. Perkins*, 94 U. S. 260. — FOLLOWING Spangler v. Jacoby, 14 Ill. 297; Prescott v. Canal Trustees, 19 Ill. 324; Turley v. Logan County, 17 Ill. 151; Schuyler County Sup'rs v. People ex rel., 25 Ill. 181; People ex rel. v. Starne, 35 Ill. 121; Ryan v. Lynch, 68 Ill. 160; Miller v. Goodwin, 7 Chicago Leg. News 294.

Where a statute is void for no entry of its passage being entered on the senate journal, subsequent acts of the legislature amending the law, and referring to it as "in force," without directly attempting to validate it, is not such recognition of the law as to validate bonds issued before such amendments. *South Ottawa v. Perkins*, 94 U. S. 260.

Neither the act of Feb. 25, 1867, incorporating the Illinois Southeastern railway, and authorizing township donations thereto, nor the amendatory act, Feb. 24, 1869, authorizing an issue of bonds for the amount of such donations, is in conflict with the constitution of the state. *Bonham v. Needles*, 103 U. S. 648. — FOLLOWING Harter v. Kernochan, 103 U. S. 562.

Under the act of March 26, 1869, a certain county, in December of that year, or-

dered a subscription to the stock of a railroad, the bonds in payment to be issued when a certain part of the road should be open to travel. In 1870 a new constitution was adopted which took away the power to make such subscriptions. The road was not opened and the bonds delivered until 1873. Held, that the new constitution did not affect the bonds, whether the order of 1869 be considered a completed subscription or only a contract to deliver bonds in the future. *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631. — APPROVED IN Bates County v. Winters, 112 U. S. 325. DISTINGUISHED IN Buffalo & J. R. Co. v. Falconer, 103 U. S. 821. FOLLOWED IN Cass County v. Gillett, 100 U. S. 585.

(2) *Under constitution of 1848.*—The legislature has the constitutional right to authorize counties and cities to subscribe to the stock of railroads. Such a law is not in conflict with the constitution, art. 3, § 38, providing that the credit of the state shall not be given to any individual, association, or corporation; nor art. 13, § 8, providing that no one shall be deprived of life, liberty, or property but by the judgment of his peers and the law of the land; nor art. 13, § 11, providing that a citizen's property shall not be applied to public use without the consent of the legislature nor without just compensation. *Johnson v. Stark County*, 24 Ill. 75. — FOLLOWING Prettyman v. Tazewell County Sup'rs, 19 Ill. 406. — FOLLOWED IN Perkins v. Lewis, 24 Ill. 208.

The act of Feb. 18, 1857, purporting to authorize the issue of certain municipal bonds for railroad stock, is of no force or effect, by reason of its not appearing by the legislative journals to have been passed as required by the constitution of 1848. *Post v. Kendall County Sup'rs*, 12 Am. & Eng. R. Cas. 546, 105 U. S. 667. — DISTINGUISHING Dunnovan v. Green, 57 Ill. 63; Force v. Batavia, 61 Ill. 99; Illinois C. R. Co. v. Wren, 43 Ill. 77; Bedard v. Hall, 44 Ill. 91; Grob v. Cushman, 45 Ill. 119; People ex rel. v. De Wolf, 62 Ill. 253; Binz v. Weber, 81 Ill. 288. FOLLOWING Ryan v. Lynch, 68 Ill. 160; Miller v. Goodwin, 70 Ill. 659.

An act entitled "An act to amend the charter of the Cairo & St. Louis R. Co.," which, among other things, validated a prior municipal election to vote bonds to the stock of the road, did not violate the Ill. Constitution of 1848, art. 3, § 23, providing

that "no private or local law * * * shall embrace more than one subject, which shall be expressed in the title." *Jonesboro v. Cairo & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 615, 110 U. S. 192, 4 Sup. Ct. Rep. 67. —FOLLOWING *Johnson v. People*, 83 Ill. 436; *Montclair v. Ramsdell*, 107 U. S. 147.

The act of April 16, 1869, making it the duty of the auditor of public accounts to ascertain the amount of interest that will accrue on town and other bonds registered in his office, and certify the amount to the county clerk, to be by him extended on the collector's books, and collected in the manner state revenue is collected, is not violative of section 5, art. 9, of the constitution of 1848. *Dunnovan v. Green*, 57 Ill. 63. —DISTINGUISHED IN *Post v. Kendall County Sup'ts*, 105 U. S. 667.

That portion of the act of Jan. 23, 1869, amendatory of the charter of the Decatur & E. St. L. R. Co. which permits a portion of each of several counties to give its credit and aid to the corporation is not in violation of that clause of the constitution of 1848 which forbids the credit of the state to be given to, or in aid of, any individual, association, or corporation. *Madison County Court v. People ex rel.*, 58 Ill. 456, 11 Am. Ry. Rep. 66.

The constitution of 1848, art. 9, § 5, giving the legislature power to vest corporate authorities with the right to assess and collect taxes for corporate purposes—held, not to extend to an act attempting to confer on parts of counties the power, to subscribe to the stock of railroads. *Madison County Court v. People ex rel.*, 58 Ill. 456, 11 Am. Ry. Rep. 66.

A statute which authorizes the trustees of schools of a township, in a county not under township organization, to order an election for the purpose of voting upon a subscription or donation to a railroad, and to make such subscription, and issue bonds, and to levy and collect taxes for the purpose of paying them, is in violation of the constitution of 1848, art. 9, §§ 5, 7. *People ex rel. v. Dupuy*, 71 Ill. 651.

The act of March 17, 1874, and that of May 29, 1877, amendatory of the former, which provide that the liability of all counties, cities, townships, towns, or precincts which have voted aid, donations, or subscriptions to the capital stock of any railroad should cease and determine upon and after July 1, 1880, and that no bonds should

be issued, or stock subscribed, to any railroad after that date upon account of, or upon the authority of, any previous vote, are not open to the objection that they impair the obligation of contracts. *People ex rel. v. Granville*, 104 Ill. 285.

An act authorizing a township to vote to subscribe for stock of a railroad, and to issue bonds in payment of the same, is allowable under the constitution of 1848. *Marshall v. Silliman*, 61 Ill. 218.

Where a charter to construct and operate a railroad confers power on counties, cities, etc., to subscribe to the capital stock of the company and issue bonds for the same, such provision is germane to such charter, and does not constitute a different subject from that of power to construct the road, it being but a means adapted to that end. Such a private law is not in violation of the constitutional provision in section 23, article 3, of the constitution of 1848, prohibiting any local or private law from containing more than one subject, and requiring that to be expressed in its title. *Viriden v. Allan*, 107 Ill. 505.

Section 20 of the act of March 10, 1869, entitled "An act to incorporate the St. Louis & Southeastern R. Co.," which authorized certain counties through which the road was located to subscribe to the capital stock of the company all or any part of any sums theretofore voted by the legal voters to another railway company, is void, as being in violation of section 23, article 3, of the constitution of 1848, which provided that "no private or local law which may be passed * * * shall embrace more than one subject, and that shall be expressed in the title." *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. Rep. 799, 29 N. E. Rep. 280.

That was a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created is germane to the object expressed in the title, the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, would affect adversely the corporation from which the subscription voted was sought to be diverted, and was therefore clearly not germane to the title of the act. *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. Rep. 799, 29 N. E. Rep. 280.

30. Indiana.—The Indiana statute (3 Ind. St. 389) authorizing aid to the construction of railroads by counties and townships taking stock in, and making donations to, railroad companies is constitutional. *Petty v. Myers*, 49 Ind. 1. *Brokaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

The act of May 12, 1869, authorizing counties and townships to aid in the construction of railroads by taking stock therein, contemplates a payment for the stock at the time of subscription, and not the creation of a debt therefor; and is therefore constitutional. *John v. Cincinnati, R. & Ft. W. R. Co.*, 35 Ind. 539, 5 Am. Ry. Rep. 41.—FOLLOWING *Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185.—*Crawford County Com'rs v. Louisville, N. A. & St. L. A. L. R. Co.*, 39 Ind. 192, 10 Am. Ry. Rep. 416.

The act of January 30, 1873, supplemental to the act of 1869, authorizing aid to railroad companies, is not unconstitutional on the ground that it divests rights vested in railroad companies, there being no rights to be divested. *Sankey v. Terre Haute & S. W. R. Co.*, 42 Ind. 402.

By the act approved December 17, 1872, railroad companies which had received aid from counties or townships by taxation were required to issue stock to the parties who had paid the taxes to the amount by them respectively paid; and the act provided that the issue of stock to a taxpayer should operate to cancel *pro tanto* the stock held by any county or township under the provisions of the statute of May 12, 1869. Where, pursuant to the act of May 12, 1869, the board of commissioners of a certain county had levied a tax in aid of a certain railroad company, and had subscribed and, with the proceeds of the tax, had paid for a certain number of shares of the capital stock of said company, and certificates of stock therefor had been issued to the county—*held*, that the act of December 17, 1872, so far as it provides for divesting counties of stock already subscribed and paid for at the time of the passage of the act, is not unconstitutional. *Lucas v. Tippecanoe County Com'rs*, 44 Ind. 524.

31. Iowa.*—Under the constitution the legislature possesses the power to confer upon counties authority to issue their bonds for a subscription to the stock of a railway

running through the county. But unless the legislature does confer such authority the counties do not possess it. *Clapp v. Cedar County*, 5 Iowa 15.—FOLLOWED IN *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. REVIEWED IN *Stokes v. Scott County*, 10 Iowa 166.

A provision in the charter of a city authorizing it "to borrow money for any object in its discretion" authorizes it to borrow money to aid in the construction of railroads, under the act of Jan. 25, 1855. *Myer v. Muscatine*, 1 Wall. (U. S.) 384.—NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479. REFERRED TO IN *Davidson v. Ramsey County Com'rs*, 18 Minn. 482 (Gil. 432).

The act of January 29, 1857, entitled "An act legalizing the issue of county, city, and town corporation bonds in the counties of Lee and Davis," is not in violation of section 6, art. 1, of the constitution of the state. *McMillen v. Lee County Judge*, 6 Iowa 391.

The decisions of the supreme court of Iowa made prior to 1859 sustaining the right of the legislature to authorize municipal corporations to subscribe to the stock of railroads extending beyond the city or county, and to issue bonds, approved by the supreme court of the United States, and followed as to all bonds issued and put upon the market during the time that those decisions were in force. The fact that the supreme court of the state has since denied such power cannot affect past transactions. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.—DISAPPROVING *State ex rel. v. Wapello County*, 13 Iowa 390. FOLLOWING *Dubuque County v. Dubuque & P. R. Co.*, 4 Greene (Iowa) 1; *State v. Bissell*, 4 Greene 328; *Clapp v. Cedar County*, 5 Iowa 15; *Ring v. Johnson County*, 6 Iowa 265; *McMillen v. Boyles*, 6 Iowa 304; *Games v. Robb*, 8 Iowa 193; *State ex rel. v. Johnson County*, 10 Iowa 157; *Stokes v. Scott County*, 10 Iowa 166.—CRITICISED IN *McClure v. Owen*, 26 Iowa 243. QUOTED IN *King v. Wilson*, 1 Dill. (U. S.) 555. REVIEWED IN *Chamberlain v. Burlington*, 19 Iowa 395.

The act of 1868, ch. 48, entitled "An act to enable townships and incorporated towns and cities to aid in the construction of railroads," is not a valid or legitimate exercise of the taxing power. The incidental benefit which may result to the community from the building of a railroad owned and operated by a private corporation is not suffi-

*See also further Iowa decisions *post*, 268.

cient to authorize such tax. *Hanson v. Vernon*, 27 Iowa 28.—DISAPPROVING *Dubuque County v. Dubuque & P. R. Co.*, 4 Greene (Iowa) 1. FOLLOWING *State ex rel. v. Wapello County*, 13 Iowa 388; *McClure v. Owen*, 26 Iowa 243. NOT FOLLOWING *Com. ex rel. v. Allegheny County Com's*, 32 Pa. St. 218; *Com. ex rel. v. Pittsburgh*, 34 Pa. St. 496; *Sharpless v. Mayor, etc.*, of Phila., 21 Pa. St. 147; *Gooddin v. Crump*, 8 Leigh (Va.) 120; *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475; *Nichol v. Nashville*, 9 Humph. (Tenn.) 252; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.—DISAPPROVED IN *Leavenworth County Com's v. Miller*, 7 Kan. 479; *Hallenbeck v. Hahn*, 2 Neb. 377. NOT FOLLOWED IN *Stewart v. Polk County Sup'rs*, 30 Iowa 9. REVIEWED IN *King v. Wilson*, 1 Dill. (U. S.) 555.

The act of 1870, ch. 102, providing for the taxation of townships and incorporated towns and cities to aid in the construction of railroads, is not in conflict with the state constitution. The collection of taxes under the statute is not a taking of property for private use, as the construction of railroads is essentially a public use. *Stewart v. Polk County Sup'rs*, 30 Iowa 9.—NOT FOLLOWING *Hanson v. Vernon*, 27 Iowa 28.—APPROVED IN *Leavenworth County Com's v. Miller*, 7 Kan. 479. FOLLOWED IN *McGregor & S. C. R. Co. v. Birdsall*, 30 Iowa 255; *Renwick v. Davenport & N. W. R. Co.*, 47 Iowa 511. QUOTED IN *King v. Wilson*, 1 Dill. (U. S.) 555. REFERRED TO IN *Davidson v. Ramsey County Com's*, 18 Minn. 482 (Gil. 432).

Iowa Act of 1874, ch. 123, authorizing cities, townships, and incorporated towns to vote aid to railroads, is constitutional. (Beck, J., dissenting.) *Renwick v. Davenport & N. W. R. Co.*, 47 Iowa 511.—FOLLOWING *Stewart v. Polk County Sup'rs*, 30 Iowa 9.—FOLLOWED IN *Snell v. Leonard*, 55 Iowa 553.

Chapter 123, Laws of 1876, authorizing the voting of taxes to aid in the construction of railroads, is constitutional. *Snell v. Leonard*, 55 Iowa 553. 8 N. W. Rep. 425.—FOLLOWING *Renwick v. Davenport & N. W. R. Co.*, 47 Iowa 511.—*Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.

32. Kansas.—Chapter 12 of the Laws of 1865, and other acts passed by the legislature authorizing counties and cities to subscribe for stock in railroad companies,

and issue bonds in payment of the stock so subscribed for, are constitutional and valid. *Leavenworth County Com's v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.—FOLLOWED IN *State ex rel. v. Nemaha County Com's*, 7 Kan. 542; *Morris v. Morris County Com's*, 7 Kan. 576. QUOTED IN *Hallenbeck v. Hahn*, 2 Neb. 377.—*State ex rel. v. Nemaha County Com's*, 7 Kan. 542, 1 Am. Ry. Rep. 319.—FOLLOWED IN *Morris v. Morris County Com's*, 7 Kan. 576.—*Morris v. Morris County Com's*, 7 Kan. 576.—FOLLOWING *Leavenworth County Com's v. Miller*, 7 Kan. 479; *State ex rel. v. Nemaha County Com's*, 7 Kan. 542.

The aid given to a railroad company is not strictly for a private purpose, nor wholly for a public purpose, though the object intended by the legislature is a public purpose. *Leavenworth County Com's v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

The government may accomplish a public purpose through the means of a private agency, a private individual or individuals, or a private corporation. It is the ultimate object to be obtained which must determine whether a thing is a public or a private purpose. The ultimate object of the government in granting municipal aid to railroads is to increase the facilities for travel and transportation from one part of the country to the other, which object is, in its nature, a public purpose. *Leavenworth County Com's v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.

The fact that a portion of such an act, providing for a certain disposition of the taxes levied upon the railroad property, is unconstitutional does not invalidate the other portions of the statute, or render the entire proceedings a nullity, or prevent the county commissioners from subscribing to the stock and issuing the bonds. *Turner v. Woodson County Com's*, 12 Am. & Eng. R. Cas. 600, 27 Kan. 314.

The following proviso contained in section 1, ch. 128, Laws of 1887, is not unconstitutional or void: "Provided, That no bonds except for the erection and furnishing of school-houses shall be voted for and issued by any county or township, within one year after the organization of such new county, under the provisions of this act." Under this proviso a newly organized county cannot legally vote for and issue bonds in aid of a railroad company within one year after the county has been organized. *State ex*

rel. v. Haskell County Com'rs, 40 Kan. 65, 19 Pac. Rep. 362.

The act of 1873, ch. 51, authorizing a certain township to take stock in a manufacturing company, and to issue its bonds in payment, the declared purpose of the company being to purchase needed lands and construct and maintain a dam across a river, and build and maintain mills for manufacturing purposes, is unconstitutional as taking property for private purposes. *Central Branch U. P. R. Co. v. Smith*, 23 Kan. 745.

33. Kentucky.—The legislature has constitutional authority to grant to municipal corporations power to tax their property for the construction of works of internal improvement, for facility of access to and transportation to and from the town or city. *Talbot v. Dent*, 9 B. Mon. (Ky.) 526. —FOLLOWING *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.—NOT FOLLOWED IN *Hanson v. Vernon*, 27 Iowa 28. REVIEWED IN *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.

The provision of an amended statute authorizing a tax for railroad stock is not a violation of the rights of the taxpayers, but to their advantage. *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

An act of the legislature authorizing counties and other municipalities to subscribe to the stock of railroads, upon a majority vote in favor of the subscription, is constitutional and valid; hence an act authorizing a county to compromise with holders of bonds issued in payment of such subscription is valid. *Brown v. Tinsley*, (Ky.) 21 S. W. Rep. 535.—FOLLOWING *Slack v. Maysville & L. R. Co.*, 13 B. Mon. (Ky.) 1.

The power of a county court to make a subscription of stock for the county, and to levy taxes to meet it, is conferred by express grant, to which the legislature may annex any condition not repugnant to the constitution. The legislature therefore has the power to require, as a condition precedent to the validity of a subscription of stock by a county court for railroad purposes, not only a majority of all votes cast in the county, but also a majority of those residing outside the limits of a certain town in the county. Such a statute does not confer a personal privilege at all, much less an exclusive privilege, in the meaning of the constitution. And the provision of the statute construed in this case that "no tax shall be imposed for said purpose upon the

property of those residing outside said [town] limits unless the votes of a majority of the voters thus residing outside said limits shall be cast in favor of such subscription and tax" was not intended to cast any burden at all upon those within the limits of the town in the event a majority of those outside the limits should vote against the proposition. *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. Rep. 687.—QUOTING *Phillips v. Covington & C. Bridge Co.*, 2 Metc. (Ky.) 219.

An act of the legislature required a county court to subscribe for a certain number of shares of capital stock of a railroad company in behalf of a certain precinct in the county, and to issue in payment therefor the coupon bonds of that precinct. *Held*, that the act was constitutional, and that no case for an injunction against the subscription was made out. *Allison v. Louisville, H. C. & W. R. Co.*, 10 Bush (Ky.) 1.—DISTINGUISHING *Allison v. Louisville, H. C. & W. R. Co.*, 9 Bush 247.

The Cumberland & Ohio R. Co., in the exercise of a right conferred upon it by its charter, applied to the county court of Barren county April 5, 1872, to submit to the qualified voters of said county a proposition for the subscription by the county for three hundred and fifty thousand dollars of the capital stock of the railroad company. The court made the order as requested, and the proposition was voted on May 4, 1872, and a majority of the qualified voters of the county voting at the election pronounced in favor of it. The county court made an order Jan. 3, 1873, directing the judge thereof upon a given contingency to subscribe for and on behalf of the county for the amount of capital stock stated. The legislature passed an act March 11, 1873, before the subscription was actually made, amending the charter of the railroad company so as to impose new and additional conditions upon the issue and delivery of the bonds of the county to the company. This amendment was rejected by the company July 10, 1873. *Held*, that the act of March 11, 1873, amending the charter of the company is constitutional and binding on the company, and that the company is not entitled to demand or receive the bonds of the county except upon the conditions imposed by the amendatory act aforesaid. *Cumberland & O. R. Co. v. Barren County Court*, 10 Bush (Ky.) 604.

34. Louisiana.—The act of March 12, 1852, "providing for the subscription by the parishes and municipal corporations of the state to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of the stock so subscribed," is constitutional. *Police Jury v. McDonogh*, 8 La. Ann. 341.—QUOTED IN *Cotten v. Leon County Com'rs*, 6 Fla. 610.

The restrictions imposed by articles 108 and 109 of the constitution of 1852 upon the aid which the state may grant to corporations for internal improvements are no limitation upon the aid which the legislature may authorize the police juries, etc., to grant. *Police Jury v. McDonogh*, 8 La. Ann. 341.

The act of March 6, 1876, to give effect to "the premium bond plan" of funding or adjusting the public debt of the city of New Orleans, is unconstitutional so far as it attempts to restrict the taxing power of the city so as to impair the obligation of its contracts with the holders of its bonds issued for railroad stock, or for other purposes. *Wolff v. New Orleans*, 12 Am. & Eng. R. Cas. 625, 103 U. S. 358.—FOLLOWING *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535.

After the state had issued certain bonds in aid of a railroad the legislature created a "Board of Liquidation" and authorized it to fund all outstanding valid claims against the state. A subsequent act declared the bonds void and forbade the board to fund them. *Held*, that the act withdrew from the board all power to fund the bonds; that it did not impair the obligation of any contract, as there had been no acceptance of the proposition to fund, and no consideration passed. *Durkee v. Board of Liquidation*, 3 Am. & Eng. R. Cas. 135, 103 U. S. 646.

35. Maine.—Special Laws 1850, ch. 379, authorizing certain cities and towns to grant aid for the construction of a certain railroad, is constitutional. *Augusta Bank v. Augusta*, 49 Me. 507.

Taxation in aid of railroads is taxation for a public purpose, and on this ground alone its constitutionality is sustainable. *Dyar v. Farmington*, 70 Me. 515.

36. Maryland.—The object of the act of 1872, ch. 245, was a loan of the credit of the county, and within and subject to the constitutional restriction (Const. art. 3, § 54). *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

The act was not duly published in the newspapers of a county "for two months before the next election for members of the house of delegates." *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

37. Michigan.—The statutes authorizing municipal aid to railroads are not in conflict with the constitution. *Talcott v. Pine Grove Tp.*, 1 Flipp. (U. S.) 120.—*DE- NYING People v. Salem Tp.*, 20 Mich. 452.

The act of March 22, 1869, authorizing cities, villages, and townships to pledge their aid to railroads, by loan or donation, is not in conflict with a provision in the state constitution that no person shall be deprived of "life, liberty, or property without due process of law;" nor in conflict with a provision that "the credit of the state shall not be granted to or in aid of any person, association, or corporation." *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.

Nor is it in conflict with the provision forbidding the state from subscribing to the stock of any corporation, or from being interested in any work of internal improvement. *Taylor v. Ypsilanti*, 12 Am. & Eng. R. Cas. 549, 105 U. S. 60.—FOLLOWED IN *Young v. Clarendon Tp.*, 29 Am. & Eng. Corp. Cas. 115, 132 U. S. 340, 10 Sup. Ct. Rep. 107.

The legislature has no authority to pass statutes authorizing townships or cities to pledge their credit in aid of the construction of a railroad; such legislation is void both upon the fundamental principles underlying the taxing power, and also upon specific provisions of our state constitution. The fact that a city has received in exchange for void bonds issued under such an enabling act the bonds of the railroad company in whose favor the city bonds were issued does not make valid the unauthorized obligations of the city. A municipal corporation has no general authority to exchange promises with other corporations or persons; its contract, to be valid, must be within the scope of the authority conferred upon it by law, and for municipal purposes. *Thomas v. Port Huron*, 27 Mich. 320.

38. Minnesota.—The amendment to section 2, article 9, of the constitution adopted November 6, 1860, providing that "no law levying a tax or making other provisions for the payment of interest or prin-

cipal of the bonds denominated 'Minnesota state railroad bonds,' shall take effect or be in force until such law shall have been submitted to a vote of the people of the state and adopted by a majority of the electors of the state voting upon the same," impairs the obligation of the contracts therein referred to, and is, consequently, repugnant to the clause in the constitution of the United States that no state shall pass any law impairing the obligation of contracts, and it is therefore void. *State ex rel. v. Young*, 2 *Am. & Eng. R. Cas.* 348, 29 *Minn.* 474, 9 *N. W. Rep.* 737.

The act of the legislature entitled "An act providing for the adjustment of the Minnesota state railroad bonds," approved March 21, 1881, delegates to judges therein mentioned legislative power—that is, power by the decision they are called on to make to determine which of two sections, section 4 or section 5, of this act shall take effect and be the law—and it is therefore void. *State ex rel. v. Young*, 2 *Am. & Eng. R. Cas.* 348, 29 *Minn.* 474, 9 *N. W. Rep.* 737.

An agreement entered into between a railway company and the authorities of a town, upon petition of a majority of the taxpayers, in pursuance of the provisions of section 7, ch. 107, Laws of 1877, for the issuance of the bonds of such town, is invalid, and imposes no legal obligation upon the town by reason of the unconstitutionality of the statute; and the latter, in its corporate capacity, is not estopped to resist the enforcement of bonds so issued by the completion of a line of railroad under the agreement by such company. *Plainview v. Winona & St. P. R. Co.*, 30 *Am. & Eng. R. Cas.* 259, 36 *Minn.* 505, 32 *N. W. Rep.* 745. — FOLLOWING *Harrington v. Plainview*, 27 *Minn.* 224, 6 *N. W. Rep.* 777.

Where a railroad company procured negotiable bonds to be so issued by the officers of a town, under the section of the statute referred to, which were in form the obligations of the town, and recited on their face that they were issued under such an agreement, and which were accepted by such company, and negotiated and transferred by it for the full face value thereof, and were subsequently negotiated and sold to the citizens of another state, who, in an action in the circuit court of the United States, brought against the town to recover overdue interest, and tried upon the merits, recovered final judgment therefor, which

fixed the liability of the town for the whole amount of such bonds to the holders thereof—held, that the acts of the company in procuring and negotiating the bonds were without authority of law and wrongful, and that, by reason thereof, a cause of action arose in favor of the town, and against the company, for the recovery of the amount of such bonds, with interest. *Plainview v. Winona & St. P. R. Co.*, 30 *Am. & Eng. R. Cas.* 259, 36 *Minn.* 505, 32 *N. W. Rep.* 745.

39. Mississippi.—The act of March 26, 1874, authorizing the town of Durant to issue bonds in aid of railroads, is constitutional. *New Orleans, St. L. & C. R. Co. v. McDonald*, 53 *Miss.* 240.

40. Missouri.—(1) *Decisions by state courts.*—An act of the legislature making previous subscriptions to railroad stock valid and binding, if approved by the court making the subscription after the passage of the act, is constitutional. *Hannibal & St. J. R. Co. v. Marion County*, 36 *Mo.* 294.

Bonds issued by a township under the act to facilitate the construction of railroads in Missouri (Sess. Acts 1868, p. 92) are not in any sense county bonds; and the county courts and counties named are merely made use of as agencies to carry out the object contemplated by the act. Hence that act is not antagonistic to section 14, art. xi., of the state constitution. *State ex rel. v. Linn County Court*, 44 *Mo.* 504.—FOLLOWED IN *Cass County v. Johnston*, 95 *U. S.* 360.

The act of 1868 is unconstitutional and void because it permits a subscription to be made by a township to the stock of a railroad company if two thirds of the qualified voters who vote on the question at an election are in favor of it, whereas the constitution of 1865 requires the assent of two thirds of all the qualified voters to authorize any municipal subscription. *Webb v. Lafayette County*, 67 *Mo.* 353.—QUOTING *St. Joseph & D. C. R. Co. v. Buchanan County Court*, 39 *Mo.* 485; *Kirkbride v. Lafayette County*, decided by Judge Dillon Nov., 1876 (*U. S.*).—*State ex rel. v. Brassfield*, 67 *Mo.* 331.—DISAPPROVED IN *Douglass v. Pike County*, 101 *U. S.* 677.—*Ranney v. Bader*, 67 *Mo.* 476.—FOLLOWING *State ex rel. v. Brassfield*, 67 *Mo.* 331; *Webb v. Lafayette County*, 67 *Mo.* 353.

The above act is also unconstitutional because section 5 devotes all the state

and county taxes to be collected within any township from any railroad company to which the township has subscribed to the reimbursement of the township for its subscription, and after it is fully reimbursed, then to school fund of the township. This is indirectly making the state extend its aid to railroads, in violation of section 13, art. 11, of the constitution of 1865; and is likewise making the county extend its aid to railroads without the assent of two thirds of the qualified voters of the whole county, in violation of section 14, art. 11. Section 5 is the compensatory section, and may be said to sustain to the whole act the same relation that the consideration clause sustains to a contract; hence it cannot be held that this section only is inoperative: the whole act is void. *Webb v. Lafayette County*, 67 Mo. 353.—APPROVED IN State ex rel. v. Walker, 85 Mo. 41.

This act is also void because the legislature had no power to authorize municipal townships to subscribe to railroad companies. It could give the power only to corporate or quasi corporate bodies, such as counties, cities, or towns. *Webb v. Lafayette County*, 67 Mo. 353.—FOLLOWED IN *Ranney v. Bader*, 67 Mo. 476.

The Act of the General Assembly of March 19, 1881 (Laws of 1881, p. 189), providing for the refunding of said taxes to the townships by the state, is unconstitutional. *State ex rel. v. Walker*, 85 Mo. 41.

(2) *Decisions by federal courts.*—The Mo. "Township Aid Act," to authorize townships to subscribe to the stock of railroads upon a two-thirds vote, is not in conflict with a provision of the state constitution providing that no "county, city, or town" shall make such subscriptions except upon a two-thirds vote. *Cass County v. Johnston*, 95 U. S. 360; *affirming* 3 Dill. 185.—FOLLOWING State ex rel. v. Linn County Court, 44 Mo. 504; *Ranney v. Bader*, 50 Mo. 600; *McPike v. Pen*, 51 Mo. 63; *State v. Cunningham*, 51 Mo. 479; *Rubey v. Shain*, 54 Mo. 207; *State ex rel. v. Bates County Court*, 57 Mo. 70; *State v. Clarkson*, 59 Mo. 149; *State v. Daviess County Court*, 64 Mo. 31; *State ex rel. v. Cooper County Court*, 64 Mo. 170. OVER-RULING *Harshman v. Bates County*, 92 U. S. 569.—CRITICISED IN State ex rel. v. Brassfield, 67 Mo. 331. FOLLOWED IN *Carroll County v. Smith*, 111 U. S. 556.—*Foot v. Johnson County*, 5 Dill. (U. S.) 281.

6 D. R. D.—35

—FOLLOWING *Cass County v. Johnston*, 95 U. S. 360, 5 Cent. L. J. 506. NOT FOLLOWING *Harshman v. Bates County*, 92 U. S. 569, 3 Dill. 150.

The Mo. Act of March 18, 1871, entitled "An act to authorize cities and towns to purchase lands and donate, lease, or sell the same to railroad companies," is in violation of the state constitution of 1865, art. 11, § 14, providing that the general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any corporation unless authorized by a two-thirds vote; and bonds issued to purchase lands to be donated to a railroad are void, though authorized by the two-thirds vote. *Jarroll v. Moberly*, 103 U. S. 580; *affirming* 5 Dill. 253.

A statute requiring municipal bonds issued for stock in a railroad to be registered and certified by the state auditor, passed after a township had voted stock to a railroad, but before its bonds were issued, is not unconstitutional as impairing the obligation of a contract. *Hoff v. Jasper County*, 15 Am. & Eng. R. Cas. 592, 110 U. S. 53, 3 Sup. Ct. Rep. 476.—FOLLOWING *Anthony v. Jasper County*, 101 U. S. 693.

A law requiring the state auditor to register municipal bonds issued for stock in railroads, and to certify that the bonds issued according to law, is not unconstitutional as an attempt to confer judicial powers on an executive officer. *Hoff v. Jasper County*, 15 Am. & Eng. R. Cas. 592, 110 U. S. 53, 3 Sup. Ct. Rep. 476.

Mo. Act of March 8, 1879, relating to the levying of taxes for the payment of county indebtedness, is in conflict with that provision of the federal constitution which prohibits laws impairing the obligation of contracts, so far as it relates to judgments against counties upon bonds issued in aid of railroads. *United States ex rel. v. Johnson County*, 5 Dill. (U. S.) 207. n.—QUOTING State ex rel. v. Shortridge, 56 Mo. 126; *Bronson v. Kinzie*, 1 How. (U. S.) 311.

The act of March 18, 1871, entitled "An act attaching certain territory to the town of Westport to enable said town to take stock in a railroad," is constitutional. It is not an act to authorize a municipal corporation to tax for its own local purposes lands lying beyond its own corporate limits. *Henderson v. Jackson County*, 2 McCrary, (U. S.) 615, 12 Fed. Rep. 676.

The above act is not unconstitutional for

failing to comply with a provision of the state constitution that every law enacted shall relate to one subject, and that shall be expressed in its title. *Henderson v. Jackson County*, 2 *McCrary* (U. S.) 615, 12 *Fed. Rep.* 676.

The act of March 24, 1868, entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts," is in conflict with the state constitution of 1865, art. 11, § 14, so far as it contemplates the right thereafter to subscribe for stock and issue bonds without being authorized by a special election. *Hill v. Memphis*, 23 *Fed. Rep.* 872.

41. Nebraska.—The act of Feb. 15, 1869, authorizing the county of Otoe to subscribe to the capital stock of a certain railroad, is constitutional and valid. *Chicago, B. & Q. R. Co. v. Otoe County*, 16 *Wall* (U. S.) 667, 4 *Am. Ry. Rep.* 82.—APPLIED IN *Duanesburgh v. Jenkins*, 57 *N. Y.* 177. FOLLOWED IN *Pine Grove Tp. v. Talcott*, 19 *Wall* (U. S.) 666.

The act of February 15, 1869, entitled "An act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose," does not violate the state constitution of 1869, art. 2, § 19, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title. *Otoe County v. Baldwin*, 15 *Am. & Eng. R. Cas.* 563, 111 *U. S.* 1, 4 *Sup. Ct. Rep.* 265. *Dawson County Com'rs v. McNamar*, 10 *Neb.* 276, 4 *N. W. Rep.* 991.

The act of Feb. 15, 1869, does not conflict with the provision of the Bill of Rights that "the property of no person shall be taken for public use without just compensation therefor." *Hallenbeck v. Hahn*, 2 *Neb.* 377.—DISAPPROVING *Hanson v. Vernon*, 27 *Iowa* 28; *People ex rel. v. Salem Tp.*, 20 *Mich.* 452; *Whiting v. Sheboygan & F. du L. R. Co.*, 25 *Wis.* 167. QUOTING *Leavenworth County Com'rs v. Miller*, 7 *Kan.* 479.

The act of February 15, 1869, as amended March 3, 1870, and February 17, 1875, is not in conflict with section 2, article 12, of the new constitution, and is still in full force. *Reineman v. Covington, C. & B. H. R. Co.*, 7 *Neb.* 310.

42. Nevada.—The act of Jan. 27, 1869,

authorizing a certain county to issue bonds in aid of a railroad and to levy taxes to pay the same, is not in conflict with a provision of the state constitution providing that no one shall be deprived of his property without due process of law; nor with another provision of the constitution that private property shall not be taken for public use without just compensation. *Gibson v. Mason*, 5 *Nev.* 283.

Neither is the above act in conflict with a provision of the state constitution which prohibits the legislature from passing local or special laws upon certain subjects, including the assessment and collection of taxes, as the act simply directs a levy of taxes, and in no way directs how they shall be apportioned to the different taxpayers, or how collected. *Gibson v. Mason*, 5 *Nev.* 283.

43. New Hampshire.—The statute (Gen. St. ch. 34, § 16) which authorizes towns to raise and appropriate money, etc., to aid in the construction of a railroad is not in conflict with the constitution. *Perry v. Keene*, 56 *N. H.* 514, 20 *Am. Ry. Rep.* 184.—REVIEWING *Concord R. Co. v. Greely*, 17 *N. H.* 47; *Great Falls Mfg. Co. v. Fernald*, 47 *N. H.* 444.

44. New York.—New York Act of April 12, 1851, authorizing the several railroad corporations of this state to subscribe to the capital stock of a certain railroad, is constitutional and valid. *White v. Syracuse & U. R. Co.*, 14 *Barb.* (N. Y.) 559.—DISTINGUISHING *Hartford & N. H. R. Co. v. Croswell*, 5 *Hill* (N. Y.) 383.—NOT FOLLOWED IN *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 *N. J. Eq.* 178.

The act to amend the charter of the city of Rochester, passed July 5, 1851, including sections 285 and 291, inclusive, which authorize the city corporation, upon certain conditions, to subscribe for and become the purchaser of stock in the Rochester & Genesee Valley railroad company to the amount of \$300,000, to issue the corporate bonds for that sum, to dispose of the stock by sale, and to raise by taxation the money to discharge the interest of such bonds, was constitutionally passed and is a valid and binding law. *Clarke v. Rochester*, 28 *N. Y.* 605; affirming 24 *Barb.* 446, 5 *Abb. Pr.* 107, 14 *How. Pr.* 193; reversing 13 *How. Pr.* 204.

The act of the legislature authorizing the towns in the counties through which the

Albany & Susquehanna railroad is located and in progress of construction to borrow money and subscribe for and purchase the stock of the company, with a view of aiding in the completion of the work, is not repugnant to any express provisions of the constitution; nor is a prohibition upon the power exerted by the legislature to be necessarily implied from the provisions of that instrument. The power exercised was within the general grant of legislative authority, and the act is a valid and binding law. That act does not deprive any citizen of his property, nor take private property for public use, within the meaning of the constitution. *Grant v. Courter*, 24 Barb. (N. Y.) 232.

New York Act of March 18, 1854, authorizing the city of Albany to loan its credit to a certain railroad company, was a valid exercise of the legislative power and is valid. *Benson v. Mayor, etc., of Albany*, 24 Barb. (N. Y.) 248.

New York Act of May 18, 1869, ch. 907, permitting municipal corporations to aid in the construction of railroads, is constitutional. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446.—FOLLOWING *Bank of Rome v. Rome*, 18 N. Y. 38; *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 456.

New York Act of March 29, 1869, authorizing certain towns in Jefferson county to subscribe to railroad stock and to issue bonds, and the enabling act of March 9, 1870, are valid and constitutional. *Cumines v. Jefferson County Sup'rs*, 63 Barb. (N. Y.) 287; *affirmed in 3 T. & C.* 296, 64 N. Y. 626.

The act of 1869 does not appropriate any of the public moneys or property of the state, and is therefore not in conflict with a provision of the constitution that such appropriations can only be made upon a two-thirds vote of the legislature. *In re Tax-Payers of Kingston*, 40 How. Pr. (N. Y.) 444.

And the taking of stock in a railroad by a town is not "lending the credit of the state" so as to be in conflict with the state constitution; neither is it strictly "lending the credit" of the town. When the town acquires the stock, it sustains the same relation to the company as an individual stockholder. *In re Tax-Payers of Kingston*, 40 How. Pr. (N. Y.) 444.

The act of 1874 (ch. 638, Laws of 1874) "to ratify and confirm certain orders of the

county judge of the county of Steuben appointing commissioners to issue bonds * * * and to legalize all proceedings under and pursuant to such orders and acts" is not violative of the constitutional provision (State Const. art. 3, § 16) declaring that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in the title." The locality is the territory composing the three towns referred to in the act, and but one subject is considered. The legislature had power to validate the bonds referred to in the act. *Rogers v. Stephens*, 86 N. Y. 623, *mem.*; *affirming 21 Hun* 44.—FOLLOWING *Horton v. Thompson*, 71 N. Y. 513.

New-York Act of 1876, ch. 66, § 2, authorizing municipalities holding bonds given by the Rochester & S. L. R. Co. in exchange for bonds of such municipalities to dispose of such bonds, is unconstitutional in so far as it authorizes an exchange of bonds for stock in the railroad company, being in violation of N. Y. Constitution, art. 8, § 2, providing that no county, city, town, or village shall give property or loan its credit to any individual, association, or corporation, or own stock or bonds therein. *Wheatland v. Taylor*, 29 Hun (N. Y.) 70.

And said section is further unconstitutional as being in conflict with N. Y. Constitution, art. 3, § 16, providing that no private or local bill shall embrace more than one subject, and that shall be expressed in its title. *Wheatland v. Taylor*, 29 Hun (N. Y.) 70.

Laws providing securities for the payment of railroad aid bonds are in the nature of contracts between debtor and creditor; and the legislature cannot, as in the case of ordinary legislation, supersede at will such a law by a later act unless the later act provides a full equivalent. *Van Tassel v. Derrenbacher*, 56 Hun 477, 10 N. Y. Supp. 145, 31 N. Y. S. R. 312; *affirmed in 123 N. Y.* 661, *mem.*, 26 N. E. Rep. 750, *mem.*

45. North Carolina.—A statute authorizing the people of a county to take stock in a railroad, and to raise the funds to pay for it by themselves, or otherwise, is not forbidden by the constitution. *Caldwell v. Burke County Justices*, 4 Jones Eq. (N. Car.) 323. *Hill v. Forsythe County Com'rs*, 67 N. Car. 367.

An act of assembly directing that the county taxes which might be levied upon the property and franchise of a railroad

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company in a certain township should be applied, as far as necessary, to the payment of the interest on bonds issued by such township in aid of the railroad is constitutional. *Brown v. Hertford County Com'rs*, 100 N. Car. 92, 5 S. E. Rep. 178.

The mere fact that other neighborhoods will derive incidental advantages from such action on the part of a township is no objection to legislation of this kind. *Brown v. Hertford County Com'rs*, 100 N. Car. 92, 5 S. E. Rep. 178.

Section 7 of art. 7 of the constitution prohibits any county, city, town, or other municipal corporation from contracting any debt, etc., without the affirmative consent of a majority of the people of the county who are qualified to vote. And the act of 1869-70, ch. 9, being an attempt to evade the restriction which the constitution has put on counties, etc., to contract debts, is unconstitutional and void. *Chester & L. N. G. R. Co. v. Caldwell County Com'rs*, 72 N. Car. 486.—DISTINGUISHING *Reiger v. Beaufort Com'rs*, 70 N. Car. 319.

46. Ohio.—The act of March 1, 1851, authorizing the commissioners of the county of Clinton to subscribe to the stock of a railroad company, does not delegate legislative power or contravene the constitution of 1802 in providing that the subscription shall not be made until the assent of a majority of the electors of the county (except two townships) is first obtained at an election held for that purpose. *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.—APPROVING *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475. REVIEWING *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.—FOLLOWED IN *Steubenville & I. R. Co. v. North Tp.*, 1 Ohio St. 105. REVIEWED IN *Knox County Com'rs v. Nichols*, 14 Ohio St. 260; *Walker v. Cincinnati*, 21 Ohio St. 14.—*Steubenville & I. R. Co. v. North Tp.*, 1 Ohio St. 105.—FOLLOWING *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77.

The act of March 20, 1850 (48 Ohio L. L. 320), authorizing the county of Belmont, on certain conditions, to subscribe for stock in the Central Ohio railroad company, and amending the charter of said railroad company (46 Ohio L. L. 165), is not inconsistent with the new constitution of Ohio. *Thompson v. Kelly*, 2 Ohio St. 647.

The act of April 23, 1872, to authorize counties, townships, and the municipalities

therein named to build railroads, etc. (69 Ohio L. 84), authorizes the raising of money by taxation, which is equally applicable to the unlawful purpose of aiding railroad companies and others engaged in building and operating railroads as it is to any lawful purpose, and gives to the officers intrusted with the control and application of the money thus raised no means or power of discrimination as to the unlawfulness of the work or purpose to which it is to be applied, and is thus in contravention of section 6, article 8, of the constitution, and therefore void. *Taylor v. Ross County Com'rs*, 23 Ohio St. 22.—DISTINGUISHING *Walker v. Cincinnati*, 21 Ohio St. 15.

Section 6 of article 8 of the constitution of Ohio inhibits the combination, in any form, of the public funds or credit of any county, city, town, or township with the capital of any other person or persons, incorporated or unincorporated, for the purpose of promoting any private enterprise whatever. Hence the act of April 6, 1880 (77 Ohio L. 119), "to authorize certain townships to build railroads and to lease or operate the same," is unconstitutional and void. *Wyscaver v. Atkinson*, 37 Ohio St. 80. *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 215.—FOLLOWED IN *Aetna Life Ins. Co. v. Pleasant Tp.*, 53 Fed. Rep. 214.—*Aetna Life Ins. Co. v. Pleasant Tp.*, 53 Fed. Rep. 214.—FOLLOWING *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. Rep. 215.

Suit was brought on certain township bonds, and an answer set up certain facts for the purpose of showing that the bonds were invalid. The trial court sustained a demurrer to the answer, but on appeal the judgment was reversed, the court holding that the statute authorizing the bonds was unconstitutional. After the case was sent back the trial court overruled the demurrer and the plaintiff replied, alleging the constitutionality of the statute. Held, that the defendant could offer evidence to prove the same facts upon which the court above held on demurrer that the statute was unconstitutional. *Aetna Life Ins. Co. v. Pleasant Tp.*, 53 Fed. Rep. 214.

47. Pennsylvania.—An act of assembly authorizing a subscription of a city to the stock of a railroad corporation is not forbidden by art. 1, section 13, of the state constitution, that section not being a restriction upon the legislative authority of the

two houses, but a bestowal of privilege upon the separate branches. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.—FOLLOWED IN *Moers v. Reading*, 21 Pa. St. 188. NOT FOLLOWED IN *Hanson v. Vernon*, 27 Iowa 28. QUOTED IN *Walker v. Cincinnati*, 21 Ohio St. 14.

Such an act does not impair the obligations of any existing contracts, nor does it attempt the impossibility of creating a contract, but merely authorizes two corporations to make one if they shall see proper. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

This is not a taking of private property for public use without compensation, contrary to section 10 of art. 9. When property is not seized, and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not taken. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

It cannot be said that the plaintiffs will be deprived of their property, in violation of section 9, art. 9. The settled meaning of the word deprive, as there used, is the same as that of the word take in section 10. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.—REVIEWED IN *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81.

Railroads are not private affairs. They are public improvements, and it is the right and duty of the state to advance the commerce and promote the welfare of the people by making or causing them to be made at public expense. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

The state may rightfully aid in the execution of such public works by delegating to the corporation the right of eminent domain, as she always does, or by an exertion of the taxing power, as she has done very often. *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

An act of the legislature authorizing a city to subscribe to the stock of a railroad company is constitutional. *Moers v. Reading*, 21 Pa. St. 188.—FOLLOWING *Sharpless v. Mayor, etc., of Phila.*, 21 Pa. St. 147.

A law which increased the capital stock of a railroad, authorized its officers to borrow money, and empowered certain municipalities to subscribe to its stock—*held*, not in conflict with a provision of the Pa. Constitution of 1838, art. 1, § 25, that, "No law hereafter enacted shall create, renew, or extend the charter of more than one cor-

poration." The law did not "extend" the municipal charters, within the meaning of the constitution. *Moers v. Reading*, 21 Pa. St. 188.

A law authorizing a city to subscribe to the stock of a railroad if it should so decide, and directing the manner of holding an election to vote on a proposition to subscribe, is not void as an attempt to delegate legislative power to the people. *Moers v. Reading*, 21 Pa. St. 188.

Prior to the amendments to the constitution in 1857 acts of assembly authorizing municipal subscriptions to the stock of railroad and other companies were constitutional. *Com. ex rel. v. Allegheny County Com'rs*, 32 Pa. St. 218.—NOT FOLLOWED IN *Hanson v. Vernon*, 27 Iowa 28.

The constitutionality of acts of assembly authorizing municipal subscriptions to the stock of railroad companies is a settled question, and no longer open to dispute. *Com. v. Taylor*, 36 Pa. St. 263. *Com. ex rel. v. Perkins*, 43 Pa. St. 400.

The ordinance passed by the city councils of Philadelphia on the 16th of Feb., 1854, authorizing a subscription of fifteen thousand shares in the North Western R. Co., is not in violation of the provisions of the act of Feb. 2, 1854, known as the Consolidation Act, nor in violation of the vested rights of the citizens of the then county of Philadelphia; nor is it contrary to their constitutional right to be exempt from taxation except by their representatives. *Kiddle v. Philadelphia & N. W. R. Co.*, 1 Pittsb. (Pa.) 158.

48. South Carolina.—The city council of Charleston, having at different times subscribed to the stock of railroad companies within and without the state, the legislature by an act of 1854 confirmed all such subscriptions and declared them obligatory on the city council. *Held*, that the act of 1854 was constitutional, and that no proceeding by *quo warranto*, in the name of the state, for the purpose of questioning the validity of such subscriptions, could afterwards be taken. *State ex rel. v. Mayor, etc., of Charleston*, 10 Rich. (So. Car.) 491.

An act of the legislature incorporating a company authorized certain townships to subscribe to the capital stock of such company upon prescribed conditions, and incorporated these townships "for the purpose of this act." *Held*, that the act related to but one subject, which was expressed in

the title—"An act to incorporate the G. & P. R. R. Co."—and that these townships were incorporated. (Mr. Justice McIver doubting.) *Floyd v. Perrin*, 30 So. Car. 1, 8 S. E. Rep. 14.

But as the constitution declares that "the corporate authorities of *** townships *** may be vested with power to assess and collect taxes for corporate purposes," and as neither in this act nor in any other act is any duty imposed upon these townships, or right given to them, except to subscribe to this railroad and to assess taxes to pay this subscription, the townships are without any corporate purpose, and therefore the power to assess a tax to pay this subscription is violative of this constitutional provision. Art. 9, section 8. (Mr. Justice McGowan dissenting.) *Floyd v. Perrin*, 30 So. Car. 1, 8 S. E. Rep. 14.—DISTINGUISHING *State ex rel. v. Chester & L. R. Co.*, 13 So. Car. 290.

This act having declared the county commissioners to be the corporate agents of the townships in the matter of the elections, subscription, payment of interest, etc., the county commissioners were not, in these matters, constituted a court before whom the taxpayers must, in the first instance, object to the constitutionality of the act, or be thereafter estopped from raising the question. *Floyd v. Perrin*, 30 So. Car. 1, 8 S. E. Rep. 14.

A township which possessed no corporate authority to incur a debt or impose a tax declared its willingness to be taxed to aid in the construction of a railroad. Held, that the tax was for a public purpose, and it was competent for the legislature to impose upon the township a tax to pay such subscription, and to accept the bonds which it had illegally issued, as was done by the act of Dec. 22, 1888. *State ex rel. v. Whitesides*, 30 So. Car. 579, 9 S. E. Rep. 661, 3 L. R. A. 777.

49. Tennessee.—A statute authorizing a limited number of counties of the state to make subscriptions to the stock of certain railroads without a popular vote is authorized by a provision in the state constitution that "the legislature shall have power to grant such charters of incorporation as may be expedient for the public good," though the general law of the state requires a vote to authorize such subscriptions, and another provision of the constitution forbids laws "for the benefit of individuals inconsistent

with the general law of the land." *Tipton County v. Rogers L. & M. Works*, 1 Am. & Eng. R. Cas. 517, 103 U. S. 523.

The act of March 9, 1867, creating a board of commissioners for a certain county with power to issue bonds of the county for stock in railroads, having been declared unconstitutional by the highest court of that state, the U. S. supreme court will consider that decision binding, and will not review the question. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121.

The reference to a vote of the people of the question of subscription or no subscription of stock in a railroad company, as prescribed in the act of 1852, ch. 117, does not invalidate the act by bringing it in conflict with the constitution. *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 637.

The act of Feb. 25, 1867, empowering the county court of counties through which a railroad might run to subscribe to its capital stock, as amended Nov. 5, 1867, is not in conflict with the constitution of 1834, and the bonds issued thereunder are valid. (Deaderick, C.J., and Turney, J., dissenting.) *Lauderdale County v. Fargason*, 7 Lea (Tenn.) 153.

Bonds issued pursuant to the act authorizing them to bear interest lawful at the place where they are payable are not usurious on their face, if the interest contracted for was lawful at the place of payment, though it be in excess of the rate allowed in the state, and such a law is not a partial law, and is constitutional. *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.

50. Texas.—The general question of legislative power to authorize municipal corporations to subscribe for stock in railroad companies, to borrow money on the faith and credit of the corporation, to pay subscriptions, and to levy taxes to pay for loans, discussed, and authorities cited at length, and the conclusion arrived at that the courts of last resort have almost uniformly sustained the constitutionality of such laws. *San Antonio v. Jones*, 28 Tex. 19.—APPROVED IN *San Antonio v. Gould*, 34 Tex. 49. FOLLOWED IN *San Antonio v. Lane*, 32 Tex. 405.—*Anderson County v. Houston & G. N. R. Co.*, 53 Tex. 228.

It was competent for the legislature while the constitution of 1835 was in force to authorize a municipal corporation to subscribe

to the capital stock of a railroad company, and to issue bonds and levy taxes for the liquidation of its subscription, if two thirds of the electors of the corporation should vote in favor of the subscription at an election to be held for the purpose. *San Antonio v. Gould*, 34 Tex. 49.—APPROVING *San Antonio v. Jones*, 28 Tex. 19; *Chiles v. Drake*, 2 Metc. (Ky.) 146.—DISAPPROVED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200; *San Antonio v. Mehaffy*, 96 U. S. 312.

In 1850 the legislature passed an act entitled "An act to incorporate the San Antonio railroad company," of which act all of the provisions except those contained in one section conferred the ordinary and appropriate powers, rights, and privileges incident and adequate to such a franchise. But by the twelfth section of the act it was enacted that the city of San Antonio and other incorporated towns on the line of the road, and also the several counties through which it should pass, might subscribe to the capital stock of the railroad company, and issue bonds or otherwise pledge their faith to pay for the same, provided that two thirds of their respective electors should vote in favor of the subscription at elections to be held for the purpose. *Held*, that these provisions are extraordinary and not such as are necessary to or usually engrafted upon a railroad charter, and the section itself, if regarded as a separate enactment, would properly be entitled "An act to provide the means for building the railroad," and it was therefore repugnant to section 24 of article 7 of the constitution of 1845, then in force and above cited. *San Antonio v. Gould*, 34 Tex. 49. *Giddings v. San Antonio*, 47 Tex. 548.—DISAPPROVED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200; *San Antonio v. Mehaffy*, 96 U. S. 312. FOLLOWED IN *Peck v. San Antonio*, 51 Tex. 490.

The authority sought to be given in section 12 of said act, upon certain cities named (to issue bonds, etc.), is not included in the caption of said act, and therefore conflicts with section 24, article 5, of the constitution, prescribing that "every law enacted by the legislature shall embrace but one object, and that shall be expressed in its title." *Giddings v. San Antonio*, 47 Tex. 548.

A petition seeking to recover on bonds and interest thereon issued by the city of

San Antonio under section 12 of the said act of September 5, 1850, is subject to demurrer, and the action of the court below, sustaining the demurrer and dismissing the suit, is affirmed. *Giddings v. San Antonio*, 47 Tex. 548.

The constitution of 1845 provided that "every law enacted by the legislature shall contain but one object, and that shall be expressed in its title." A law was passed entitled "An act to incorporate the San Antonio railroad company," one section of which authorized a city to take stock in the company and issue bonds or otherwise pledge the faith of the city to pay the same. *Held*, no violation of the constitutional provision. *San Antonio v. Mehaffy*, 96 U. S. 312.—DISAPPROVING *San Antonio v. Gould*, 34 Tex. 49; *Giddings v. San Antonio*, 47 Tex. 548. FOLLOWING *San Antonio v. Lane*, 32 Tex. 405.—DISAPPROVED IN *Peck v. San Antonio*, 51 Tex. 490.

Section 32 of art. 12 of the constitution of 1869: "The inferior courts of the several counties in this state shall have the power, upon a vote of two thirds of the qualified voters of the respective counties, to assess and provide for the collection of a tax upon the taxable property to aid in the construction of internal improvements, provided that such tax shall never exceed two per cent. upon the value of such property," was not designed to determine the character of such aid or the manner in which it should be extended, but the conditions and extent of such aid. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

The act of April 12, 1871, entitled "An act to authorize counties, cities, and towns to aid in the construction of railroads and other works of internal improvement," prescribed the conditions and manner of extending such aid, and is constitutional. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

A county under such law can aid in the construction of a railroad by taking stock of the company engaged in its construction. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

51. Vermont.—The legislature passed an act authorizing certain towns to subscribe for, purchase, or acquire, on specified conditions, bonds of a certain railroad company in New York, or the bonds or stock of any railroad company whose road should

so connect with certain railroads in the state that ran through and near said towns as to afford communication with New York or Boston, and to make and issue their own negotiable bonds for that purpose, and providing that no such subscription should be made "unless the assent in writing thereto of a majority of the taxpayers, both in number and amount of tax," signed and acknowledged before a justice of the peace "by each person so assenting," should first be had upon an instrument of assent naming three resident citizens and taxpayers to be commissioners to make said subscription, nor unless said commissioners should also first append to such instrument their certificate that such majority had duly assented, and procure such instrument and certificate and a copy thereof, certified by the town clerk, to be recorded in the county clerk's office. *Held*, not unconstitutional for authorizing taxation for other than a public purpose, because the purpose was public; nor because the aid thereby authorized ensured to the benefit of a private corporation, for the right to tax depended upon the public character of the object to which the fund was appropriated, and not upon that of the means selected to apply it; nor because the enterprise the towns were thereby empowered to aid was beyond the scope of the purposes for which towns are organized, for towns are created to perform such governmental functions as the state may for convenience devolve upon them; nor because, the work being of a public character, the general public should have been taxed in its aid, for if the local public enjoy peculiar advantages thereby the taxes may be apportioned; nor because the power was not given to be exercised only by consent of the towns expressed by vote in open town meeting, for the towns' consent, although not needed, was in fact procured by a vote more effectually guarded than the one contended for could have been; nor because the railroad to be aided was without the state, for if the road aided was useful to the public there was warrant for the exercise of the power of taxation in aid of it, whether it was within the control of the state or not. *Bennington v. Park*, 50 *Vt.* 178.

52. Virginia.—A law which authorizes a city to subscribe to a joint stock company (created for the purpose of opening communication between that city and the waters of a navigable stream), and to levy taxes and

borrow money to pay said subscription, is constitutional. *Goádin v. Crump*, 8 *Leigh (Va.)* 120.—NOT FOLLOWED IN *Hanson v. Vernon*, 27 *Iowa* 28.

The intent of Const. art. 5, § 15, was to prevent in one act the union of objects having no connection, and is effected where an act has but one general aim fairly indicated in its title, as "to incorporate a railroad company"; and such act may embrace the necessary details, such as authorizing counties to aid by their subscriptions in its construction, and the like. And the act approved April 21, 1882, entitled "An act to incorporate the A. & D. R. Co.," is not repugnant to said section. *Powell v. Brunswick County Sup'rs*, 88 *Va.* 707, 14 *S. E. Rep.* 543.—APPROVED *Taylor v. Greenville County Sup'rs*, 86 *Va.* 506.

When under said act a county subscribes, it and its citizens must be presumed to have acted on the expectation that amendments to the charter would be made as required by the circumstances. *Powell v. Brunswick County Sup'rs*, 88 *Va.* 707, 14 *S. E. Rep.* 543.

53. Wisconsin.—(1) *Decisions in state courts.*—The act of 1867, ch. 93, and statutes like it, permitting counties and towns to subscribe for the capital stock of railroads, and to issue bonds and levy taxes to pay for the same, are constitutional. *Oleson v. Green Bay & L. P. R. Co.*, 36 *Wis.* 383.—FOLLOWED IN *State ex rel. v. Jennings*, 48 *Wis.* 549. LIMITED IN *Perrin v. New London*, 67 *Wis.* 416.—*Bushnell v. Beloit*, 10 *Wis.* 195.

The courts will not declare such an act invalid solely on the ground that it is not wise and wholesome, but is evil and pernicious in its consequences. *Bushnell v. Beloit*, 10 *Wis.* 195.—FOLLOWED IN *Lawson v. Milwaukee & N. R. Co.*, 30 *Wis.* 597.

The act of 1867, ch. 448, authorizing the supervisors of a county to issue county orders in aid of a railroad, and to levy a tax to pay the same, is invalid, because not a legitimate exercise of the taxing power, where the county does not become a stockholder. *Whiting v. Sheboygan & F. du L. R. Co.*, 25 *Wis.* 167.—DISAPPROVED IN *Hallenbeck v. Hahn*, 2 *Neb.* 377; *Olcott v. Fond du Lac County Sup'rs*, 16 *Wall. (U. S.)* 678, DISTINGUISHED IN *Re Taxpayers of Kingston*, 40 *How. Pr. (N. Y.)* 444. FOLLOWED IN *Olcott v. Fond du Lac County*, 2 *Biss. (U. S.)* 368; *Rogan v.*

Watertown, 30 Wis. 259; Phillips v. Albany, 28 Wis. 340; Lawson v. Schnell, 33 Wis. 288; Ellis v. Northern Pac. R. Co., 77 Wis. 114.

The act of 1874, ch. 7, entitled "An act to legalize certain acts of the board of supervisors of Marathon county," and having for its object the rendering valid of certain proceedings of such supervisors at two meetings in subscribing to the stock of a certain railroad, is not in conflict with the state constitution, art. 4, § 18, as failing to express the subject-matter thereof in the title. *Single v. Marathon County*, 38 Wis. 363.

Tax certificates are "other property" within the meaning of Rev. St. § 949, providing that a county may make a subscription to the capital stock of a railroad company, "to be paid in money, lands, or other property." *Hall v. Baker*, 74 Wis. 118, 42 N. W. Rep. 104.

The act of 1869, ch. 126, as amended in 1871, ch. 31, provided that the proper officers of any county over which a railroad might run might levy a tax and issue bonds to aid in the construction thereof, and for the purchase of a right of way and depot grounds, "upon such terms and conditions as shall be agreed upon," and that the company should submit a written proposition of "the terms, conditions, and considerations" upon which the money or bonds shall be paid or delivered, and that all shares of capital stock, or bonds, or other securities might be held by a county as by individuals. *Held*, that the statute contemplated a subscription to the capital stock, not a donation, but only authorized the issue of bonds upon lawful terms and considerations, and when so issued were valid. (Ryan, C. J., dissenting.) *Round v. Wisconsin C. R. Co.*, 45 Wis. 543. — FOLLOWED IN *State ex rel. v. Jennings*, 48 Wis. 549. REVIEWED IN *Smith v. Fond du Lac*, 10 Biss. (U. S.) 418, 8 Fed. Rep. 289.

(2) *Decisions in federal courts.*—A taxpayer cannot take advantage of a law providing for a tax on real estate only to pay bonds issued by a city for railroad stock, under a law providing for a tax on both real and personal property to pay them, on the ground that the law exempting personal property violates the obligation of a contract. The bondholders only can raise that question. *Gilman v. Sheboygan*, 2 Black (U. S.) 510.—DISTINGUISHED IN *Muscantine v. Mississippi & M. R. Co.*, 1 Dill. (U. S.)

536. REVIEWED IN *Richmond v. Richmond & D. R. Co.*, 21 Gratt. (Va.) 604.

A law providing for a special tax on the real estate only of a city, to pay bonds issued to a railroad, where there is personal property liable to general taxation, is in conflict with a provision in the Wis. constitution that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." It would be otherwise if the legislature had exempted personal property from taxation for all purposes. *Gilman v. Sheboygan*, 2 Black (U. S.) 510.—APPROVING *Weeks v. Milwaukee*, 10 Wis. 242; *Knowlton v. Rock County Sup'rs*, 9 Wis. 410; *Lumsden v. Cross*, 10 Wis. 282; *Attorney-General v. Winnebago Lake & F. R. Plankroad Co.*, 11 Wis. 42.

The private and local laws of 1867, ch. 93, authorized a certain city to issue bonds to a particular railroad "for such sum or sums * * * as may be agreed upon by and between the directors of the railroad company and the proper officers of such city or village." *Held*, that this was a sufficient limitation upon the power of the municipality to issue bonds, within the meaning of the state constitution, art. 11, § 3, requiring the legislature to restrict the power of villages and cities as to taxation, borrowing money, and contracting debts. *Long v. New London*, 9 Biss. (U. S.) 539, 5 Fed. Rep. 559.

A statute authorizing any municipality within a county to issue bonds in aid of a railroad is prospective in its operation, and authorizes a village subsequently incorporated to issue bonds. *Long v. New London*, 9 Biss. (U. S.) 539, 5 Fed. Rep. 559.

The act of March 21, 1871, authorizing cities, towns, and villages to subscribe to the capital stock of a certain railroad, contained no restriction as to the amount that might be subscribed; but it was provided that the amount of a proposed subscription should be set forth in a written proposition by the company, and submitted to the people and approved by a popular vote. *Held*, a sufficient compliance with the state constitution, art. 11, section 3, which makes it the duty of the legislature to restrict the power of municipalities as to taxation, borrowing money, etc. *Smith v. Fond du Lac*, 10 Biss. (U. S.) 418, 8 Fed. Rep. 289.—DISTINGUISHING *Foster v. Kenosha*, 12 Wis. 618; *Fisk v. Kenosha*, 26 Wis. 23. REVIEWING *Bound v. Wisconsin C. R. Co.*, 45 Wis. 560.

The act of 1883, ch. 150, approving and

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ratifying the act of a certain county in conveying certain lands, which it held under tax titles, to aid in the construction of a railroad through the county, is valid, as a railroad is so far a public benefit as to justify taxation in its support, though it is owned and operated by a private corporation. *Northern Pac. R. Co. v. Roberts*, 42 *Fed. Rep.* 734.—NOT FOLLOWING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 *Wis.* 167. QUOTING *Brodhead v. Milwaukee*, 19 *Wis.* 658; *New Orleans, St. L. & C. R. Co. v. McDonald*, 53 *Miss.* 240.

IV. CONSTRUCTION OF STATUTES.

54. In general.—The Ala. Act of Feb. 17, 1854, entitled "An act to aid the Tennessee and Coosa railroad" (Sess. Acts 1853-54, p. 280), is not void for uncertainty; the portion of the two and three per cent. funds therein specified is advanced to the railroad company as a loan, and not as a gift; and the company is bound, in the absence of subsequent legislation as to the terms of payment, to repay the sum so loaned in cash within ten years, without interest for four years, and with interest at five per cent. per annum after four years. *Tennessee & C. R. Co. v. Moore*, 36 *Ala.* 371.

Since the contract with the railroad company does not require or authorize any member of the board of aldermen or common council to do any work or perform any service for said corporate authorities, the 16th section of the act of 1843, prohibiting contracts for work or service between said corporate authorities and the individuals composing either board, has no application to the case. *Gibbons v. Mobile & G. N. R. Co.*, 36 *Ala.* 410.

If said contract be a violation of the official oath, as prescribed by section 7 of the act of 1844, of those aldermen and common councilmen who were at the time stockholders in said railroad company, yet, since the statute does not declare the prohibited act void, nor impose a penalty for its violation, the contract is nevertheless valid in law. *Gibbons v. Mobile & G. N. R. Co.*, 36 *Ala.* 410.

The fact that several of the aldermen and common councilmen were, at the time the contract was entered into, stockholders in said railroad company does not, *per se*, invalidate the contract. *Gibbons v. Mobile & G. N. R. Co.*, 36 *Ala.* 410.—REVIEWING

Ranger v. Great Western R. Co., 27 *Eng. L. & Eq.* 35.

Where an act of the legislature authorized the city of Belleville to issue bonds to any railroad, and in another section declared that the act should apply and be in force for the use and benefit of the town of Mascoutah—*held*, that the act gave the town the same power to make a corporate subscription as it did the city, upon the same terms and conditions. *Decker v. Hughes*, 68 *Ill.* 33.

The effect of the Iowa Act of Jan. 25, 1855, was merely to attach certain limitations to the exercise of the power to make municipal subscriptions to railroads where it had already been conferred, not to grant or extend the power. *Williamson v. Keokuk*, 44 *Iowa* 88.

An act of the legislature authorized certain named commissioners to receive subscriptions to the stock of the Louisville, H. C. & W. R. Co., the shares to be for one hundred dollars each, and might be subscribed for by any individual, city, town, precinct, county, or corporation; and as soon as one thousand shares should be subscribed the subscribers should thereby become incorporated into a company. The act further provided "that whenever the said railway company, or the president or commissioner thereof, shall request the county court of any county to do so, such court may forthwith submit to the qualified voters of any designated precinct * * * in any county the question whether the court shall subscribe to the capital stock of said company, on behalf of said precinct, the amount of stock specified in the request of said company," and also prescribed the manner of holding the election, and the levy and collection of the tax if voted. *Held*, that the legislature did not intend that precinct subscriptions should be included in the one thousand shares of stock necessary to be subscribed to authorize the company to organize and elect directors, and until it was organized the question could not be submitted to the voters of any precinct whether the county court should subscribe for stock. *Allison v. Louisville, H. C. & W. R. Co.*, 9 *Bush (Ky.)* 247.—DISTINGUISHED IN *Allison v. Louisville, H. C. & W. R. Co.*, 10 *Bush (Ky.)* 1.

Under Minn. Laws 1877, ch. 106, § 7, in order to bind a town to issue bonds in aid of a railroad, the agreement to issue bonds

must be perfected before the construction of the portion of the road the construction of which the agreement is designed to aid. *State ex rel. v. Highland*, 25 Minn. 355.

The Mo. Act of Feb. 16, 1872, forbidding, under certain penalties, the officers of a municipality in its behalf to loan the credit thereof, or donate to or subscribe stock in any railroad or other company, without the previous assent of two thirds of the qualified voters, is merely prohibitory in its character, and confers no authority on those officers when such assent is given. *Jarroll v. Moberly*, 103 U. S. 580.

The powers conferred by special charters upon county courts in Missouri to subscribe to railroad stock without a vote of the people were not repealed by the prohibition contained in the state constitution adopted in 1865, as that constitution did not affect existing charters, but only limited the power of the legislature in the future. *Nicolay v. St. Clair County*, 3 Dill. (U. S.) 163.—APPROVING *State ex rel. v. Macon County Court*, 41 Mo. 453; *Chillicothe & B. R. Co. v. Mayor, etc., of Brunswick*, 44 Mo. 553; *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; *State ex rel. v. Sullivan County Court*, 51 Mo. 522; *Smith v. Clark County Court*, 54 Mo. 58.

The New Mex. St. of 1872 allows a county to aid a railroad which shall pass through the county by the issue of bonds not exceeding 5 per cent. of the assessed value of the property, provided a majority of the inhabitants vote in favor of the proposed taxation. *Cole v. Santa Fe County Com'rs*, (N. Mex.) 27 Pac. Rep. 619.

The N. Y. Acts of 1863 and 1864 made the affidavits on file conclusive evidence of the authority and duty of the commissioners to issue town bonds, to the amounts specified, for subscriptions to stock of the Albany & Susquehanna R. Co. *People ex rel. v. Mitchell*, 35 N. Y. 351; *affirming 45 Barb.* 208.—DISTINGUISHED IN *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532.

An act which authorizes a town to subscribe for the stock of a railroad is sufficient authority to the company to receive the subscription and to exchange its stock for the bonds of the town. *Bushnell v. Beloit*, 10 Wis. 195.

55. Strict construction.—A special law empowering a municipal corporation to issue its bonds in aid of the construction of

a railroad is to be strictly construed. The power conferred is not to be extended nor the express conditions restricted by doubtful construction. *McManus v. Duluth, C. & N. R. Co.*, 51 Minn. 30, 52 N. W. Rep. 980.

Purchasers of municipal bonds executed by officers or agents must ascertain at their peril that the delegated authority assumed has been conferred. So if a defendant town was never authorized to create its bonds, and the commissioners who issued them were not the agents of the town for that purpose, holders of the bonds cannot recover upon them. *Cowdrey v. Canadea*, 21 Blatchf. (U. S.) 351, 16 Fed. Rep. 532.

The authority of a majority of the taxpayers of a town to encumber the property of a minority against their will in aid of a railroad or other corporation is not countenanced by the common law; and every step, therefore, required by the statute must be strictly complied with. *Cowdrey v. Canadea*, 21 Blatchf. (U. S.) 351, 16 Fed. Rep. 532.

Under the above rule of strict construction, a proceeding to bond a town in aid of a railroad must conform to the law as it exists at the time. So where the proceeding is after the passage of New York Act of 1871, ch. 925, amending the act of 1869, ch. 907, the bonds are void if the proceeding is had according to the act of 1869. *Cowdrey v. Canadea*, 21 Blatchf. (U. S.) 351, 16 Fed. Rep. 532.

Neither the Ga. Act of 1871 amending the charter of the city of Macon, nor the act of 1874 regulating the manner in which municipal corporations shall issue bonds, authorizes the issue of any bonds which said city or said corporations have not a special legislative authority to issue, independently of such acts. *Blake v. Mayor, etc., of Macon*, 53 Ga. 172.

The Ill. act entitled "An act to provide for a general system of railroad corporations," approved November 6, 1849, in so far as it provides for municipal subscription to railroad companies, has no reference to villages, but applies only to counties and cities. *Pitzman v. Freeburg*, 92 Ill. 111.

The council of a county adopted the report of a committee recommending a sale of stock held by the county in a railroad, and appointed an agent to manage or sell the stock. *Held*, that a transfer of the stock by the agent was not valid under a statute pro-

viding that "the council of every county may pass by-laws for obtaining such real and personal property as may be required for the use of the corporation, and for disposing of such property when no longer required." The sale could only be by a by-law under the corporate seal. A mere repeal of the by-law authorizing the subscription would not ratify the transfer. *Grand Junction R. Co. v. Hastings County*, 25 *Grant's Ch. (U. C.)* 40.

56. Delegation of legislative power.—The provision of an act which requires that a subscription to the stock of a railroad company by the county commissioners should depend upon a vote of the qualified voters of the county is not a delegation to the people of legislative powers, but only a legitimate mode of obtaining an expression of the will of the constituent as a guide for the action of the representative. *Cotten v. Leon County Com'rs*, 6 *Fla.* 610. *San Antonio v. Jones*, 28 *Tex.* 19.

57. Acts limiting municipal indebtedness.—Ala. Act of 1843, § 9, prohibiting the corporate authorities of Mobile from borrowing money, or creating new debts, "for purposes of profit or improvement," without the unanimous vote of the board of aldermen and common council, at a full meeting, concurring with the mayor, is expressly reserved from repeal by the act of 1844 "to consolidate the several acts of incorporation of the city of Mobile, and to alter and amend the same" (Sess. Acts 1843-44, p. 191, § 48), and is not repealed or in any manner impaired by the acts of 1858 and 1859, nor is said section confined in its operation to the powers which said city authorities were then authorized to exercise. But the issue of bonds under the contract with defendant company is not, within the meaning of said section, the creation of a new debt "for the purpose of profit or improvement"; consequently the validity of said contract is not affected by the fact that it was not made at a full meeting of both said boards, and with the unanimous vote of all their members. *Gibbons v. Mobile & G. N. R. Co.*, 36 *Ala.* 410.

Where an act incorporating a railroad company, and empowering certain towns and cities to subscribe for the capital stock thereof, was on its passage before the legislature at the same time with an amendment to the charter of the city of Gainesville, by which it was provided that the city council should have power to issue the bonds or

notes, or both, of said city for the purpose of improving its streets and promoting its growth and advancement and educational facilities, and all the property of said city should be bound for their redemption, provided that the debt of said city should at no time exceed \$35,000, such acts did not conflict with each other. The amendment to the city charter in limiting the debt of the city had reference to a debt or debts incurred for improving the streets, etc., as mentioned therein, and not to subscriptions to the corporate stock of the railroad. The amendment to the city charter having been approved the day after the charter of the railroad did not repeal or render illegal the provisions of the other act. *Hope v. Mayor, etc., of Gainesville*, 72 *Ga.* 245.

The act of Feb. 22, 1873, removes all doubt by amending the act limiting the city's indebtedness, and providing that no part thereof should be construed to affect in any manner the city's subscription to the stock of the railroad. *Hope v. Mayor, etc., of Gainesville*, 72 *Ga.* 246.

Kan. Laws of 1885, ch. 99, § 5 (Gen. St. of 1889, p. 797), does not control or limit the amount of bonds to be issued under the provisions of chapter 67, Laws of 1886 (Gen. St. of 1889, p. 1305), authorizing cities of the first and second class to issue bonds for the purpose of aiding railroad companies in securing depot grounds and terminal facilities. *Chicago, K. & N. R. Co. v. Manhattan*, 45 *Kan.* 419, 25 *Pac. Rep.* 879.

58. Bonds do not constitute a lien on the road.—The Ohio Act of March 20, 1850, whereby the city of Cincinnati issued its bonds to a railroad to the amount of \$600,000, amounted to a loan of the bonds, secured by a pledge of \$1,000,000 of the stock of the company, and did not create a lien or mortgage on the road and fixtures. *Cincinnati v. Morgan*, 3 *Wall. (U. S.)* 275.

59. When federal courts follow decisions of state courts.—The decisions of the highest court of a state in matters growing out of the same statute, relating to municipal aid to works of internal improvement, and upon a similar state of facts, are not conclusive upon the supreme court of the United States. *Venice v. Murdock*, 92 *U. S.* 494.

A corporation may be formed in any manner that a state sees fit to adopt; and when the highest court of a state decides that, by certain legislation, a corporation

has been created capable of receiving municipal aid, such decision concludes not only the courts of the state, but also those of the United States. *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 Sup. Ct. Rep. 969.

60. Conditions precedent to delivery of bonds.—Where a railroad is chartered between designated *termini*, and the charter authorizes counties "through which it may pass" to subscribe to its stock, a county may subscribe before the route is actually located. *Woods v. Lawrence County*, 1 Black (U. S.) 386.

Under the Cal. Act, of 1860 (St. 1860, 133) relative to the issuance of the bonds of Butte county to the California Northern R. Co. in certain contingencies, the basis upon which the supervisors are to proceed in estimating the work done by the company so as to entitle it to bonds is the actual expenditure by the company, and not the value of the work. This actual expenditure, connected with proof of the other facts required by the statute, *prima facie* constitutes the company's claim on the county for the bonds. *California Northern R. Co. v. Butte County Sup'rs*, 18 Cal. 671.

The county might refuse to issue the bonds if the expenditures were not really made, or if fraud had been committed in the contracts for such expenditures. *California Northern R. Co. v. Butte County Sup'rs*, 18 Cal. 671.

The board of supervisors act ministerially in the issuance of bonds under this act, and mandamus lies if they improperly refuse. *California Northern R. Co. v. Butte County Sup'rs*, 18 Cal. 671.

The Ky. Act of April 9, 1873, providing that before bonds of any county in aid of a railroad are issued the company shall give a covenant that the bonds shall be honestly applied to the object for which they were subscribed, does not apply to the lessee of a railroad. Such lessee company may operate the road without giving a covenant, and it does not thereby become liable to indictment under the act of April 12, 1873, imposing a penalty upon any corporation which shall exercise its corporate powers, franchises, or privileges without first giving bonds under the laws creating it. *Com. v. Chesapeake & O. R. Co.*, 91 Ky. 118, 15 S. W. Rep. 53.

The Mich. Act of March 22, 1869, provided that when municipal bonds should

issue in aid of a railroad they should be delivered to the state treasurer; that the railroad, upon presenting a certificate from the governor that the law had been complied with, should receive the same, with an indorsement of the treasurer showing the date and to whom delivered. *Held*: (1) that an actual delivery to the treasurer was necessary; (2) that the governor alone could determine when the bonds could be delivered to the railroad; and (3) that the indorsement of the treasurer was necessary to their validity, which could only be authorized by the certificate of the governor. *Young v. Clarendon Tp.*, 29 Am. & Eng. Corp. Cas. 115, 132 U. S. 340, 10 Sup. Ct. Rep. 107.

In such case—*held*, that the law of escheats would apply to the bonds while in the hands of the state treasurer. *Young v. Clarendon Tp.*, 29 Am. & Eng. Corp. Cas. 115, 132 U. S. 340, 10 Sup. Ct. Rep. 107.

The state courts declared the above law unconstitutional, and the state treasurer thereupon returned the bonds. Several years thereafter a creditor of the railroad instituted this suit in equity against the railroad and town, claiming that the railroad had an equitable title to the bonds, which were liable for his debt. *Held*, that, as the suit was not brought until after the statute would have barred a suit at law by the railroad against the town, the statutory bar could be set up in equity. *Young v. Clarendon Tp.*, 29 Am. & Eng. Corp. Cas. 115, 132 U. S. 340, 10 Sup. Ct. Rep. 107.

61. Repeal by implication.—Where a legislature passes two acts, the first to authorize the towns of certain counties to subscribe to the stock of a certain railroad, and the second to authorize the towns of another group of counties to subscribe to another road, and one county is common to both groups, the latter act does not repeal the former as to that county. *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434.

The Ga. Act of Dec. 27, 1838, authorizing the city of Savannah "to obtain money on loan, on the faith and credit of said city, for the purposes of contributing to works of internal improvement"—*held*, to include the power to guarantee the bonds of a railroad. Said act was not repealed by the act of March 4, 1856. *Savannah v. Kelly*, 12 Am. & Eng. R. Cas. 679, 108 U. S. 184, 2 Sup. Ct. Rep. 468.

The general statute of Illinois of Nov. 6, 1849, in relation to county subscriptions to

railroad stock, is not repealed as to the Illinois Southeastern R. Co. by the act of February 26, 1867, § 7, to incorporate that company—i. e., by these two acts a county is not forbidden to subscribe to the capital stock as well as to make a donation to the said company. Nor are the above acts repealed, so far as they concern the said company, by section 10 of the amendatory act of February 24, 1869. *Clay County v. Society for Savings*, 5 Am. & Eng. R. Cas. 170, 104 U. S. 579.

The Ill. Act of 1869, making provision for voting aid by counties to railroads, did not repeal the act of 1867, which allowed the city authorities to issue bonds in such amount as they might determine. *Balcheller v. Mascoutah*, 2 Fed. Cas. 504, 7 Chicago Lg. News 230.

Kan. Act of March 3, 1877, empowered counties to issue bonds to the amount of \$4000 per mile in aid of narrow gauge railways and to exchange them for second mortgage railway bonds, but expressly provided that it should not be construed to repeal or change any "existing law authorizing counties to issue bonds in aid of railroads." At the time this act was passed counties were authorized to aid railways without regard to their gauge, but could not make their bonds exchangeable for second mortgage bonds. *Held*, that the power of counties to aid railways generally at the time the act of 1877 was passed was not taken away. *Kingman County Com'rs v. Cornell University*, 57 Fed. Rep. 149.

The rights of defendant railway company, and the powers and duties of the council of the city of Louisville, as defined by the company's charter in 1868, were not affected by the new city charter of 1870. The charter of the company controls the charter of the city as to debts created by the city to pay for subscription of stock in the company. *Tyler v. Elizabethtown & P. R. Co.*, 9 Bush (Ky.) 510.

An act of the general assembly entitled "An act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same," approved February 8, 1843, contained the following provision: "The city shall not, at any time, become a subscriber for any stock in any corporation." By a special act, approved March 1, 1851, enacted while the above general prohibition was in force, the city was authorized to

subscribe to the stock of the Ohio & Mississippi railroad company any amount not exceeding the sum of \$500,000. An amended city charter, also entitled "An act to reduce the law incorporating the city of St. Louis, and the several acts amendatory thereof, into one act, and to amend the same," approved March 3, 1851, contained the provision, above set forth, that "the city shall not, at any time, become a subscriber for any stock in any corporation" (art. 7, section 13, Sess. Acts 1851, p. 168); and also the following (see art. 7, section 25): that "all acts and parts of acts contrary to and inconsistent with the provisions of this act, or with the purview thereof, are hereby repealed." These several acts took effect from their passage. *Held*, that the act of March 3, 1851, did not repeal the special enabling act of March 1, 1851, and that a subscription under the act of March 1, 1851, to the stock of the Ohio & Mississippi railroad company, made by the city of St. Louis, was authorized by law and valid, and that the city thereby became a legal stockholder in said company. *City & County of St. Louis v. Alexander*, 23 Mo. 483.

The Neb. Act of 1883 is a complete act, covering the whole of the matter embraced in the act of Feb. 19, 1877, and repeals the first-named act by implication. *State ex rel. v. Benton*, 33 Neb. 823, 51 N. W. Rep. 140.

In 1885 the legislature passed an act amending sections 11, 12, and 13 of ch. 45 of the Compiled Statutes, which had been repealed by implication by the act of 1883. *Held*, that the amendatory act of 1885 was invalid. *State ex rel. v. Benton*, 33 Neb. 823, 51 N. W. Rep. 140.

Under the act of 1883, where a county has issued refunding bonds bearing interest at six per cent., it may, after such bonds are payable, issue other refunding bonds at a lower rate of interest, as four and one half per cent., to replace them. *State ex rel. v. Benton*, 33 Neb. 823, 51 N. W. Rep. 140.

N. Y. Act of 1869, ch. 907, as amended in 1870-71, requiring that all taxes collected from a railroad in a town which has aided in the construction of the road by issuing bonds, except road and school taxes, shall be applied to the retirement of such bonds, is not repealed by the act of 1880, ch. 286, entitled "An act for the relief of the town of Somerset, to abolish the office of railroad commissioner of said town, and to enable it to adjust its indebtedness and issue bonds

therefor." *Ackerson v. Niagara County Sup'rs*, 25 N. Y. Supp. 196, 72 Hun 616.

62. When taxpayer is entitled to stock.—A taxpayer has the exclusive right to the stock due from a company under a subscription to its stock made under the general railroad law, and it can not be issued by the railroad to any one else. *Martin v. Pacific R. Co.*, 83 Mo. 634.

Under the Pacific railroad acts of Missouri, a taxpayer is not entitled to have his tax certificates converted into stock until the subscription made by the county in aid of the road has been paid in full. *Spurlock v. Missouri Pac. R. Co.*, 90 Mo. 199, 2 S. W. Rep. 219.

63. Regulating selling price of bonds.—A provision in a railroad charter that counties might subscribe to its stock, and issue its bonds in payment, but that the bonds should not be sold at less than par, only meant that they should not be so sold at the expense of the counties; but after the company had taken them at par it was not prevented from selling them at a discount. *Woods v. Lawrence County*, 1 Black (U. S.) 386.—FOLLOWED IN *Richardson v. Lawrence County*, 17 Law Ed. (U. S.) 558.

Ind. Act of Dec. 31, 1849, § 6 (Local Acts of 1849 and 1850, p. 39), legalized the stock subscribed by counties before its passage, and empowered the commissioners to issue bonds for its payment. The same act restricted the railroad company therein named from selling its own bonds at a greater discount than ten per cent., but did not so restrict it in the sale of the bonds of others. *Bartholomew County Com'rs v. Bright*, 18 Ind. 93.

64. Repeal of law before subscription is completed.—A law authorizing counties to subscribe to the stock of railroads upon the recommendation of a grand jury provided that acceptance of a subscription by a company should be deemed acceptance of another act imposing certain restrictions on corporations. After a recommendation by a grand jury, but before acceptance, the law imposing the restrictions was repealed. *Held*, that the right to subscribe under the recommendation ceased, and that no subsequent acceptance by the company, or subscription by the county commissioners, would bind the county. *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389.—APPROVED IN *Crawford County v. Pittsburg & E. R. Co.*, 32 Pa. St.

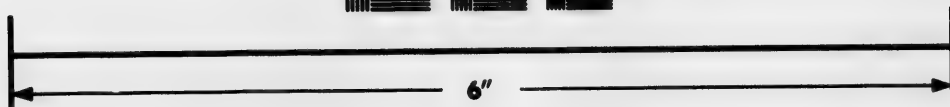
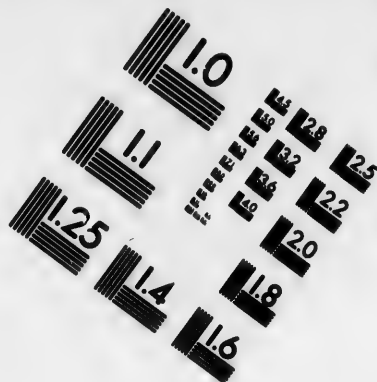
141. *DISTINGUISHED IN Mercer County v. Hackett*, 1 Wall. (U. S.) 83. *EXPLAINED IN State v. Saline County Court*, 48 Mo. 390.

Where a county by a vote of the people thereof obtained the right, under Kan. Laws 1865, ch. 12, and Laws 1866, ch. 24, to subscribe for stock in and issue bonds to a railroad company, such right was not abrogated by the legislation of 1868 and 1869 (Gen. St. 1868, p. 203, §§ 51-54; *Id.* p. 892, §§ 1-4; *Id.* pp. 1123-1128, §§ 1, 2, 6, 8; Laws 1869, pp. 108-110), but such right was continued in force. *Morris v. Morris County Com'rs*, 7 Kan. 576.

65. Subscriptions payable in bonds.—A provision in the charter of a railroad company requiring five per cent. of its stock to be paid in does not apply to the aid extended by counties in the construction of the road by an exchange of county bonds for stock in the railroad company. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

Section 8 of the charter of a railway company gave power to municipalities to make subscriptions to such company, issue bonds, and levy the requisite tax to pay them, upon a vote; section 9 provided the mode of calling an election to "determine whether such subscription should be made and such tax levied"; section 10 provided that, upon a vote, the corporate authorities should "levy such tax, and subscribe the amount thereof," as voted; and section 11 provided that "any such municipality should subscribe under the provisions of the charter, and should issue its bonds, they should be in full payment of its subscription. *Held*, that the several sections, construed together, only provides for subscriptions payable in bonds to be discharged by the levy of a tax, and not for subscriptions to be paid in money, in the first instance, previously raised by taxation. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

66. Charter of company authorizing subscription.—A provision in a city charter limiting its power to borrow money to a certain amount is taken away by a provision in a railroad charter which authorizes the several counties, cities, and incorporated villages along the line of the road to subscribe to its capital stock in sums larger than the amount authorized by the city charter. *Robertson v. Rockford*, 21 Ill. 451.



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The charter of the Belleville & S. I. R. Co. authorized the directors to receive subscriptions to the capital stock as might be prescribed by their by-laws and regulations, "from any county, city, town, or village," subject to the provisions and restrictions of "an act to provide for a general system of railroad corporations," approved Nov. 6, 1849, did not confer power upon municipal corporations to subscribe to the stock of the company, nor did the reference to the provisions of the act of 1849 enlarge the terms of the grant. *Pitzman v. Freeburg*, 92 Ill. 111.

By the act incorporating the Pacific railroad (Mo. Sess. Acts 1849, p. 223, the respective counties in which the road shall be located are authorized to subscribe for the stock of the company and invest the funds of the county therein. The stock is to be held, owned, and treated as county property, and the stock subscribed by each county belongs to and is owned by the county unless its title has been divested by acts and transactions subsequent to the original subscription. *Ridings v. Hall*, 48 Mo. 100.

67. Retrospective operation.*—The Ky. Act of April 9, 1873, "for the protection of counties, cities, etc., subscribing stock in railroads, turnpikes, and other improvements," was not intended as an amendment to the charter of any corporation, but as a general law, and has no application where a subscription for stock in a corporation for the construction of a railroad, turnpike, or other similar public improvement had been fully consummated before the passage of the act. *Cumberland & O. R. Co. v. Washington County Court*, 10 Bush (Ky.) 564.

The Md. Act of 1874, ch. 225, confirmatory of the act of 1872, ch. 245, was doubtlessly passed under the assumption that the popular election required by the act of 1872 had been regularly held; and the conditions precedent to a valid confirmatory act not having been in fact complied with, there was no legal or valid authority conferred and confirmed by said acts of 1872 and 1874. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

Where, under the N. Y. Act of 1869 (ch. 907, Laws of 1869) authorizing municipal corporations to aid in the construction of

railroads, and prior to the passage of the amendatory act of 1871 (ch. 925, Laws of 1871), proceedings had been regularly taken to bond a town in aid of a railroad, and the county judge had made his adjudication and record, and had appointed commissioners—held, that the proceedings were not invalidated by said amendatory act, and that the commissioners had authority, after its passage, to subscribe for stock and issue bonds under and in pursuance of the judgment of the county judge. *Syracuse Sav. Bank v. Seneca Falls*, 7 Am. & Eng. R. Cas. 216, 86 N. Y. 317; affirming 21 Hun 304.—FOLLOWING *Angel v. Hume*, 17 Hun 374.—FOLLOWED IN *Syracuse Sav. Bank v. Seneca Falls*, 7 Am. & Eng. R. Cas. 216, 86 N. Y. 317.—*Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 379, 64 How. Pr. 291.

The commissioners had authority to issue bonds, all payable at the expiration of thirty years from date; the provision of said act of 1871, amending section 4 of the original act by adding thereto a clause authorizing the commissioners to issue bonds payable in less than thirty years, but requiring they shall not so issue them that more than ten per cent. shall be payable in any one year, simply gave to the commissioners an option either to make them all payable at the expiration of thirty years or to make them payable in a shorter time; if they chose the latter, they were to be made payable in instalments. *Syracuse Sav. Bank v. Seneca Falls*, 7 Am. & Eng. R. Cas. 216, 86 N. Y. 317; affirming 21 Hun 304.

The amendments to N. Y. Const. art. 8, § 11, adopted Jan. 1, 1875, prohibiting counties, cities, towns, or villages from thereafter loaning their money or credit in aid of any individual, association, or corporation, operate as a repeal of all existing statutes relating to the same subject except so far as they relate to existing contracts in force when the amendments were adopted. And no legal obligation is created as against a town until the subscription to the stock is actually made. The judgment of a county judge merely finding that a majority of the taxpayers of the town has consented to a bond issue does not create such right. *Buffalo & J. R. Co. v. Railroad Com'rs*, 5 Hun (N. Y.) 485.

If there were any defects or irregularities in the proceedings by Oconto county in subscribing and paying for stock of the St.

* See also ante, 22, 23.

P., E. & G. T. R. Co., they were cured by ch. 151, Wis. Laws of 1887, and such proceedings were thereby rendered valid, even when called in question in a suit commenced before the passage of that act. *Hall v. Baker*, 74 Wis. 118, 42 N. W. Rep. 104.

68. Authority to refund.—In 1877 the Nebraska legislature passed "an act to authorize the issue of county bonds in certain cases." This provided for issuing refunding bonds to replace bonds issued to railroad companies or any work of internal improvement. This act was carried into Comp. St. 1881 as sections 11, 12, and 13, ch. 45. In February, 1883, the legislature passed an act to authorize counties to issue refunding bonds, at not to exceed six per cent. interest, to replace other bonds previously issued by the county and then payable. *Held*, that the act of 1883 applied to all bonds previously issued by a county and then payable. *State ex rel. v. Benton*, 33 Neb. 823, 51 N. W. Rep. 140.

County bonds issued to aid in the construction of works of internal improvement can be refunded only under the provisions of the act of February 28, 1883. *State ex rel. v. Benton*, 33 Neb. 834, 51 N. W. Rep. 144.

69. For construction of depots and side tracks.—The Kansas Act of March 2, 1872, "to aid in the construction of railroads or water power, by donations thereto, or the taking of stock therein, or for works of internal improvement"—*held*, to authorize bonds to aid in the construction of depots and side tracks. *Rock Creek v. Strong*, 96 U. S. 271.

70. Time of taking effect.—The Neb. "Act concerning counties and county officers," approved March 7, 1879, did not take effect till Sept. 1 of that year. The provisions of section 26 of that act have no application to valid county bonds issued before Sept. 1, 1879. *Burlington & M. R. R. Co. v. Saunders County*, 17 Neb. 318, 22 N. W. Rep. 560.

The Ohio General Act of May 3, 1852, "to provide for the organization of cities and incorporated villages," provides (section 111) that "this act shall take effect from and after the fifteenth day of May next"; yet in view of all its provisions, and of the fact, as shown by the legislative journals, that the same was finally passed by the concurrent vote of the two houses on the 28th of April, 1852, although the same was not

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signed by the presiding officers of the two houses until the 3d of May following, it is evident that the act, in the mind of the legislature, spoke from the 28th of April, 1852, and took effect "from and after the fifteenth day of May next" thereafter; and the first section of that act, repealing "all laws" then "in force for the organization or government" of municipal corporations, did not operate to repeal the prior local and special acts authorizing certain municipal corporations to subscribe stock in the Dayton & Michigan R. Co., and to issue bonds in payment of such subscriptions. *State ex rel. v. Perrysburg*, 14 Ohio St. 472.

Nor does the seventeenth section of said act (as amended), which limits the power of taxation by the corporate authorities of cities and villages, for the purpose of paying the interest on their public debt, to six mills on the dollar, operate to repeal so much of said prior local and special acts as confer the power and impose the obligation to levy taxes, at a rate absolutely sufficient to pay the accruing interest on the bonds issued under said prior and special acts, although the same may exceed the rate of six mills on the dollar. *State ex rel. v. Perrysburg*, 14 Ohio St. 472.

71. Jurisdiction of county judge.—By N. Y. Act of 1869 relating to the bonding of towns, a town was transformed from a mere political division of the state, with limited corporate powers, into a municipal corporation, with power to borrow money on an extensive scale, and to invest it in the stock or bonds of a railroad company as a majority of the taxpayers, representing a majority of its taxable property, should designate, but such powers could only be exercised by proper proceedings before a county judge. *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. Rep. 24, 24 N. Y. S. R. 6, 4 L. R. A. 685.—DISTINGUISHING *People ex rel. v. Batchellor*, 53 N. Y. 128; *Horton v. Thompson*, 71 N. Y. 513. FOLLOWING *Horn v. New Lots*, 83 N. Y. 100.—FOLLOWED IN *Hoag v. Greenwich*, 133 N. Y. 152.

Under the provision of the N. Y. Town Bonding Act of 1869 (chap. 907, Laws of 1869), giving to the judgment of a county judge authorizing the bonding of a town and the record thereof "the same force and effect as other judgments and records in courts of record in this state," the usual legal presumptions attending adjudications

of courts of record attach to such a judgment, and the burden of proving a lack of jurisdiction in the county judge rests upon a party asserting it. *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519.

Commissioners duly appointed pursuant to said act became by force of the judgment of the county judge the agents of the town, authorized to borrow the sum specified, but restricted as to the terms of credit. *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519.—DISTINGUISHING *Gould v. Sterling*, 23 N. Y. 456; *Horton v. Thompson*, 71 N. Y. 513.

The Tenn. Act of 1851-52, ch. 117, allows county courts in the respective counties through which a railway or railways have been or shall be located, etc., to subscribe stock in such railroad companies through their chairman. *Campbell County v. Knoxville & K. R. Co.*, 6 Coldw. (Tenn.) 598.

V. THE POWER TO SUBSCRIBE.

72. In general.*—Aid, as fostering a public use, may be extended to the construction of a railroad, by means of the power of eminent domain or of subscription to capital stock, and by donation made by cities and other political subdivisions of the state, under the authority of the legislature. *Stockton & V. R. Co. v. Stockton*, 41 Cal. 147, 3 Am. Ry. Rep. 102.

It is no impediment to granting aid by a township that it includes a city which is in debt to the extent permitted by the constitution. —*Irwin v. Lowe*, 89 Ind. 540.

The fact that several of the aldermen and common councilmen of a city were, at the time the city entered into a contract to subscribe to the stock of a railroad, stockholders in the railroad, does not *per se* invalidate the contract. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

The power of a county to take stock in a company organized for the purpose of constructing a railroad, or other public improvements through the same, having been recognized at different times by a majority of this court, it may be regarded as settled. *McMillen v. Lee County Judge*, 6 Iowa 391.

* Power of municipalities to subscribe in aid of railroads, see note, 15 AM. & ENG. R. CAS. 605.

Consolidation, change of name, etc., as affecting power of municipal corporations to issue bonds in aid of railroads, see note, 5 L. R. A. 728.

Two statutes authorized the county courts of certain counties to subscribe to railroad stock, and to cause patents to be issued to certain swamp lands, one upon condition and the other without condition. The subscriptions were made, and the patents were issued, reciting the former act, but failing to recite that the condition had been complied with. *Held*, that the orders and patents were, nevertheless, valid. *Chouteau v. Allen*, 70 Mo. 290.

A railroad charter gave cities the right to subscribe to the stock, and provided that the charter should be forfeited if the road was not commenced and completed in a given time. Afterwards acts were passed extending this time. *Held*, that the privilege of subscribing was also extended. *Com. ex rel. v. Pittsburgh*, 41 Pa. St. 278.—FOLLOWED IN *Seybert v. Pittsburg*, 1 Wall. (U. S.) 272.

73. No inherent or implied right to subscribe.—A municipal corporation possesses no powers except such as are given expressly or by necessary implication; and it has no power, without express authority, to subscribe to the stock of a railroad or plank-road company. *Chisholm v. Montgomery*, 2 Woods (U. S.) 584. *People ex rel. v. Mitchell*, 35 N. Y. 551; *affirming* 45 Barb. 208.

Nor to incur debts or borrow money to enable such corporation to become a subscriber to the stock of a railway company. Such a power must be conferred by express legislative grant. *Hancock v. Chicot County*, 32 Ark. 575.

If empowered so to do, it must conform to the conditions prescribed in the law. The board of supervisors is made by law the instrumentality of the county, but its power does not come into existence except upon certain conditions, which are of the nature of conditions precedent. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735.—FOLLOWED IN *Wells v. Pontotoc County Sup'rs*, 102 U. S. 625.

The people of a county, in their primary capacity, have no authority under the law to make a contract of subscription binding upon the county; the board of county commissioners, pursuant to the authority delegated by such vote, must enter into the contract of subscription before either the county is compellable by mandamus to surrender its bonds, or the railway company to deliver its stock. *People ex rel. v. Pueblo*

County Com'rs, 2 *Colo.* 360, 20 *Am. Ry. Rep.* 237.

The Tenn. Act of January 23, 1871, does not confer on municipal corporations the power to subscribe to the stock of, or loan their credit to, any corporation, or to become a stockholder therein with others. *Kelley v. Milan*, 127 *U. S.* 139, 8 *Sup. Ct. Rep.* 1101.—FOLLOWED IN *Norton v. Dyersburg*, 127 *U. S.* 160.

74. Power must be expressly conferred.*—The subscription of a municipal corporation to the capital stock of a railroad company, unless authorized by legislative authority, is not valid and binding on the corporation. *Mississippi, O. & R. R. Co. v. Mayor, etc., of Camden*, 23 *Ark.* 300.

The right of railroad companies to ask from local communities assistance involving the necessity of taxation will not be enlarged by construction. Privileges of this character are in derogation of individual rights. They will not be implied, but must be clearly and unmistakably granted. But when this has been done the judiciary cannot interfere to defeat the legislative will. *Tyler v. Elizabethtown & P. R. Co.*, 9 *Bush (Ky.)* 510.

The grant of power to a municipality to subscribe to the stock of a private corporation is the delegation of an extraordinary power, and should not be extended beyond the fair import of the words used. Without legislative sanction the assent of a majority of the voters will not authorize a municipality to make such a subscription. *Lewis v. Bourbon County Com'rs*, 12 *Kan.* 186.—DISAPPROVED IN *Block v. Bourbon County Com'rs*, 99 *U. S.* 586.

The county commissioners of Philadelphia county have no power, without the sanction of the county board, to subscribe for stock in the Sunbury & Erie R. Co. by virtue of the act of Feb. 10, 1852, authorizing the corporate and constituted authorities of any municipal or other corporation to subscribe to the same. *Brown v. Philadelphia County Com'rs*, 21 *Pa. St.* 37.

A clause in the charter of a railroad company which says, "It shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe to the capital stock of said company," manifestly refers to private corporations, and confers no

power upon municipal corporations to subscribe for such stock. *Campbell v. Paris & D. R. Co.*, 71 *Ill.* 611.—FOLLOWED IN *East Oakland Tp. v. Skinner*, 94 *U. S.* 255.

Where a statute authorizes subscriptions by a county to the stock of a railroad company, subject to the restriction, that the "amount" should be designated by the grand jury, a recommendation by the grand jury of a subscription not exceeding a certain amount confers upon the commissioners no authority to make any subscription whatever. *Frick v. Mercer County*, 138 *Pa. St.* 523, 21 *Atl. Rep.* 6.

The provisions of the Tenn. Constitution of 1870, § 29, that no municipal shall become a stockholder in any corporation, or loan its credit thereto, unless upon the assent of three fourths of the voters thereof, operate as a direct prohibition on the municipalities, but grant no affirmative power, or power to act without enabling legislation. *Norton v. Brownsville Com'rs*, 129 *U. S.* 479, 9 *Sup. Ct. Rep.* 322.

A provision in a village charter authorizing the trustees, when in their opinion the interests of the village require the expenditure of money "for an extraordinary or special purpose," to submit the question of raising money therefor by taxation to a vote of the electors, refers only to strictly municipal purposes, and does not authorize the raising of money to aid in the construction of a railway. *Perrin v. New London*, 67 *Wis.* 416, 30 *N. W. Rep.* 623.

A provision in a railroad charter provided that the corporation should cause books to be opened for subscriptions to the capital stock, and "it shall be lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe any amount to the capital stock of said company." *Held*, not to authorize a municipal subscription to such stock. *East Oakland Tp. v. Skinner*, 94 *U. S.* 255.—FOLLOWED IN *Campbell v. Paris & D. R. Co.*, 71 *Ill.* 611.

75. A general grant of power not limited to cities then incorporated.—Where a legislative charter authorizes "any incorporated town or city" in certain counties to subscribe to the stock of the road, the power is not limited to towns and cities then incorporated. *Lewis v. Clarendon*, 5 *Dill. (U. S.)* 329.

76. May vote aid under authority of general statute.—A city acting under a special charter may lawfully vote a tax in

* Power to issue municipal aid bonds must be express, see note, 15 *AM. & ENG. R. CAS.* 621.

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aid of a railroad, notwithstanding the provision of Iowa Laws of 1876, ch. 116, that "no general laws, as to powers of cities organized under the General Incorporation Act, shall in any manner be construed to affect the charters or laws of cities organized under special charters unless they shall have special reference to such cities." *Barthemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

An incorporated town in Illinois having the usual powers of municipal corporations is a village within the meaning of a law authorizing "any village, city, county, or township" to subscribe to the stock of a railroad. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358.—APPROVING *Martin v. People ex rel.*, 87 Ill. 524. DISAPPROVING *Welch v. Post*, 99 Ill. 471.

77. By whom exercised.—Cities of third class.—Kan. Comp. Laws, 187, § 4, which provides that cities of the third class shall remain a part of the corporate limits of the townships in which they are situated, does not exclude such cities from the power to subscribe to railroad stock and issue their bonds in payment. *Bard v. Augusta*, 30 Fed. Rep. 906.

And Kan. Laws of 1876, ch. 107, as amended in 1877, by express provision authorizes "any city" to issue its bonds in aid of railways, which includes cities of the third class. *Bard v. Augusta*, 30 Fed. Rep. 906.

In 1881 a city of the third class had the power, under certain terms and conditions, and within certain limitations, to subscribe to the capital stock of a railroad company, and to issue its bonds in payment for the stock, although the city may have been a portion of a municipal township, which township had already subscribed for all the stock and issued all the bonds in aid of railroads which it had the power to subscribe for or issue. *Iola v. Merriman*, 46 Kan. 49, 26 Pac. Rep. 485.

An authority given to the city of Pittsburgh to subscribe for the stock of a railroad company is properly exercised by the mayor, aldermen, and citizens of Pittsburgh, which is the corporate title of the city. *Com. ex rel. v. Pittsburgh*, 34 Pa. St. 496.

78. Power of city council and county commissioners.—When a city has entered into an agreement with a railroad to issue bonds to aid in its construction, and an ordinance has been passed in pursuance

thereof and approved by the voters, the city council cannot waive or alter the time, terms, or conditions thereof. *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 48 (Gil. 36).

It is within the scope of the authority of the board of county commissioners to determine whether an election has been had authorizing them to subscribe stock in a railroad company, and it is also within the scope of their authority to subscribe such stock when such election has been held, and to make all the necessary orders with reference to the same. Laws 1865, p. 41; Laws 1866, p. 72; Laws 1867, p. 39; Gen. St. 892. *State ex rel. v. Allen*, 5 Kan. 213.

It is not necessary that the petition in this case should state that such election was actually held, or that a majority of the legal voters at such election voted in favor of subscribing such stock, and issuing the bonds of the county in payment therefor. The petition shows that the board found or determined such to be the facts, and that is all that is necessary in the premises. It was the duty of the clerk to record these proceedings, whether he considered them true or untrue, legal or illegal. *State ex rel. v. Allen*, 5 Kan. 213.

Having made a contract of subscription and delivered it to the president of the railroad, the commissioners exhausted their power, and had no authority to make another subscription upon different terms. *Danville v. Montpelier & St. J. R. Co.*, 43 Vt. 144.

79. Express power conferred in city charter.—A railroad is a "road" within the meaning of a provision in a city charter authorizing the council "to take stock in any chartered company for making roads to said city." *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395.

The common council would have no power to subscribe at all in the absence of the petition provided for in the charter; but when the power to subscribe is conferred by the petition, the mode in which it is to be exercised, as to the time and mode of payment, must necessarily be left, in a measure, to the discretion and judgment of the common council. *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395.—APPROVED IN *Venice v. Murdock*, 92 U. S. 494. DISTINGUISHED IN *Noble v. Vincennes*, 42 Ind. 125. REVIEWED IN *State ex rel. v. School Dist. No. 4*, 13 Neb. 82.

VI. PETITION AND CONSENT OF TAX-PAYERS.

1. Petition.

80. In general.—The president of the board of directors of a railroad is authorized to present a petition of voters of the county to the board of supervisors, requesting a vote on subscribing to the road, when such president acts under a resolution of the directors. Such petition is regular, and the supervisors cannot refuse it. *People ex rel. v. Logan County Sup'rs*, 45 Ill. 162.

Where a railway charter provides that when ten legal voters of any city, county, or town shall present to the clerk thereof a written application requesting an election to determine whether a subscription or donation shall be made to the company, such clerk shall receive and file the application and call an election, it must appear that the application was delivered to the clerk and was signed by ten legal voters. Proof that the application was signed by ten citizens is not sufficient, as a citizen may not be a legal voter. *People ex rel. v. Orltown Sup'rs*, 88 Ill. 202, 21 Am. Ky. Rep. 297.

The proviso in Ind. Act of 1867, § 60, relates to donations by cities to railroads, and not to subscriptions of stock, to authorize which a petition of a majority of the resident freeholders is not necessary. *Thompson v. Peru*, 29 Ind. 305.

Iowa Code, § 114, providing that a county judge may submit at a regular or special election the question whether money may be borrowed to aid in the erection of public buildings, or whether the county will construct or aid in constructing any road or bridge which may call for an extraordinary expenditure, is sufficiently complied with where a large number of the inhabitants of the county sign a petition requesting that the question whether the county will aid in building a railroad shall be put to a vote of the people, and the county judge pronounces favorably upon the proposition, issues his proclamation, and the question is submitted to the voters, all the proceedings being regular. The term "any road," as used in the statute, is not restricted to common roads, streets, and lanes, but may embrace railroads. *Dubuque County v. Dubuque & P. R. Co.*, 4 Greene (Iowa) 1.

The N. Y. Act of May 18, 1869, authorized railroad aid bonds to issue on the petition of a "majority of the taxpayers." In 1871

this statute was amended so as to provide for a petition by a "majority of the taxpayers, not including those taxed for dogs or highway tax only." *Held*, that bonds issued after 1871, under the terms imposed by the law of 1869, were void. *Rich v. Ments Tp.*, 134 U. S. 632, 10 Sup. Ct. Rep. 610.—FOLLOWING *People ex rel. v. Smith*, 55 N. Y. 135; *Wellsborough v. New York & C. R. Co.*, 76 N. Y. 182; *Metzger v. Attica & A. R. Co.*, 79 N. Y. 171.

A mistake in a petition, asking for an appropriation for a railroad by a county board instead of by a township, does not vitiate a tax, where it appears that no one in interest was misled or deceived by the mistake. *Scott v. Hansheer*, 94 Ind. 1. *Jussen v. Lake County Com'rs*, 95 Ind. 567.

Where a township is petitioned to vote aid to a railroad, the tax is not invalid because a city included within the township votes, as such city is a part of the township and is entitled to vote. *Scott v. Hansheer*, 94 Ind. 1.

When a petition for a municipal election upon the question of aiding in the construction of a railroad describes the proposed route of the road as "northwestwardly to Anamosa or to a point nearer," and the notice describes it as "westwardly to Anamosa or to a point nearer," the variance is immaterial. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

Under N. Y. Act of 1869 to bond a town to aid in the construction of a railroad, the petition must state whether the money to be raised is to be invested in railroad stock or in bonds. A mere statement that it is to be invested in stocks or bonds, or both, is defective. *People ex rel. v. Van Valkenburgh*, 63 Barb. (N. Y.) 105.

81. Each petitioner must sign his own name.—The names of petitioners, under N. Y. Act of 1869, ch. 907, must be personally subscribed. Signing by an agent is not valid. *People ex rel. v. Smith*, 45 N. Y. 772; *affirming 3 Lans. 291*.

In proceedings under said act of 1869 it must appear that the taxpayers who signed the petition signed personally, or were present when their names were signed, or written permission to sign their names must be produced. Where other persons sign for the taxpayers, oral authority to sign proved by themselves is not enough. These are jurisdictional requirements which are not waived by failing to object before the county

judge, and an objection may be made at any step of the proceedings. *People ex rel. v. Hulbert*, 46 N. Y. 110; reversing 59 Barb. 446. *People ex rel. v. Peck*, 42 How. Pr. (N. Y.) 425.

82. Who are entitled to sign.—Under N. Y. Act of 1869 every person whose name appears on the assessment roll has the right to give his consent or sign a petition in favor of bonding the town, whether he owns any property in the town at the time he signs the consent, or whether he resides at the time in the town or not. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

It is not necessary that the petitioners should be owners of the property for which they are taxed. If they represent it in any capacity, and are assessed on the tax list as so representing it, then they are taxpayers and may become petitioners. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446; reversed on another point in 46 N. Y. 110.

Under Wis. Rev. St. § 946, providing for the acceptance through a petition of the taxpayers of a municipality of the proposition of a railroad company for a subscription to its stock, the persons resident in the municipality on the day when the petition may first be presented, and whose property was assessed for taxation on the last assessment roll, except idiots, insane persons, and minors, are those entitled to sign such petition. *State ex rel. v. Blackstone*, 63 Wis. 362, 24 N. W. Rep. 72.

But in determining whether the petition has been signed by a majority of the taxpayers so resident, idiots, insane persons, and minors are to be counted. *State ex rel. v. Blackstone*, 63 Wis. 362, 24 N. W. Rep. 72.

83. Signatures need not all be on one paper.—Under the N. Y. Act May 12, 1871, ch. 925, a petition to authorize a town to issue bonds in aid of the construction of a railroad, it is not required that the signatures of the petitioners nor the conditions imposed should be stated in a single paper or petition, but may be subscribed to and inserted in several papers or petitions. *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 379, 64 How. Pr. 291.

The act does not require the signatures to be appended to a single heading, and the presentation of nineteen papers substantially the same at the same moment is to be deemed the presentation of a single

petition. *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 379, 64 How. Pr. 291.

84. Signatures procured by fraud.—Signatures of petitioners procured by a bribe are valid, if they were otherwise entitled to sign. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

But it might be otherwise if a taxpayer should be induced to sign by misrepresentation as to the nature of the instrument signed, or as to the company to be benefited, and has had no opportunity to inform himself of the contents of the petition. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

Where, in the course of the canvassing and electioneering to induce a sufficient number of freeholders of a certain town to become signers of a petition, certain representations, promises, and inducements were falsely and fraudulently made and held out by the railroad company to such freeholders, and which resulted in such freeholders becoming signers to said petition—held, that such representations, promises, and inducements, although made at a time and meeting previous to the time at which said freeholders became signers, were nevertheless a part of the *res gestæ*. *Wullenwaber v. Dunigan*, 33 Neb. 477, 50 N. W. Rep. 428.

Where two agents of a railroad company were engaged in the common purpose of soliciting the freeholders of a town to become signers to a petition, and one of said agents made certain pledges and promises, and held out certain inducements to said freeholders, who shortly afterwards were by the other of the said agents presented with said petition and signed the same—held, that such pledges, promises, and inducements were a part of the *res gestæ*. *Wullenwaber v. Dunigan*, 33 Neb. 477, 50 N. W. Rep. 428.

85. Signatures procured on Sunday.—Where a town board of supervisors is authorized by law to issue bonds in aid of a railroad only upon presentation of a petition therefor signed by a certain number of taxpayers of the town, the procuring and affixing of such signatures on Sunday is "business," and is unlawful, and confers no authority upon the supervisors to issue such bonds. *De Forth v. Wisconsin & M. R. Co.*, 5 Am. & Eng. R. Cas. 28, 52 Wis. 320, 9 N. W. Rep. 17, 38 Am. Rep. 737.

The fact that plaintiff affixed his signature on Sunday will not prevent him from obtaining an injunction against the issue of

the bonds on the ground that the required number of signatures were not affixed on any secular day, where he did not on any secular day authorize the presentation of such petition to the supervisors, and where nothing had been done by the railroad company to earn the bonds before it was notified that plaintiff would resist their issue and denied the validity of such signature. *De Forth v. Wisconsin & M. R. Co.*, 5 Am. & Eng. R. Cas. 28, 52 Wis. 320, 9 N. W. Rep. 17, 38 Am. Rep. 737.

86. Proof of signatures.—Under the N. Y. Act of 1866, ch. 398, to facilitate the construction of the New York & Oswego Midland railroad, § 2, making the affidavits of the assessors annexed to the consents of taxpayers evidence of the facts therein contained, does not make such affidavits conclusive. *People ex rel. v. Brown*, 55 N. Y. 180.—DISTINGUISHING *Starin v. Genoa*, 23 N. Y. 439.—APPLIED IN *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532.

87. Petition must show that the required proportion of taxpayers signed it.—In a proceeding to bond a town to aid a railroad, the burden is on the petitioners to show that a majority of the taxpayers have signed the petition, as required by the statute. *People ex rel. v. Van Valkenburgh*, 63 Barb. (N. Y.) 105.

Under N. Y. Act of 1869 a petition is fatally defective unless it states that the subscribers constitute a majority of the taxpayers, and represent a majority of the taxable property as represented by the last assessment roll. *People ex rel. v. Hughitt*, 5 Lans. (N. Y.) 89.

Excluding those taxed for dogs or highway tax only. *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. Rep. 541, 11 Cent. Rep. 319.—LIMITING *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490.—*Wellsborough v. New York & C. R. Co.*, 76 N. Y. 182.—FOLLOWING *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491.—APPLIED IN *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532.—FOLLOWED IN *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. Rep. 610. REVIEWED IN *Whiting v. Potter*, 18 Blatchf. (U. S.) 165.—*People ex rel. v. Smith*, 55 N. Y. 135.—DISTINGUISHED IN *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327. FOLLOWED IN *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. Rep. 610.—*Rich v. Mentz*, 19 Fed. Rep. 725.—FOLLOWING *Cowdrey v. Caneadea*, 16 Fed.

Rep. 532. OVERRULING *Rich v. Mentz*, 18 Fed. Rep. 52, 21 Blatchf. (U. S.) 492; *Candler v. Attica*, 18 Fed. Rep. 299, 21 Blatchf. (U. S.) 499.

In the petition presented to the county judge in proceedings to bond a town under the Town Bonding Act of 1869 (ch. 907, Laws of 1869), the petitioners described themselves as "representing a majority of the taxpayers of the town." The affidavit of verification attached to the petition stated that "the persons signing said petition are a majority of the taxpayers." In an action by the town to have bonds of the town, issued by the commissioners appointed in said proceedings, adjudged void, and that they be delivered up and canceled—*held*, that the word "representing" did not necessarily import that the majority did not themselves sign, but did it through agents representing such taxpayers; that it might be treated as having reference to the term "majority," not to the persons constituting it; and, as it appears that the word was used in various places in the act in that sense, this was a legislative interpretation of it for the purposes of the act; and so the statement was to be considered as declaring that the subscribers were a majority of the taxpayers. *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122, 21 N. E. Rep. 168.

Where a county election is ordered under Kan. Act of 1876, ch. 107, as amended in 1877, for the purpose of authorizing the county to subscribe to the stock of a railway, and to issue bonds in payment, and such election is ordered upon a petition which does not contain the names, and is not a petition, of two fifths of the resident taxpayers of the county, an election held thereunder is void for want of a sufficient petition, though the county board declares the petition sufficient. *Chicago, K. & W. R. Co. v. Chase County Com'rs*, 43 Kan. 760, 23 Pac. Rep. 1064.

88. Last assessment roll as a criterion.—Under N. Y. Acts of 1869, ch. 907, and 1871, ch. 925, the last assessment roll is the criterion for ascertaining whether the persons petitioning the county judge therefor represent a majority of the taxpayers of the town. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446; *reversed in* 46 N. Y. 110.

And where a petition is presented to the county judge, under the above statutes it is made his duty to determine whether it conforms to the provision of the statute re-

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quiring a majority of the taxpayers, according to the last assessment roll, to sign it. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446; reversed in 46 N. Y. 110.

To enable said judge to discharge that duty, the original last-completed assessment roll must be produced before him, or, in case this cannot be done, secondary evidence of its contents given. *People ex rel. v. Suffern*, 68 N. Y. 321; affirming 6 Hun 304.

An assessment roll cannot be said to be completed, within the meaning of said act, until the assessors have discharged their whole duty in reference thereto. *People ex rel. v. Suffern*, 68 N. Y. 321, affirming 6 Hun 304.

Where the assessment roll in the hands of the collector of a village incorporated under N. Y. Act of 1870, ch. 291, which was produced before a county judge, had no oath written thereon or attached thereto, and there was no proof that it had in fact ever been verified—held, that it was not a completed assessment roll, and was insufficient to authorize the county judge to act; and that a decision based thereon, that the requisite number of taxpayers had signed the petition, was void. *People ex rel. v. Suffern*, 68 N. Y. 321; affirming 6 Hun 304.

The attaching of an affidavit after the presentation of the petition did not cure the defect; moreover, the fact that the roll was delivered to the collector, and that he had collected taxes thereon, did not give it validity or make it a completed roll. *People ex rel. v. Suffern*, 68 N. Y. 321; affirming 6 Hun 304.

If the names on both the petition and the last assessment roll are identical, this is *prima facie* evidence that the persons are the same; but in any event the petitioners must be identified as the persons named on the last assessment roll; and where initials only are used, additional evidence of identity must be given. *People ex rel. v. Smith*, 45 N. Y. 772; affirming 3 Lans. 291.

The statutes make non-resident owners taxpayers, and if their lands are properly taxed they are entitled to petition; but when the statute is not complied with, and the lands in fact are not taxed as non-resident lands, the owners thereof cannot join in a petition. *People ex rel. v. Oliver*, 1 T. & C. (N. Y.) 570.

89. Withdrawal of names from petition.—Where a petition asking a city to make a donation in aid of the construc-

tion of a railroad has been presented to the common council and referred to a committee of the council, persons who signed the petition may, by a remonstrance, withdraw their names from the petition while the same is in the hands of the committee; and if, after such withdrawal, there is not a sufficient number of petitioners asking the donation, the council cannot make the same. *Noble v. Vincennes*, 42 Ind. 125.—DISTINGUISHING *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395.—REVIEWED IN *Adams v. Mayor, etc., of Kokomo*, (Ind.) 12 Am. & Eng. R. Cas. 585.

A taxpayer who has signed a petition for bonding a town under the New York statutes may withdraw his name at any time before a final submission of the case to the county judge; and thereafter his name and the taxable property which he represents cannot be considered. *People ex rel. v. Sawyer*, 52 N. Y. 296.—DISAPPROVING *In re Taxpayers of Greene*, 38 How. Pr. (N. Y.) 515. DISTINGUISHING *Lake Ontario, A. & N. Y. R. Co. v. Mason*, 16 N. Y. 451.—*People ex rel. v. Hatch*, 65 Barb. (N. Y.) 430, 1 T. & C. 113. *People ex rel. v. Wagner*, 7 Lans. (N. Y.) 467, 1 T. & C. 221. Contra, see *People v. Peck*, 42 How. Pr. (N. Y.) 425. *In re Taxpayers of Greene*, 38 How. Pr. (N. Y.) 515. *People ex rel. v. Henshaw*, 61 Barb. (N. Y.) 409.

It is error to reject an offer to have certain signers appear and withdraw their consent, upon a general objection; and an objection that the petitioners were not actually produced cannot be made first upon review. *People ex rel. v. Wagner*, 7 Lans. (N. Y.) 467, 1 T. & C. 221.

Taxpayers signing a petition for the bonding of a town cannot withdraw their consent before presentation of the petition. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

90. Verification of petition.—Under N. Y. Act of 1869, as amended in 1871, the verification of a petition is a part of the petition, and if the two together state all the facts required by the statute, the county judge to whom it is addressed acquires jurisdiction. *Whiting v. Potter*, 2 Fed. Rep. 517.

The term "taxpayers" in such petition and verification will be taken to include owners of non-resident lands who are taxed as such. *Whiting v. Potter*, 2 Fed. Rep. 517.

The verification of a petition must cover all the allegations contained therein. *Angel v. Hume*, 17 Hun (N. Y.) 374.

91. Must describe the company to be aided.—A petition under New York statutes for bonding a town must designate the railroad company to be aided, which must also be an existing incorporated company. *People ex rel. v. Franklin, 5 Lans. (N. Y.) 129.*

The New York Act of April 16, 1852, authorizing the towns in Cayuga county to borrow money to aid in constructing a railroad, which directed the money "to be paid over to the president and directors of such railroad company * * * as may be expressed by the written assent of two thirds of the resident taxpayers," did not require the taxpayers to designate the company by name. "A railroad connecting Lake Ontario with the Susquehanna & Cayuga railroad, and passing through the city of Auburn"—*held*, a sufficient description. *Scipio v. Wright, 101 U. S. 665.*

Under N. Y. Act of 1871 amending the law relating to bonding towns in aid of railroads, a petition is defective if it fails to state that the railroad company to be aided is a corporation in the state. *In re Gorham, 43 How. Pr. (N. Y.) 263.*

But the statutes do not require that the railroad shall be actually located in order to render proceedings to bond a town valid, or to justify the county judge in directing the bonds to be issued in aid of the company. All that is required is that the petition shall show that the petitioners desire that the municipal corporation shall issue its bonds to the amount named, and invest them or their proceeds in the stock or bonds of a designated railroad company in the state. *People ex rel. v. Peck, 42 How. Pr. (N. Y.) 425.*

The provision of N. Y. statutes relating to bonding towns which requires that the petition shall state what "railroad company in this state" is desired to be aided is sufficiently complied with where the petition names the company by its corporate name, with the addition "an association formed in said county and state." *Calhoun v. Delhi & M. R. Co., 28 Hun (N. Y.) 379, 64 How. Pr. 291.*

The fact that the petition asks for an appropriation to a certain railway company, "or its successor by consolidation," does not invalidate the petition or the proceedings thereon; but in such case, in the event of consolidation, the right to the appropriation will pass to and vest in the consoli-

dated company. *Jussen v. Lake County Com'rs, 95 Ind. 567.*—DISTINGUISHED IN *Hamilton County Com'rs v. State, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64.*

92. Should specify the amount to be appropriated.—A petition to the board of commissioners of a county to make an appropriation of money, by levying a special tax, to aid in the construction of a railroad, and the notices of election on the subject of the proposed appropriation, must specify the amount of money to be appropriated. A certain per cent. on the taxable property of the county is not a specific amount. (Worden, J., dissented.) *Detroit, E. R. & I. R. Co. v. Bearss, 39 Ind. 598, 10 Am. Ry. Rep. 382.*

A petition to a board of commissioners to make an appropriation of money, by taxation of a certain township, to aid in the construction of a railroad, and also the notice of election, specified a certain sum, "or a sum equal to two per centum of all taxable property in said township," as the appropriation desired. *Held*, that the amount of the appropriation is set out with sufficient certainty. *Williams v. Hall, 65 Ind. 129.*—DISTINGUISHING *Detroit, E. R. & I. R. Co. v. Bearss, 39 Ind. 598.*

The petitioners for an appropriation to aid in the construction of a railroad may designate in their petition whether the amount appropriated shall be donated to the railway company or invested in its capital stock, but their failure to make such designation will not vitiate the petition or any of the proceedings had thereon. *Jussen v. Lake County Com'rs, 95 Ind. 567.*

93. Conditions annexed in petition.—A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation. The act of March 8, 1879 (Acts 1879, p. 46), enables petitioners and voters to annex conditions to appropriations, but does not compel them to do so if they do not desire any conditions. *Goddard v. Stockman, 5 Am. & Eng. R. Cas. 164, 74 Ind. 400.*—REVIEWING *Indiana N. & S. R. Co. v. Attica, 56 Ind. 476.*

In a proceeding under Ind. Act of May 12, 1869, a petition asking for an appropriation in aid of the construction of a railroad, upon condition that the company locate and construct a depot within the corporate limits of a municipality, is not thereby vitiated,

nor the proceedings under the petition rendered void. *Bittinger v. Bell*, 65 Ind. 445. —QUOTED IN *Brokaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

The petition required of taxpayers must be absolute in form; no power is given to them to make their request conditional upon the location of the road upon a particular route, and a request coupled with such a condition is absolutely void, and renders the bonds void in the hands of *bona fide* holders. *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405. —FOLLOWING *Troy & B. R. Co. v. Tibbits*, 18 Barb. (N. Y.) 298; *People ex rel. v. Adirondack Co.*, 57 Barb. 656.

After the passage of New York Act of 1871, ch. 925, amending the town bonding law of 1869, petitions are valid, although made upon the express condition that the railroad "be made upon a certain route" designated, as such condition is sanctioned by section 2 of the act. *People ex rel. v. Peck*, 42 How. Pr. (N. Y.) 425.

A petition calling for an election to take a corporate subscription in a railway was, on the morning of the election, altered by striking out a clause that the bonds were to be delivered as fast as the work on the road should progress within the town, leaving the statutory condition to apply that no bonds should be delivered until the value of the work on the road should equal the amount subscribed. *Held*, that, as the alteration worked no injury to the town, it did not invalidate the election, nor the right of the company to have the bonds issued. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

94. Law in force at date of application controls.—The validity of a proceeding to bond a town for railroad purposes must be determined by the law as it existed when the application was made; and where the petitions were mostly subscribed while the New York Act of 1869 was in force, several months preceding the application, during which time the law was changed by the act of 1871, the latter governs. *People ex rel. v. Peck*, 42 How. Pr. (N. Y.) 425.

95. Company must first be incorporated.—The statutes relating to these proceedings contemplate that the railroad company shall be incorporated before they can be lawfully taken. But they contain nothing requiring that to be proved as a

fact before the county judge, or to be stated with any special peculiarity in the petition. What they require is that it should be a railroad company within this state, and be named in the petition. *People ex rel. v. Peck*, 42 How. Pr. (N. Y.) 425.

96. Bonds not to issue till sufficiency of petition is determined.—The common council must decide upon petitions to aid railroads before bonds can rightfully be issued. *Madison v. Smith*, 83 Ind. 502.

97. Determination of sufficiency of petition not open to collateral attack.—The sufficiency of a petition for the bonding a town, and of a notice of hearing, cannot be raised in a collateral action brought to restrain the payment of interest on bonds issued in pursuance thereof. *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 379, 64 How. Pr. 291.

After township trustees have passed upon the sufficiency of a petition for an election to decide upon a tax to aid a railroad, and the election has been ordered, and a favorable vote taken and the tax levied, the validity of the tax cannot be assailed on the ground that one third of the resident taxpayers had not signed the petition. The trustees have jurisdiction to settle that question, and their decision cannot be collaterally attacked. *Ryan v. Varga*, 37 Iowa 78. —DISTINGUISHED IN *Slack v. Blackburn*, 64 Iowa 373. FOLLOWED IN *Chicago M. & St. P. R. Co. v. Shea*, 67 Iowa 728. —*West v. Whitaker*, 37 Iowa 598.

Where a petition is presented to township trustees under the Iowa statute, asking them to submit to a vote the question of imposing a tax in aid of a railroad, and the trustees have found that the petition was signed by one half of the resident freehold taxpayers of the township, and cause such finding to be entered of record, such finding must be taken as true, and excludes the presumption that they found that it was signed by "a majority" of the taxpayers, as required by the statute, and a tax voted thereunder is absolutely void, and the want of jurisdiction may be shown in an injunction proceeding to restrain the collection of the tax. *Slack v. Blackburn*, 64 Iowa 373, 20 N. W. Rep. 478. —DISTINGUISHING *Ryan v. Varga*, 37 Iowa 78.

The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to

vote aid for the construction of a railroad, "and proof being made that twenty-five of the petitioners are freeholders of Clinton township," is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated. *Goddard v. Stockman*, 5 Am. & Eng. R. Cas. 164, 74 Ind. 400.

A petition asking for municipal aid in the construction of a railroad, under New York statutes, only stated that the petitioners were a majority of the taxpayers whose names appeared on the last assessment roll, but did not state that they were a majority excluding those taxed for dogs or highway tax only, and including owners of non-resident lands taxed as such, but the affidavit of a petitioner and taxpayer did state that the signers were a majority, excluding those taxed for dogs and highway tax only, and including those taxed as non-resident land-owners. *Held*, that the petition and affidavit were to be considered together, and a judgment of the county judge finding that such petitioners were a majority of the taxpayers, as required by statute, was sufficient. *Whiting v. Potter*, 18 Blatchf. (U. S.) 165.—REVIEWING *People ex rel. v. Spencer*, 55 N. Y. 1; *Wellsborough v. New York & C. R. Co.*, 76 N. Y. 182.

98. Reconsideration of sufficiency of petition.—Where the city council upon petition refuses to subscribe for the stock of a railroad company, under Ind. Code, § 3153, it has no power after the lapse of two years to again consider the same petition and grant its prayer. *Madison v. Smith*, 83 Ind. 502.—REVIEWING *Clarke County Com'rs v. State ex rel.*, 61 Ind. 75; *Doctor v. Hartman*, 74 Ind. 221; *Indianapolis v. Patterson*, 33 Ind. 157; *Foist v. Coppin*, 35 Ind. 471; *Smith v. Chandler*, 13 Ind. 513; *Roberts v. Warren*, 3 Wis. 736; *Covington v. Ludlow*, 1 Metc. (Ky.) 295.

Where a railroad corporation silently acquiesces for two years in a decision of a city council adverse to a petition, it cannot afterwards revive the original petition and secure a favorable decision. *Madison v. Smith*, 83 Ind. 502.

99. What gives jurisdiction to call an election.—Where a sufficient petition

for an appropriation by a township to aid in the construction of a railroad has been duly filed before the proper board of county commissioners, under the Ind. Act of May 12, 1869 (1 Rev. St. 1876, p. 736), the filing of the petition calls into exercise the jurisdiction of the board, and authorizes that body to determine every fact necessary to the granting of the prayer of the petition, including the question whether or not the railroad company sought to be aided has been duly organized under the laws of this state. *Lawrence County Com'rs v. Hall*, 70 Ind. 469.

Section 3153, Ind. Rev. St. 1881, was in 1877, and still is, in force, and by its provisions a petition by a majority of the freeholders of a city is necessary to confer upon the common council power as well to subscribe for the stock of a railroad company as to make a donation to aid it. Section 3152 is and was also in force, and is not inconsistent with section 3153. *Madison v. Smith*, 83 Ind. 502.

At least fifty freeholders, residents of a township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required, the commissioners have no jurisdiction. *Wullenwaber v. Dunigan*, 30 Neb. 877, 47 N. W. Rep. 420. *State ex rel. v. Babcock*, 21 Neb. 187, 31 N. W. Rep. 682.

Under N. Y. Act of 1869, ch. 907, as amended in 1871, the jurisdiction of the county judge relating thereto depends upon a proper petition presented to him, and if any fact required to be stated therein is omitted all subsequent proceedings are void. It must be in the petition because the statute requires it, and the fact that it is brought to the knowledge of the judge in some other way, or at some other stage of the proceeding, or that it seems unnecessary, does not cure the defect. *People ex rel. v. Spencer*, 55 N. Y. 1.—REVIEWED IN *Whiting v. Potter*, 18 Blatchf. (U. S.) 165.

A petition is fatally defective if it fails to state that the company to be aided is a railroad company in the state, as required by section 1 of the statute. The mere naming of the corporation without stating whether it is a foreign or domestic corporation is not a compliance with the statute. *People ex rel. v. Spencer*, 55 N. Y. 1.

Under New York Act of 1869, § 1, a petition must be presented to the county judge

signed by the requisite number of taxpayers before he is authorized to make an order for a hearing. *People ex rel. v. Hughitt*, 5 *Lans.* (N. Y.) 89.

Under N. Y. Act of 1869, § 2, if taxpayers wish to consent to the bonding of a town, but do not sign the petition which is presented to the county judge, they must appear before him at the time and place designated for the taking of proof and then and there express a desire to join in the petition; and the statute contemplates a personal appearance. *People ex rel. v. Hughitt*, 5 *Lans.* (N. Y.) 89.

An expression by some of the taxpayers of their desire that the proceeds of the bonds issued by the town should be invested in first mortgage bonds of a railroad company does not thereby render the petition informal or insufficient. A first mortgage bond is a bond of the company, and there is no evidence or presumption that more than one mortgage will ever be issued. *People ex rel. v. Hughitt*, 5 *Lans.* (N. Y.) 89.

The assessment roll which is to furnish the names of taxpayers and amounts assessed is the last roll which has been revised and corrected by the supervisors. *People ex rel. v. Hughitt*, 5 *Lans.* (N. Y.) 89.

Commissioners appointed under the New York statute to subscribe to railroad stock on behalf of a town are limited to the authority conferred by the statute and the petition presented to the county judge; and a subscription to a different company, or for a larger amount than that authorized by the petition, is void. *Rochester, N. & P. R. Co. v. Cuyler*, 7 *Lans.* (N. Y.) 431.

2. Assent of Taxpayers.

100. Necessity of obtaining assent.

—Where the power of a town to subscribe to railroad stock and issue its bonds in payment is conditioned upon twelve or more freehold residents of the town applying to the county judge for the appointment of commissioners, and upon obtaining the consent in writing of a majority in number and amount of the resident taxpayers of the town, such application and consent are conditions precedent to the authority of the town to subscribe for stock and to issue bonds. *Duanesburgh v. Jenkins*, 40 *Barb.* (N. Y.) 574.

If such town issues bonds without first obtaining the consent of the required number of taxpayers, as required by the statute,

the bonds are void, at least in the hands of the railroad company. *Duanesburgh v. Jenkins*, 40 *Barb.* (N. Y.) 574.

The method in which the assent of a town to its subscription for stock and the issuing of its bonds to aid the construction of a railroad may be given is in the discretion of the legislature. It may authorize such assent to be expressed by any officer of the town; and where it has once acted, it does not part with any portion of this power. Where it has previously clothed a majority of the taxpayers with this authority, it may take it away and confer it upon a town officer; and it may also take away any conditions previously imposed and give the officer unrestricted authority to act, or it may impose other and new conditions at its pleasure. *Duanesburgh v. Jenkins*, 57 *N. Y.* 177; reversing 46 *Barb.* 294.—QUOTING *People ex rel. v. Mitchell*, 35 *N. Y.* 551.

Under N. Y. Act of 1868, ch. 553, as amended in 1869, ch. 96, the consent of the taxable inhabitants is absolutely necessary; and where the consent does not specify a company in whose stock the money is to be invested, it is fatally defective; and such defect is not cured by the act of 1871, ch. 809, purporting to legalize and confirm the acts of the commissioners relating thereto. *Horton v. Thompson*, 71 *N. Y.* 513; reversing 7 *Hun* 452.—FOLLOWING *People ex rel. v. Batchellor*, 53 *N. Y.* 128.—DISAPPROVED IN *Thompson v. Perrine*, 103 *U. S.* 806. DISTINGUISHED IN *Solon v. Williamsburgh Sav. Bank*, 114 *N. Y.* 122; *Brownell v. Greenwich*, 114 *N. Y.* 518, 22 *N. E. Rep.* 24, 24 *N. Y. S. R.* 6, 4 *L. R. A.* 685; *Hoag v. Greenwich*, 133 *N. Y.* 152. FOLLOWED IN *Scipio v. Wright*, 101 *U. S.* 665; *Rogers v. Stephens*, 86 *N. Y.* 623.

Under Vt. Act of Nov. 12, 1867, it is not sufficient merely to file the writing containing the assent and certificate of a majority of the taxpayers; but it must be filed and recorded as required by the statute to give the commissioners authority to make the subscription. And such want of authority may be set up in a mandamus proceeding by an assignee of the company to compel the town to issue the bonds. *Lamoille Valley R. Co. v. Fairfield*, 51 *Vt.* 257.—FOLLOWING *Essex County R. Co. v. Lunenburg Selectmen*, 49 *Vt.* 143.

101. Conditional assent.—Taxpayers may impose as a condition to the subscribing for stock and to the delivery of

bonds that the road shall be constructed through a certain village; and when a condition is thus imposed, the commissioners appointed to subscribe for the stock and to issue the bonds are bound thereby. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491; *affirming 7 Hun 499*.

In a proceeding to bond a town the county judge appointed three commissioners to procure the necessary consent. One of the number declined to act, and a fourth one was appointed in his place. In obtaining the consents each commissioner used a separate paper, and on two of them the signers consented that the three commissioners originally appointed might make the subscription and issue bonds, while on the third the signers consented that two of them might do so, excluding the one who had resigned; but the subscription was made by the three acting commissioners. *Held*, that the taxpayers might impose conditions as to the making of the subscription, but in this case the consent did not authorize the subscription. *People ex rel. v. Hutton*, 18 Hun (N. Y.) 116.—QUOTING *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491; *Adams v. Washington & S. R. Co.*, 10 N. Y. 334.

102. Revocation of assent.—Under a statute authorizing the bonding of a town in aid of a railway upon the assent of the taxpayers owning more than one half of the taxable property of the town, taxpayers have a right to revoke their consent at any time prior to the making of the affidavit by the assessors that such majority has given its consent. *People ex rel. v. Allen*, 52 N. Y. 538.—APPLIED IN *Springport v. Teutonia Sav. Bank*, 5 Am. & Eng. R. Cas. 199, 84 N. Y. 403.

After signing a petition consenting to the bonding of a town certain of the taxpayers executed and acknowledged revocations of their consent with the same formalities as the consents, and delivered them to the assessors while they had the consents before them, and before they had acted thereon, which reduced the number consentin' below that required by the statute; but the assessors disregarded the revocations and went on and made the affidavit of consent, as required by the statute. *Held*, that the omission to file the revocations did not render them ineffectual, but that their delivery made them effectual, and withdrew from the assessors the authority to make the affidavit.

Springport v. Teutonia Sav. Bank, 5 Am. & Eng. R. Cas. 199, 84 N. Y. 403.—APPLYING *People ex rel. v. Allen*, 52 N. Y. 538.

And in such case the omission to file the revocations did not estop the town from suing to restrain holders of the bonds from transferring them and to compel their cancellation. Even assuming that the taxpayers who thus consented and revoked their assent were estopped by their own act, it could not estop the whole body of the taxpayers of the town. *Springport v. Teutonia Sav. Bank*, 5 Am. & Eng. R. Cas. 199, 84 N. Y. 403.

Where a proceeding is instituted under the Vermont statute to bond a town in aid of a railroad, and after a majority of the taxpayers have given their assent in writing, but before the commissioners have certified that fact, enough of the taxpayers to destroy the majority execute in writing a withdrawal of their assent and send it to the commissioners, without going before them in person, and the statute makes no provision for withdrawing such assent, the commissioners may disregard the withdrawal, and such withdrawal will not affect the validity of the bonds. *First Nat. Bank v. Dorset*, 16 Blatchf. (U. S.) 62.

103. Want of assent cured by retrospective legislation.—The legislature may subsequently validate any act which it might have authorized in advance. So the act of commissioners in bonding a town without first procuring the consent of the taxpayers, as required by the statute, may be subsequently validated by the legislature. *Hardenbergh v. Van Keuren*, 4 Abb. N. Cas. (N. Y.) 43; *reversed in 16 Hun 17*.

A consent of taxpayers which does not specify the company in whose stock the money to be raised is to be invested, as required by the statute, is fatally defective, but may be cured by a subsequent statute. *Horton v. Thompson*, 71 N. Y. 513; *reversing 7 Hun 452*.—FOLLOWING *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 459.

A statute authorized a certain town to issue bonds in aid of a railroad on condition that the resident taxpayers representing a majority of the taxable property of the town should give their consent in writing. The required number gave their consent, but a part of them annexed a condition that the road should be located through or near a

certain village. Subsequently the legislature passed an act validating such consent "for the purposes for which it was authorized to be given," and providing that it should not be invalidated for certain specified causes, "or for any other error, irregularity, omission, or defect." *Held*, that this cured any irregularity in annexing the condition to the consent of the taxpayers. *People ex rel. v. Clark*, 53 Barb. (N. Y.) 171.

104. Mode of ascertaining the proportion of taxpayers who assent.—Where a statute authorizes a town to subscribe to railroad stock upon the consent in writing of a majority of the taxpayers "appearing upon the last assessment roll," the last assessment roll referred to is the last one before the time of making the subscription, and not the last one before the passage of the statute. *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574.

The last assessment roll referred to in the above statute means the last one completed at the time the subscription is made; and where the one for the year in which the subscription is made is not complete, the one for the previous year is to be used. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446.

Where a statute provides that a town shall only subscribe to railroad stock and issue its bonds in payment upon the assent of the owners of more than one half of its taxable property according to the last assessment roll, such assessment roll means the last one before the town assessors made affidavit of such consent, and not the last one before the bonds are issued. *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131.

Where a statute authorizes corporate subscriptions to the capital stock of a railroad and the issuing of bonds in payment thereof upon the consent in writing "of a majority of the taxpayers appearing on the last assessment roll of such village or town, representing the majority of the taxable property of the residents of such town," a canal corporation which owns property in the town, but has its principal office and place of business elsewhere, cannot be said to be a resident of the town, and is not included. *People v. Schoonmaker*, 63 Barb. (N. Y.) 44.

The surrounding circumstances leading to the enactment of a law may be looked to to aid in its construction. So where the above statute was procured by a resolution at a meeting of the resident taxpayers

having for its very object the exclusion of the canal company and other corporations from voting or consenting to the bonding of the town, it should be construed so as to carry out the legislative intent. *People v. Schoonmaker*, 63 Barb. (N. Y.) 44.

Under N. Y. Act of 1869, ch. 907, relating to the bonding of towns, all names upon the tax roll must be counted in ascertaining whether a majority of the taxpayers consented thereto, including persons taxed only for dogs. *People ex rel. v. McMaster*, 10 Abb. Pr. N. S. (N. Y.) 132.

Joint owners are to be counted separately; but under the amendment of 1871 a partnership is to be counted as one taxpayer. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

And a person assessed both individually and as guardian or trustee should be counted but once. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

And names representing assessments against the estates of deceased persons must be excluded from the count, as such assessments, under the statute, are illegal and void. *People ex rel. v. Franklin*, 5 Lans. (N. Y.) 129.

105. Necessity of proving assent.

—A plaintiff suing a town on bonds issued under N. Y. Act of 1852, ch. 375, authorizing the several towns in Cayuga county to aid in the construction of railways, must show affirmatively that the required assent of taxpayers was obtained and filed in the clerk's office. The representation of the town officers, as expressed on the face of the bonds, that the necessary assent had been obtained and filed does not bind a town. *Starin v. Genoa*, 23 N. Y. 439; *reversing* 29 Barb. 442.—DISAPPROVED IN *Venice v. Murdock*, 92 U. S. 494.

But the contrary of the above doctrine is held by the supreme court of the United States; and that in a suit by a *bona fide* holder of such bonds the town is estopped from disputing their validity, and that the plaintiff is not bound to prove the genuineness of the signatures of the written assent of the taxpayers, where the proper town officers had recited that such assent had been given. *Venice v. Murdock*, 92 U. S. 494.

The action of a county in making the subscription to the stock of a company is dependent upon the assent of the prescribed majority, to be ascertained in the manner prescribed by law, for its validity and bind.

ing force. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

106. Affidavits of assessors as proof of assent.—An affidavit of a town assessor that two thirds of the resident taxpayers of the town according to the last assessment roll had given their assent to the bonding of the town is not sufficient evidence of the fact in the absence of any provision of the statute making it such. *Starin v. Genoa*, 23 N. Y. 439; reversing 29 Barb. 442.—APPLIED IN *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532. DISTINGUISHED IN *People ex rel. v. Brown*, 55 N. Y. 180.—*Gould v. Sterling*, 23 N. Y. 439; reversing 29 Barb. 442.—DISTINGUISHING *Bank of Rome v. Rome*, 19 N. Y. 20.—DISAPPROVED IN *Venice v. Murdock*, 92 U. S. 494. DISTINGUISHED IN *Hoag v. Greenwich*, 133 N. Y. 152. FOLLOWED IN *Horton v. Thompson*, 71 N. Y. 513; *Scipio v. Wright*, 101 U. S. 665. NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446. QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

The affidavits of the town assessor are not made incontrovertible and conclusive evidence of the facts therein stated. They are *prima facie* evidence, and may be impeached for falsity, or rebutted by competent evidence. *People ex rel. v. Hutton*, 18 Hun (N. Y.) 116. *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532; reversing 22 Hun 201.—APPLYING *Starin v. Genoa*, 23 N. Y. 439; *People ex rel. v. Mead*, 36 N. Y. 224; *Venice v. Woodruff*, 62 N. Y. 463; *People ex rel. v. Brown*, 55 N. Y. 196; *Wellsborough v. New York & C. R. Co.*, 76 N. Y. 185. DISTINGUISHING *People ex rel. v. Mitchell*, 35 N. Y. 551; *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Bank of Rome v. Rome*, 19 N. Y. 20.

The town is not precluded by such affidavit of its assessor from showing that in fact the consent of a majority of the taxpayers of the town had not been obtained. *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532; reversing 22 Hun 201.

Where a statute only authorizes a town to issue its bonds in aid of a railroad upon a majority of the assessors making an affidavit to the effect that a majority of the taxpayers in interest have consented thereto, and making such affidavit proof of such consent, such affidavit is in the nature of a judgment, and the action of the assessors in making it is reviewable upon a certio-

rari. *People ex rel. v. Allen*, 52 N. Y. 538.

When the assessors show that they have before them the assessment roll and consents of the taxpayers, the signatures to which were proved as conveyances of real estate were required to be proved, they are authorized, aided by their personal knowledge of the taxpayers, to determine whether the requisite number had signed the consents, and such return is conclusive in a certiorari proceeding to review the proceedings of such officers in bonding a town. *People ex rel. v. Morgan*, 65 Barb. (N. Y.) 473.

Where a statute requires a majority of the taxpayers according to the last assessment roll of the town to consent to the bonding of it, and consents have been obtained for the last two years, an affidavit which states that the number of consents have been obtained according to the assessment rolls of the last two years is sufficient compliance with the statute. If the affidavit shows that the required number of consents has been obtained as appears by both rolls, it necessarily so appears by the last one. *Pierce v. Wright*, 6 Lans. (N. Y.) 306, 45 How. Pr. 1.

Commissioners acting under N. Y. Act of 1868, ch. 811, who issue bonds of a town without the requisite consent of the taxpayers so as to make them valid obligations of the town, are not necessarily guilty of official misconduct so as to make them personally liable. Where a provision of the statute makes it the duty of assessors to make a verified certificate that such consent has been obtained, and the commissioners act thereon in good faith, it is a complete justification. *Ontario v. Hill*, 99 N. Y. 324.

Where a statute provides that commissioners may borrow money on the faith and credit of the town and issue bonds therefor, upon the affidavit of the assessors that a majority of the taxpayers in interest have assented thereto, *bona fide* holders of such bonds before maturity cannot recover thereon where the only evidence of such consent is an affidavit of the assessors stating that the consent of the requisite majority has been obtained, as required by the statute, and stating further that the commissioners are authorized to borrow money on the faith and credit of the town, but without saying anything about issuing

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bonds, and without stating to what the consent has been obtained. *Smith v. Ontario*, 15 Blatchf. (U. S.) 267.—DISTINGUISHED IN *Irwin v. Ontario*, 3 Fed. Rep. 49, 18 Blatchf. 259.

Plaintiff, a town, issued its bonds under N. Y. Act of 1869, ch. 314, in aid of a railway. Section 2 of the act required the town assessors to certify that a majority of the taxpayers of the town had given their assent, and provided that such affidavit should be "presumptive evidence" of the facts therein stated. Subsequently the court of appeals annulled the proceedings on the ground that the required consent of the taxpayers had not in fact been given, though the consents and affidavits were in form sufficient. Afterwards the town commenced an action against holders of the bonds to have them delivered up and canceled. Held, that the defendants, not being parties to the former litigation, were not estopped from setting up the affidavit of the assessors as "presumptive evidence" of such consent, thus making it incumbent on the town to rebut the presumption afforded by the affidavit. But the affidavit was not conclusive in favor of the defendants, but might be disputed by the town. *Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.—DISTINGUISHING *Venice v. Woodruff*, 62 N. Y. 462.—DISTINGUISHED IN *Cagwin v. Hancock*, 5 Am. & Eng. R. Cas. 150, 84 N. Y. 532.

By N. Y. Act of 1867, ch. 874, § 2, the town assessor was required to make an affidavit, in a proceeding to bond a town, showing that a majority of the taxpayers had consented thereto, which, when so made, should be legal evidence of the facts contained therein. In a proceeding to compel the commissioners of the town to issue the bonds to the railroad company the assessor testified that he signed a paper, but not under oath, the contents of which were not stated to him and which he did not know, and that he had not taken any means of ascertaining whether a majority of the taxpayers had consented or not. This affidavit was taken before one who was acting as attorney for the company in procuring the bonding of towns, and he stated as a witness that he read the affidavit to the assessor and swore him to it; that he told the assessor that a majority had consented to bonding the town, but this statement was made without having the assessment roll present. Held, that the

town was not bound by the affidavit, and that the company could not compel it to issue the bonds. *People ex rel. v. Barrett*, 18 Hun (N. Y.) 206.

107. Requiring assent not a delegation of legislative power.—It is no objection to the exercise of the power given to the legislature to impose local taxation to carry out local enterprises that in the exercise of this power the legislature has referred the propriety of imposing such taxes on the taxpayers themselves, and providing that the act shall not become a binding law unless their consent is given. *Slack v. Maysville & L. R. Co.*, 13 B. Mon. (Ky.) 1.—FOLLOWED IN *Baltimore & O. R. Co. v. Jefferson County*, 29 Fed. Rep. 305.—*Bank of Rome v. Rome*, 18 N. Y. 38; affirming 27 Barb. 65.—DISTINGUISHING *Barto v. Himrod*, 8 N. Y. 483.—*Gould v. Sterling*, 23 N. Y. 456.—DISAPPROVED IN *Venice v. Murdock*, 92 U. S. 494. DISTINGUISHED IN *Hoag v. Greenwich*, 133 N. Y. 152. FOLLOWED IN *Horton v. Thompson*, 71 N. Y. 513; *Scipio v. Wright*, 101 U. S. 665. NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446. QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

VII. ELECTION.

108. In general.*—If the legislature authorizes a municipal corporation to vote a donation or subscription to secure the location and erection of a public building, a vote authorizing the same will create a legal liability. The courts cannot inquire into the propriety or policy of such legislation. *Hensley Tp. v. People ex rel.*, 84 Ill. 544.

Under the charter of the Bloomington & Ohio River R. Co., §§ 8, 9, and 10, adopted March 10, 1869, power was conferred on towns along the line of such road to vote, under the notices therein specified, for or against the issue of township bonds as a donation in aid of its road, and upon a vote the power was conferred to issue such bonds. *Windsor v. Hallett*, 3 Am. & Eng. R. Cas. 76, 97 Ill. 204.—FOLLOWING *Prairie v. Lloyd*, 97 Ill. 179.

The statute does not make the county commissioners the canvassing officers, nor designate the time and place of making the canvass of votes cast at an election held on

* Right of individuals to vote stock under a county subscription where each taxpayer becomes a stockholder, see 52 AM. & ENG. R. CAS. 127, abstr.

the question of subscribing stock in a railway corporation. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

A statute which authorizes a town at any time prior to a day therein specified to create and issue its bonds in aid of a public enterprise by a vote of its supervisors, to be ratified at any election authorized to be held at any time prior to said day, and which also expressly provides that no bonds shall be issued until after such ratification, and that they shall then be issued and disposed of in such way as the parties may thereafter agree upon, does not require the formal execution and delivery of such bonds prior to the day limited for said ratification. *State ex rel. v. Lake City*, 25 Minn. 404.

Under Tenn. Const. of 1834, art. 2, § 29, the legislature has the power to submit the question of subscribing stock to a railroad company to a vote of the people, and the authority given to the county by the legislature to make such subscription is made dependent for its exercise on the result of a vote of the citizens for or against the proposition. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

An election in a township was ordered, to decide whether such town should subscribe to the capital stock of a company named, payable in bonds issuable when the company should have constructed its shops within the town at an expense of not less than \$25,000. Held, that a vote in favor of the proposition was legal, and authorized a subscription to the stock of the company, but not to aid in the erection of shops. *Casey v. People ex rel.*, 132 Ill. 546, 29 Am. & Eng. Corp. Cas. 168, 24 N. E. Rep. 570.

The fact that the vote was upon condition that the shops should be erected in the town, and the subscription may have been made on that condition, did not affect the right to subscribe to the stock of the company. *Casey v. People ex rel.*, 132 Ill. 546, 29 Am. & Eng. Corp. Cas. 168, 24 N. E. Rep. 570.

In section 384 of the Iowa Code, relating to the division of a township containing a city or incorporated town, the words "for election purposes" refer only to the election of officers for the new township; and as the old township organization in such a case continues to exist until the 1st day of January following the order of the supervisors for the division of the township, all other elections to be held before the 1st day of January must be by the original township

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as it was before the division. *So held* in this case, where a tax in aid of a railroad was voted by the whole original township in December prior to the January when the division of the township previously ordered took effect under the statute. *Williams v. Poor*, 65 Iowa 410, 21 N. W. Rep. 753.

Where the proposition submitted to the vote of the people provided for the issuing of bonds in the amount of \$500 each—held, that the fact that the amount which could legally be issued could not be divided exactly into sums of \$500 did not render the vote a nullity, or prevent the county commissioners from issuing the bonds. *Turner v. Woodson County Com'rs*, 12 Am. & Eng. R. Cas. 600, 27 Kan. 314.

Minn. Sp. Laws 1869, ch. 34, authorized the city of Hastings, by a vote of a majority of its city council, ratified by the voters of the city, to issue bonds in aid of the St. Paul & Chicago R. Co.; that before said bonds should be issued the question of their issue should be passed upon by the voters at any election held for that purpose at any time prior to the 1st day of August, and if such issue was by them approved, then that the bonds should be issued, and the council might make such agreements as they might deem proper with the company for, or relating to, the disposal of the bonds or their proceeds. Pursuant to this law the council on May 3, 1870, duly adopted an ordinance authorizing the issue of a certain amount of bonds, and fully prescribing the terms and conditions upon which they should be issued, among which was one that no bonds should be issued until after the completion of the railway, as specified in the ordinance. This ordinance was duly ratified by the people at an election held May 15, 1870, in pursuance of its provisions. Held, that the ordinance was a proper exercise of power on the part of the city council under the law in question. *Warsop v. Hastings*, 22 Minn. 437.

In a suit against a town for the interest due upon certain bonds issued by it in aid of a railroad, and reciting that they were issued pursuant to an order of the trustees "authorized by a vote of the people of said town at a special election held for that purpose," where it appeared that sixteen votes were cast, and all in favor of the subscription, but no testimony indicated when the election was held, or that there were any judges of the election, or that any poll

books were kept, or that any return of the votes cast had ever been made to any officer or body authorized to declare the result, and the evidence strongly tended to show that no registration of the qualified voters of the town had ever been made, certified, and filed as required by law, or authenticated in any way, the issue of the bonds was held unauthorized, and the plaintiff not allowed to recover. *Carpenter v. Lathrop*, 51 Mo. 483.—QUOTING *Steines v. Franklin County*, 48 Mo. 167. QUOTING AND DISTINGUISHING *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 539. REVIEWING *Ranney v. Baeder*, 50 Mo. 600.

100. Conditions precedent to calling election.—In order to render a vote of the people upon a question of borrowing money or aiding in constructing a road of any validity, and to confer any authority by it upon the county judge, all the requisites of the statute must be complied with in reference to each question or proposition submitted. *McMillan v. Boyles*, 3 Iowa 311. —QUOTED IN *Alvis v. Whitney*, 43 Ind. 83.

Supervisors may require proof that persons petitioning for a vote on subscribing to the stock of a railroad are legal voters; but where such proof is offered, and refused, it must be regarded as waived. *People ex rel. v. Logan County Sup'rs*, 45 Ill. 162.

It is not essential to the validity of a popular election, ordered and held on the question of subscription to stock, that there should be a final and definite survey and location of the entire line of the company's road. All that is required is a substantial location, designating the *termini* and general direction of the road, and an estimate of the cost of constructing it. *Wilson County v. Third Nat. Bank*, 3 Am. & Eng. R. Cas. 151, 103 U. S. 770. *Harwood & C. F. & M. R. Co. v. Case*, 37 Iowa 692.

Where a statute provides that the people may vote upon taking stock "in any road which passes through or contiguous to any county," and there is no provision requiring the road to be located before such vote, the vote may be taken before the location. *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 637.

Section 1144 of the Tenn. Code provides that "before such application [that is, to the county court to order an election] can be made the entire line of the road in which the stock is proposed to be taken shall be surveyed by a competent engineer, and substan-

tially located by designating the *termini* and approximating the general direction of the road, and an estimate of the grading, embankment, and masonry made by the engineer under oath and filed with the application." *Held*, that no election can be ordered until these requirements are complied with. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

The provisions of the above section are not directory, but mandatory. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

Under Cal. Act of Apr. 4, 1870, aid may be granted to a road between certain points, where the company is not incorporated until after the order is made calling an election. *Coleman v. Marin County Sup'rs*, 50 Cal. 493.

Before the board of county commissioners of a county shall cause a first election to be held under the provisions of section 1, ch. 183, Kan. Laws of 1887 (Gen. St. of 1889, p. 1283), to determine whether a municipal township shall be permitted to subscribe to the capital stock of a railroad company constructing or proposing to construct a railroad through or within such township, a petition in writing, signed or purporting to be signed by two fifths of the resident taxpayers of the township in which the election is to be held, must be presented to the board which is requested to order such an election. *Kansas City & P. R. Co. v. Rich Tp.*, 45 Kan. 275, 25 Pac. Rep. 595.

Under an act authorizing a city to make an agreement with a railroad company to issue its bonds to aid in constructing its railroad, and by ordinance to provide for issuing the bonds, and providing that no such agreement or ordinance shall take effect until the ordinance specifying the time, terms, and conditions of the bonds shall be submitted for approval to the voters of the city, an agreement must be entered into before the ordinance is submitted, and submission before such agreement is void. *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 48 (Gil. 36.)

An Ohio Act of March 21, 1850, as amended March 25, 1851, authorized county elections to vote on making subscriptions to the stock of railroads; but if a subscriber should not be authorized by the county then a vote might be taken by township on the question of subscriptions by them. *Held*, that a township had no power to vote or issue bonds until after the county had

refused to subscribe either by a direct vote or by failure to call an election within a reasonable time. *Northern Nat. Bank v. Porter Tp.*, 15 Am. & Eng. R. Cas. 575, 110 U. S. 608, 4 Sup. Ct. Rep. 254; affirming 5 Fed. Rep. 568.

A law provided that if the "corporate authorities" of a city "shall propose to subscribe to the capital stock of a railroad" it should be their duty to fix a time for holding an election to vote on the proposition. *Held*, that this did not require the corporate authorities to meet and propose to subscribe before the election was called. *Moers v. Reading*, 21 Pa. St. 188.

110. Duty to call election.—Where a petition is properly presented to the board of county commissioners under the provisions of ch. 107, Kan. Laws of 1876, and the amendments thereto, and upon being examined and canvassed the county is found to contain the requisite number of legal petitioners, it is the duty of the commissioners to cause an election to be held, as prayed for, to determine whether such subscription shall be made. *State ex rel. v. Rush County Com'rs*, 35 Kan. 150, 10 Pac. Rep. 535.

But where it appears that at the time the petition is presented a question is pending whether or not the township shall be divided into two townships, and the county commissioners refuse to act upon the petition for the election until after the question whether the township shall be divided or not shall be settled and determined—*held*, that the supreme court will not order a peremptory writ of mandamus to be issued to compel the county commissioners to order such an election until the question of the division of the township is finally settled and determined. *State ex rel. v. Anderson County Com'rs*, 28 Kan. 67.

111. Who may issue the call.—Where there is a city within the limits of a township, but not coterminous with the township, the township trustees may order the submission of the question whether the township, including the city, will vote a tax in aid of the construction of a railroad. *Young v. Webster City & S. W. R. Co.*, 75 Iowa 140, 39 N. W. Rep. 234.

Where called meetings of boards of trustees or other bodies are necessary, it is not required in the case of the absence of members that the meetings be deferred until their return in order that they may act without such notice. *So held*, where two of the

trustees of a township, without notice to the third one, who was absent from home, in a called meeting, ordered an election upon the question of voting a tax in aid of the construction of a railroad. *Young v. Webster City & S. W. R. Co.*, 75 Iowa 140, 39 N. W. Rep. 234.

Under the Ohio Act of March 21, 1850, to incorporate the Springfield & Mansfield R. Co. (48 Ohio L. 294), and the act of March 25, 1851, "to authorize special elections to decide the question of subscription to the Springfield & Mansfield railroad by counties and townships" (49 Ohio L. 548), the trustees of Goshen township were authorized to submit the question of a subscription by said township to the capital stock of said company to the electors of the township, to be voted on at the time of the annual election in October, 1851, no steps having previously been taken by the commissioners of Champaign county to procure a vote of the electors of the county on the question of a county subscription. *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569.—DISTINGUISHING *Hopple v. Brown Tp.*, 13 Ohio St. 311.

112. Call by county court.—Where a statute provides for calling an election by the county court to vote on subscriptions to railroad stock, an election called by the board of supervisors is void, and confers no authority to make the subscription. *Richland v. People ex rel.*, 3 Ill. App. 210. *Force v. Batavia*, 61 Ill. 99.—DISTINGUISHED IN *Post v. Kendall County Sup'rs*, 105 U. S. 667.—*Gaddis v. Richland County*, 92 Ill. 119.

To authorize a county court to make a subscription in aid of the construction of the Lexington & Big Sandy railroad, under the statute of that subject (Ky. Sess. Acts of 1851-52, p. 786), it was necessary that the election for ascertaining the sense of the voters of the county as to the making of such subscription should have been ordered by the county court on the application of the officers of the railroad company. And a vote taken in any other way did not authorize the subscription by the county court of stock in said railroad. The payment by the county court to the officers who held the election without authority could not give validity to an election which was illegal. *Fayette County Court v. Lexington & B. S. R. Co.*, 17 B. Mon. (Ky.) 335.

A provision of law requiring all the members of a county court to be present when levying taxes does not apply to mere min-

isterial acts of the court in ordering a vote of the county on a proposition of taxing the county in aid of a railway. *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed (Tenn.)* 637.—DISTINGUISHED IN *Bowling Green & M. R. Co. v. Warren County Court*, 10 *Bush (Ky.)* 711.

Where a county court is authorized to submit a question of subscribing to railroad stock to a vote of the people of the county, and a favorable vote has been obtained, the court cannot revoke its action and order a second vote. *Madison County Court v. Richmond, I. & T. F. R. Co.*, 80 *Ky.* 16.

An application made in the name of commissioners appointed by the legislature to organize a company will not vitiate the order of the county court for an election to determine whether the county shall subscribe to the stock of the railroad, though the directors had been elected and were the proper agents of the company to make the application. *Louisville & N. R. Co. v. State*, 8 *Heisk. (Tenn.)* 663, 19 *Am. Ry. Rep.* 107.

Though the Tennessee Act of 1871, ch. 50, requires the order to be made by a majority of the justices at a quarterly term, yet bonds will not be subject to attack after issue because the order was made by a majority of the justices not at a quarterly term. *Louisville & N. R. Co. v. State*, 8 *Heisk. (Tenn.)* 663, 19 *Am. Ry. Rep.* 107.—REVIEWING *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed (Tenn.)* 638.

Where a county court submits the question of subscription to stock of a railroad company to a vote of the people of the county, the question whether it was submitted in pursuance of the law, or, in other words, whether the county court, under the circumstances, had authority to submit it, is a question not in the nature of a contested election between candidates for office, and the fact that a chancery court has not jurisdiction to hear and determine such contested election does not prove its want of jurisdiction to declare a subscription of stock void as a contract, if made without authority of law. *Winston v. Tennessee & P. R. Co.*, 1 *Bart. (Tenn.)* 60.—REVIEWING *Nicholi v. Mayor, etc., of Nashville*, 9 *Humph. (Tenn.)* 252; *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed (Tenn.)* 640.

The charter of a railway company provided that when it should "request the county court of any county through or adjacent to which it is proposed to construct said rail-

way to subscribe, either absolutely or upon special conditions, a specified amount to the capital stock of said company, the county court so requested may in its discretion order an election." *Held*, that this gave the county judge no authority to submit the question of taxation or subscription to a vote of the people without having associated with him a majority of the justices of the county. *Bowling Green & M. R. Co. v. Warren County Court*, 10 *Bush (Ky.)* 711.—DISTINGUISHING *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed (Tenn.)* 659.

113. Call by board of supervisors.—A board of supervisors may call a special meeting for the purpose of calling an election to vote on bonding the county in aid of a railroad, under Cal. Act of Apr. 4, 1870. *Coleman v. Marin County Sup'rs*, 50 *Cal.* 493.

Under Illinois statutes of 1857, authorizing counties to adopt township organization, the board of supervisors of a county has authority, under Ill. Act of Nov. 6, 1849, authorizing counties to subscribe for stock in railroad companies, to call an election to ascertain the will of the people in that behalf. *Prettyman v. Tazewell County Sup'rs*, 19 *Ill.* 406.

Under the Illinois statutes the board of supervisors of a county alone has the power to order an election to subscribe to railroad stock; and in such matters as ordering the election, canvassing the vote, deciding that a majority has voted for the subscription, and in passing a resolution that the county will take the stock and issue its bonds, it cannot delegate the power; but after all this is done it may direct that the bonds be signed by the county judge. *Clarke v. Hancock County Sup'rs*, 27 *Ill.* 305.

And an election called by the county court is unauthorized, and bonds issued in pursuance thereof are void, even against an assignee without notice taking the bonds before due. *Marshall County Sup'rs v. Cook*, 38 *Ill.* 44.—DISAPPROVING *Mercer County v. Hackett*, 1 *Wall. (U. S.)* 83; *Gelpcke v. Dubuque*, 1 *Wall.* 175.—DISTINGUISHED IN *Mercer County Sup'rs v. Hubbard*, 45 *Ill.* 139.

It is competent for the board of supervisors, under section 986 *et seq.* of the Iowa Revision, to call a special election for the purpose of submitting to the voters of the

county the question of the ratification of a contract between the county and a railroad company, under which the swamp lands of the county are to be conveyed to the company to aid in the construction of its road. *Cedar Rapids & M. R. R. Co. v. Boone County*, 34 Iowa 45, 5 Am. Ry. Rep. 59.

114. When call should be made.—

Where a special election is held in a town to authorize the issuing of bonds in aid of a railway, and it appears from the record that the election was not ordered the number of days before it took place that the statute required, the record shows on its face that the election was illegal, and an issue of bonds, therefore, unauthorized. *Hill v. Memphis*, 23 Fed. Rep. 872; affirmed in 134 U. S. 198, 10 Sup. Ct. Rep. 562.

Such bonds are not invalid because the election to authorize them was held in less than thirty days after the date of the order calling it, contrary to the statute, where the bonds contain a recital that they were issued "in pursuance of and in accordance with the act of the legislature." *Humboldt Tp. v. Long*, 92 U. S. 642.

115. Contents of the call.—Where the law authorizing corporate subscriptions in aid of a railroad is silent as to what the petition for and notice of the election shall contain as to the length of time the bonds shall run, and the election is called according to law, it will not be essential to the validity of the election that the petition, notice of election, and vote should fix the time when the bonds will mature. *People ex rel. v. Harp Sup'rs*, 67 Ill. 62.

A submission to a vote of the question whether a county will subscribe to the stock of a railroad need not specify the rate of interest to be paid on the bonds when issued, nor the time for the payment of such interest; nor is it necessary to state at what time the proposition, if adopted, will take effect. *Whittaker v. Johnson County*, 10 Iowa 161.

An article in a warrant for a town meeting is sufficient if it gives notice, with reasonable certainty, of the subject-matter to be acted upon. Thus, where the only mode provided in the charter of a railroad by which towns interested therein may aid in its construction is a subscription to its stock, an article in a warrant for a town meeting "to see if the town will loan its credit to aid in the construction of the" railroad named gives reasonable notice that

a proposition to subscribe for stock will be acted upon and will authorize such action. *Belfast & M. L. R. Co. v. Brook*, 60 Me. 568.

A public act authorizing town aid to railroads need not be noticed in the article in the warrant to see if the town will vote such aid. *Canton v. Smith*, 65 Me. 203.

Under the Missouri General Railroad Law an order of the county court submitting to the voters of the county a proposition to subscribe for stock in aid of a railroad is not required to specify the name of the corporation if the proposed route be described with requisite certainty. *Ninth Nat. Bank v. Knox County*, 37 Fed. Rep. 75.—FOLLOWING *Johnson County Com'rs v. Thayer*, 94 U. S. 631; *Block v. Bourbon County Com'rs*, 99 U. S. 698.

It is not necessary that all the details of the manner and conditions of extending aid be specifically submitted to a vote and be voted upon; the substantial question to be voted upon is, "Shall the county aid in the construction of the road in the manner and to the extent provided?" *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

It is not necessary that the order of the court directing a vote upon a subscription should state that the amount to be subscribed will not require an annual tax in excess of twenty cents, or that it is not more than one fifth the capital stock of the company. *Redd v. Henry County Sup'rs*, 31 Gratt. (Va.) 695.

In an order made under Va. Act 1881-82, p. 467, directing the submission of the question whether or not a county should subscribe to the stock of a company proposing to build its railroad through the county, the county court failed to state the maximum of subscription and the number of miles the road was to be built through the county. Held, that such failure does not invalidate the order nor the proceedings under it. *Taylor v. Greenville County Sup'rs*, 86 Va. 506, 10 S. E. Rep. 433.

A town passed a resolution to guarantee the bonds of a railroad to a certain amount, if the people of the town voted favorably, and provided that the vote should be by ballot by "yes" or "no"; and a record of a town meeting subsequently made stated that the resolution was adopted. As a matter of fact the vote was not by ballot, but by a division of a town meeting; but neither

the town nor any person for it made any objection for more than three years, and till long after the company had, in good faith, issued the bonds guaranteed, and delivered them to the directors in payment of work and materials. *Held*, that both the town and the inhabitants thereof were estopped from claiming that the vote was not legal. *New Haven, M. & W. R. Co. v. Chatham*, 42 Conn. 463, 10 Am. Ry. Rep. 168.—REVIEWED IN *Sawyer v. Manchester & K. R. Co.*, 62 N. H. 135, 13 Am. St. Rep. 541.

A petition for a call of an election to subscribe for a specified amount of stock contained several express conditions. In the alternative writ for a mandamus the town supervisor was required to call an election to vote, not as petitioned for, but whether the town would subscribe to the stock or donate to the railroad, without stating amount or conditions, and where the peremptory writ misrecited the petition for the call of the election, but commanded the supervisor "to call an election of the legal voters of the town under the laws of this state"—*held*, that the peremptory writ was erroneous in not following the petition for the call of an election. *People ex rel. v. Brooks*, 57 Ill. 142.

While Mass. Sts. of 1870, ch. 325, and of 1872, ch. 53, were in force, a warrant for a town meeting contained the following articles: "To see if the town will vote to subscribe for and hold shares in the capital stock of" a certain railroad corporation to be formed under the St. of 1872, ch. 53, for the purpose of building a railroad from that town to another; "to see if the town will vote to become an associate for the formation of" the railroad; and "to see what action the town will take in regard to raising money to aid in building" the railroad. At the meeting held in pursuance of this warrant the town voted to subscribe for the stock of the railroad corporation to a certain amount, and to become an associate for the formation of the corporation; and, in order to pay this subscription, voted to authorize its treasurer to borrow a sum not exceeding that subscribed, "in amounts as may be required by the directors," and to give therefor the notes or bonds of the town payable to a certain amount in each year. Bonds were issued in pursuance of this vote, and taxes were levied in each year to meet the bonds falling due. *Held*, in an action to recover back such taxes paid under pro-

test, that the warrant was sufficient, and that the votes of the town thereunder were valid. *Kittredge v. North Brookfield*, 138 Mass. 286.

116. Power to call a second election.—Where the question of a county subscription to railroad stock is submitted to a vote, which is in the negative, if there is nothing in the statute to prohibit it, a second vote may be had, and if it is favorable, a subscription may be made; and this is so though the statute speaks of "an election." *Calhoun County Sup'rs v. Galbraith*, 99 U. S. 214.—CRITICISED IN *Woodruff v. Okolona*, 57 Miss. 806.

A second election under the last proviso of section 1, chapter 183, Laws of 1887 (Kan. Gen. St. 1889, p. 1283), can only be held for the same purpose for which the proposition was submitted at the first election. If the second proposition is materially different from the first as to the amount of stock to be subscribed, the route of the railroad, the location of one of its depots, and the time for its final completion, it will give no authority for a subscription under the last proviso of said section and chapter. *Kansas City & P. R. Co. v. Rich Tp.*, 45 Kan. 275, 25 Pac. Rep. 595.

Minn. Sp. Laws 1875, ch. 132, simply provide for a special meeting to vote upon the question of issuing bonds in aid of a railway "whenever ten freeholders shall petition the proper authorities" therefor, and there is nothing in the act to prevent more than one election, or more than one issue of bonds. *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. Rep. 621.

A favorable vote by a municipality under the above statute is a standing offer to subscribe, but the company is not bound to accept it. It may expressly refuse, or impliedly do so by some act inconsistent with an acceptance or amounting to a waiver; but may procure in lieu of a rejected offer another vote. *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. Rep. 621.

Under the charter of the Western North Carolina R. Co., passed in 1855, and the amendment at the next session—*held*, that the justices of any of the county courts of the counties along the line of the road are authorized to determine on an amount to be subscribed by such county to the stock of such company, and to submit the same for the approval of the voters of such county, notwithstanding a former proposi-

tion to subscribe may have been submitted to them and rejected. *Held*, further, that such subscriptions may be made *toties quoties*, as the emergencies of the undertaking require. (Pearson, C.J., dissenting.) *Caldwell v. Burke County Justices*, 4 Jones Eq. (N. Car.) 323.

Under the act of April 23, 1872 (69 Ohio L. p. 84), at least twelve months must intervene between special elections held by the same municipal authority for or against the construction, leasing, and operating of a proposed railroad, whether the elections have relation to the same proposed road or to other and different roads. *Stewart v. Norwalk Trustees*, 22 Ohio St. 323.

A city empowered to loan its bonds to a railroad upon the consent of two thirds of its electors held three elections at which two thirds did not consent. *Held*, that the city was not estopped to hold a fourth election, and the requisite vote being then obtained the bonds issued were valid. *Society for Savings v. New London*, 29 Conn. 174.—APPROVED IN *Venice v. Murdock*, 92 U. S. 494.

117. Notice of election.—(1) *Illinois*.

—Where the election in pursuance of which a subscription is claimed to have been made is a special election, authorized by law to be held for the specific purpose of determining whether and upon what conditions the subscription should be made, the act prescribing the notice which should be given, the question lies at the foundation of the power; and if it is not shown that the notice was properly given, as required by the statute, there will be no inferences in favor of the validity of the election, and the power will fail. In this the rule is different from that which prevails in cases of elections held under the general election law, where the time of holding the election is fixed by statute. *People ex rel. v. Jackson County Sup'rs*, 92 Ill. 441. *Williams v. People ex rel.*, 132 Ill. 574, 24 N. E. Rep. 647.

The validity of town bonds does not depend upon the town clerk keeping a proper record of the proceedings authorizing them; but where it appears that no town ordinance was ever passed requiring the town clerk to give a notice of the election to determine whether the subscription should be made, and, if so, on what terms and conditions, bonds issued in pursuance of such an election are void. *Jacksonville*,

N. W. & S. E. R. Co. v. Virden, 104 Ill. 339.

While some of the provisions of the "act to incorporate the Cairo and Vincennes R. Co." are repugnant to certain provisions in the general railroad act, there is no such repugnancy between the two acts as to justify the conclusion that the requirement of thirty days' notice in the latter act was repealed by implication by the former act. *Williams v. People ex rel.*, 132 Ill. 574, 24 N. E. Rep. 647.

Where the charter of a company vested in the county court the discretionary power to call an election to vote on subscribing to the capital stock of a company, but failed to prescribe any notice to be given of the election—*held*, the general statute applied, requiring thirty days' notice. *Williams v. People ex rel.*, 132 Ill. 574, 24 N. E. Rep. 647.

A statute authorized any county through which a railroad might pass to subscribe to its capital stock to a limited amount upon a favorable election, and required thirty days' notice to be given. A later act authorized subscriptions under other limitations, which required a vote of the people "in such manner as the county authorities may determine," but did not fix any time for which the notice of election should be given. *Held*, that the latter act did not repeal the prior one as to the thirty days' notice of an election. The words "in such manner as the county authorities may determine" did not necessarily refer to the time of notice, but to the conditions to be inserted therein as to the amount of the subscription, the time the bonds are to run, and the rate of interest. *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90.

But even if the county authorities had the power to fix the time of the notice of the election, it could only be done by an order or resolution entered of record, and it was not sufficient to merely direct that an election should be "conducted according to law." Even if the former act was repealed, the general statute, which required thirty days, would govern, and an election held without such notice was invalid. *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90.

When the law required that twenty legal voters might petition a town to call an election to vote stock to a railroad, and that notice should be posted at least twenty days,

but the petition was signed by only twelve legal voters and the notice posted for only ten days—*held*, that the election was a nullity, and conferred no power to subscribe to said stock and issue bonds; that such bonds are invalid in the hands of *bona fide* holders. *Williams v. Roberts*, 88 Ill. 11, 21 Am. Ry. Rep. 268.

Under a law providing for a vote whether a township shall issue bonds in aid of a railroad which requires the town clerk, upon receiving the proper petition, to "immediately give the notice required by law for an election," etc.—*held*, that three notices were all that were required to be posted of the time and place of the election, the same as of an annual town meeting, and not five, as the law then required in case of a special town meeting. *Windsor v. Hallett*, 3 Am. & Eng. R. Cas. 76, 97 Ill. 204.

(2) *Indiana*.—Immediate notice is a condition precedent. In case it be not given the sheriff is to give such notice for an election at another time. *State v. Ripley County Com'rs*, 9 Ind. 310.

(3) *Iowa*.—In view of the fact that taxes in aid of railroads must be levied by the county supervisors, and the further fact that the city of Davenport is coterminous with the civil township in which it is situated—*held*, that a variance between the petition for an election upon the question of voting a tax in aid of a railroad and the notice of such election—the petition being for a tax on the "assessed value of the property in said city," and the notice being of a tax "upon the assessed value according to the county valuation"—was immaterial, since the supervisors could not be presumed to know anything of any valuation except the county valuation. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

The statute does not require that notice of an election upon the question of a tax in aid of a railroad shall be published ten days before the election. It is sufficient if it is done "immediately" after the petition is filed; that is, as soon as the newspaper selected by the township trustees is published. *Johnson v. Kessler*, 76 Iowa 411, 41 N. W. Rep. 57.—*REVIEWING* *Peoria & R. I. R. Co. v. Preston*, 35 Iowa 115.

A notice for a special election to vote on the question of aiding a railroad by taxation, which fails to state to what point the road shall be completed before the tax shall become payable, is insufficient under the

statute. And where the notice provides only that fifty miles of the road shall be built through the township, and the cars running thereon, before the tax shall be due, the tax voted thereon is void. *Kleise v. Galusha*, 78 Iowa 310, 43 N. W. Rep. 217.—*DISTINGUISHING* *Bartemeyer v. Rohlf's*, 71 Iowa 582; *Burges v. Mabin*, 70 Iowa 636. *FOLLOWING* *Allard v. Gaston*, 70 Iowa 731.

(4) *Minnesota*.—The posting of notices on the 13th day of a month, of an election to be held on the 23d day of the same month, to vote town aid to a railroad is a sufficient compliance with a provision of a statute requiring such notices to be posted "at least ten days prior" to the election. *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197, 6 N. W. Rep. 621.

An ordinance designated the 15th day of May as the day for holding an election, and directed the city clerk to give ten days' notice thereof by publication. The ordinance was first published May 5, when it took effect. The notice of election was given simultaneously with the publication of the ordinance. *Held*, sufficient. *Warsop v. Hastings*, 22 Minn. 437.

(5) *Nebraska*.—Where a county board calls a special election in a township of the county, under the provisions of Comp. St. 1887, ch. 45, §§ 14-17, and gives notices of the election in a newspaper published in the county, the county is liable for the expenses of publishing the notice for the special election. *Kearney County v. Stein*, 26 Neb. 132, 41 N. W. Rep. 1071.—*DISTINGUISHING* *Center Tp. v. Gilmore*, 31 Kan. 675.

In giving the notice and causing the same to be published, issuing the bonds and collecting the tax, the county board acts as the officers of, and on behalf of, the county, and not as the agents of the township. *Kearney County v. Stein*, 26 Neb. 132, 41 N. W. Rep. 1071.

(6) *New York*.—The provision of the act of 1867 authorizing the villages of Sandy Hill and Fort Edward to issue bonds to aid in the construction of a railroad (§ 5, ch. 953, Laws of 1867), which requires that a notice of a special election by the taxable inhabitants of either of said villages, to be held for the purpose of voting upon the question of issuing bonds of the village, shall be published "for at least two weeks previous to the time appointed for such election," is not inconsistent with, and was not repealed by, the amendatory act of 1868 (ch. 317, Laws

of 1868). *People ex rel. v. Ft. Edward*, 70 N. Y. 28.

Said provision required that at least two weeks should intervene between the publication of the notice and the election. Therefore when the first publication of the notice was upon April 24, 1868, for a meeting held May 3, 1868—*held*, that this was not a compliance with the statute, and that there was no valid election. *People ex rel. v. Ft. Edward*, 70 N. Y. 28.

(7) *Tennessee*.—A failure to give the notice required by a statute of an election to authorize county courts, under the Tennessee statute, to take stock in a railroad cannot prejudice persons who vote in the negative, and they cannot take advantage thereof; and as such provision is only directory, a failure to give the notice will not vitiate an election and a subscription made in pursuance thereof. *Hord v. Rogersville & J. R. Co.*, 3 Head (Tenn.) 208.

118. Contents of notice of election.—Where persons petition the supervisor to call an election and name a number of conditions of subscription, and the supervisor gives a notice without specifying any conditions, and the vote results in favor of subscription, the omission to specify the conditions in the notice will not invalidate the bonds. *Marshall v. Silliman*, 61 Ill. 218.—*FOLLOWED IN Quincy v. Cooke*, 12 Am. & Eng. R. Cas. 645, 107 U. S. 549, 2 Sup. Ct. Rep. 614.

A railroad charter authorized towns to subscribe stock to the amount of \$35,000 on twenty days' notice of an election. After notices were posted the legislature authorized subscriptions of \$100,000, but no new notices were posted. *Held*, that the vote only authorized a subscription of \$35,000. *Wiley v. Silliman*, 62 Ill. 170.

Where the petition filed with the town clerk for an election upon the question of donating bonds in aid of a railroad stated the time the bonds were to run and the interest they were to bear—*held*, that an omission in the notice of the election to state these facts, when the notice recited that the petition was filed in the clerk's office, would not vitiate the election. *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277.

Under the Ind. Act of May 12, 1869, authorizing counties and townships to aid in the construction of railroads, the notice given by the county auditor must specify the sum to be appropriated; otherwise the

election and all subsequent proceedings will be void. *Crooke v. Daviess County*, 36 Ind. 320.

Notice of the election which specifies the name of the company, and that the aid voted is to be expended by said company in "the construction of its road within Waterloo and Cedar Falls townships on the west side of the Cedar river above Black Hawk creek in said county," is sufficiently specific as to the line of the road. *West v. Whitaker*, 37 Iowa 598.

A tax voted in aid of a railroad, under Iowa Laws of 1876, ch. 123, is invalid where the notice of the election does not state to what point the road must be completed before the tax shall become due. *Allard v. Gaston*, 70 Iowa 731, 29 N. W. Rep. 752.—*FOLLOWED IN Kleise v. Galusha*, 78 Iowa 310, 43 N. W. Rep. 217.

A notice of an election of a city to vote aid to a railroad, which describes the road as commencing at a particular place in the city, to run thence in a certain direction to a designated point in another county, "or to a point nearer" so as to connect with another railroad, is sufficient to satisfy the requirements of Iowa Act of 1884, ch. 159, requiring a point to be named to which the road shall be completed. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.—*DISTINGUISHED IN Kleise v. Galusha*, 78 Iowa 310, 43 N. W. Rep. 217.

Where the notice of election on the question of voting a tax in aid of a railroad provided: "One half of said tax to be levied and collected in the year 1887 and the other half in the year 1888," and the election was held on the 25th of September, 1886, and the levy made on the 29th of the same month—*held*, that the levy was valid, and that the notice should be construed, not as requiring the tax to be levied and collected the same year, which the law does not permit, but to be so levied that it might be lawfully collected one half in the year 1887 and the other half in the year 1888. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

It is not necessary that the notice under the above statute should state the date upon which the work shall be done to entitle the company to the tax. It is sufficient if it provides that the tax shall be payable when a specified amount of the work is done. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

The provision of Iowa statute requiring

it to be stated that the road should be "fully completed" to a designated point, to entitle the company to a tax voted, only means that the road should be constructed and the cars running thereon for the purpose of carrying passengers and freight. Therefore a notice requiring that the company should have its road ironed and cars running thereon to a specified point by a fixed date is sufficient. *Yarish v. Cedar Rapids, I. F. & N. W. R. Co.*, 72 Iowa 556, 34 N. W. Rep. 417.

The condition on which a tax was voted to aid in the construction of defendant's road was stated in the notice to be that the road should be built from a given point to some point of intersection with another road, so that there would be a continuous line of road to a named station on such other road. *Held*, that this did not require that defendant should build a continuous line of road from the given point to such station, but that it was sufficient that such station might be reached by a continuous line by the use of the line of such other road from the point of intersection to such station. *Young v. Webster City & S. W. R. Co.*, 75 Iowa 140, 39 N. W. Rep. 234.

119. Proof of giving notice.—The certificate of the sheriff that he has posted notices of election in ten public places in the township is not defective for not specifying the places, and such certificate is *prima facie* evidence that notices have been posted in ten public places in said township. If, in fact, notices of an election be not posted in ten public places, as prescribed by the statute, the election will be invalid. *Detroit, E. R. & I. R. Co. v. Bearss*, 39 Ind. 598, 10 Am. Ry. Rep. 382.

120. Registration of voters.—At an election in a township for and against subscribing stock to a railroad under the charter, which does not require a registry of the voters, the registry law of 1865 does not apply, the presumption being that this should be held like other township elections. *Dunnoyan v. Green*, 57 Ill. 63.

At a county election to subscribe to the capital stock of a railroad the regular judges of election in two townships failed to act, and those who were selected and acted in their places failed to use the registry of voters. *Held*, that the carelessness or fraud of acting judges in not using the registry list could not be held to deprive the electors of their right of suffrage, and such

neglect of duty alone did not invalidate the election, it not being shown that any illegal votes were cast in consequence thereof. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.

The provisions of the Iowa registry law (ch. 171, Laws of 1868) are mandatory and imperative. An election without registration of voters is void. *Nefzger v. Davenport & St. P. R. Co.*, 36 Iowa 642.

While the provisions of the Mo. Constitution of 1865 in reference to the registration of voters, and the statutes enacted in pursuance thereof, were in force, those persons only were qualified voters whose names were placed on the registration books. This was the final qualifying act, and no matter if a citizen possessed every other qualification, if not registered he was not a qualified voter. The registration books furnished the test of the number of qualified voters in a township. *State ex rel. v. Brassfield*, 67 Mo. 331.—**DISTINGUISHING** *State ex rel. v. Mayor of St. Joseph*, 37 Mo. 272; *State v. Binder*, 38 Mo. 450.

The registration books of the voters are admissible in evidence to determine the number of qualified voters in the county. *State v. Harris*, 96 Mo. 29, 8 S. W. Rep. 794.

An election in the city of Wilmington upon a proposition to subscribe to the capital stock of the Wilmington, O. & E. C. R. Co. should be held and determined by the registration, properly revised, made biennially as prescribed in its charter, for city elections. The mayor and aldermen have no power to cause a new registration to be made. *Smith v. Wilmington*, 98 N. Car. 343, 4 S. E. Rep. 489.

In an action brought to have an election to ratify the issue of bonds to a railroad declared void and to restrain the issuing of the bonds, it was made, *prima facie* at least, to appear that the election was not called in accordance with law; that no notice of the election was given; that no opportunity was given for registration to such persons as had become qualified since the last election; that as a matter of fact a majority of the qualified voters did not vote for the measure; and that there were various other grave irregularities. *Held*, that an injunction until the hearing should be granted to restrain all action under and in pursuance of the election. *McDowell v. Massachusetts & S. Constr. Co.*, 96 N. Car. 514, 2 S.

E. Rch. 351.—FOLLOWED IN *Goforth v. Rutherford R. Constr. Co.*, 96 N. Car. 535.

121. Opening polls.—Where there are two voting precincts in a township, an election for public aid to construct a railroad, when the polls are not opened in both precincts, is void under Ind. Rev. St. 1881, § 4048, and in such case no tax for aid can be levied. *State v. Madison County Com'rs*, 92 Ind. 133.

122. The ballots.—Where the statute prescribed that the ballots used should contain the words, "For the railroad appropriation," and at the election a large portion of the ballots cast and counted contained only the words "For the railroad"—*held*, that the casting and counting of such ballots was an irregularity which would not affect the validity of the election. *Detroit, E. R. & I. R. Co. v. Bearss*, 39 Ind. 598, 10 Am. Ry. Rep. 382.

The form of the vote is sufficiently explicit when it reads: "For the Lyons railroad," or, "Against the Lyons railroad." *State v. Bissell*, 4 Greene (Iowa) 328.

The notice specified that "those in favor of aiding in the construction of said railroad will have written or printed on their ballots 'Taxation,' and those opposed thereto 'No Taxation.'" *Held*, that ballots having on them the word "Taxation" were properly counted and returned as "For Taxation." *West v. Whitaker*, 37 Iowa 598.

When the trustees prescribed that the ballots should have written upon them the words, "For Taxation," or, "Against Taxation," and certain electors cast ballots bearing the words, "Against taxation for the benefit of railroad companies or any other monopolies to the indebtedness of the poor man"—*held*, that such ballots should be counted the same as if they were in the form prescribed by the trustees. *Cattell v. Lowry*, 45 Iowa 478.

123. All qualified electors may vote.—An act authorized municipalities to subscribe for railway stock after submitting the question to, and being approved by, "the inhabitants." *Held*, that "inhabitants" meant legal voters. *Walnut v. Wade*, 3 Am. & Eng. R. Cas. 36, 103 U. S. 683.

Constructing the amended charter and the Ga. constitution together, and making them harmonize in spirit and meaning, the proper mode of taking the sense of the citizens in 1871 on the question of subscribing for a given amount of stock in a certain railroad

was to order a public election by all the qualified voters of the city, with the privilege to each and every qualified voter to vote for or against the proposed subscription. *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370.

The votes of a majority voting at such election, though a majority of the whole number of qualified voters did not vote at all, were sufficient to warrant the mayor and council in making the subscription. *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370.

When the question is whether a township shall aid in the construction of a railroad by voting a tax, all the voters of the township, including such as reside within an incorporated town which lies wholly or in part within the township, may lawfully vote at such election. *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.—FOLLOWING *Ryan v. Varga*, 37 Iowa 80.

Where a proposition to subscribe to the stock of a railroad is submitted to the legal voters of a city, the mistake of the mayor in instructing the election officers that the payment of a poll tax was not necessary to entitle persons to vote at that election, and the receiving of illegal votes under such instruction, does not render the submission of the question illegal and the election void. *Woolley v. Louisville S. R. Co.*, 93 Ky. 223, 19 S. W. Rep. 595.

Under the Minn. constitution it is not competent for the legislature to authorize any person or class of persons other than the electors or the officers chosen by the electors of a town to determine what action requiring local taxation the town will take in any particular case. Therefore Minn. Laws 1877, ch. 106, § 7, which assumed to empower a majority of the resident taxpayers, without regard to whether they were electors or not, to bind a town to issue its bonds in aid of a railroad, is unconstitutional and void. *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. Rep. 777.

124. Limiting right to vote to freeholders.—Where a statute authorizes a county to subscribe to the stock of a railroad company upon condition that the holders of the real estate therein should, by a majority, vote for such subscription, and the question is submitted by the county court to all the voters of the county, the levy of a tax for that purpose is invalid. *Bullock v. Curry*, 2 Metc. (Ky.) 171.

The act "to authorize the city of Montgomery to aid in the construction of the South and North Alabama railroad," approved Feb. 24, 1860, which authorizes the corporate authorities of said city, "in such manner as they may deem expedient, to take the sense of the holders of real estate in said city upon the proposition to raise by tax upon real estate" a specified sum to be invested in stock of said railroad company, requires that the sense of all the holders of real estate in the city shall be ascertained by an expression of their wishes *per capita* before the proposed tax can be levied; and an election held under an ordinance of the corporate authorities, by which it is provided that the vote shall be taken *pro rata* according to the value of the real estate owned by the respective voters, "each voter being allowed one vote for every hundred dollars of assessed real estate owned by him," is not a compliance with the terms of the act; and although it appears, from the register kept by the manager of the election, that, of all the persons who voted at such election, a majority in number voted for the tax, this does not cure the defect in holding the election on illegal principles, which may have prevented persons from voting. *Montgomery City Council v. State ex rel.*, 38 Ala. 162.

125. A majority vote, generally.*

—Bonds issued upon less than a majority vote are illegal. *Onstott v. People ex rel.*, 123 Ill. 489, 15 N. E. Rep. 34.

Where a Missouri statute directs a county to subscribe for railroad stock after a majority of the voters of the county vote in favor of it, the consent of a majority of such voters favorable to the subscription is necessary to its validity; and such consent must be obtained after the statute takes effect, which is ninety days in that state after its passage. *City & County of St. Louis v. Alexander*, 23 Mo. 483.—CRITICISED IN *State ex rel. v. Garrouette*, 67 Mo. 445. FOLLOWED IN *Osage Valley & S. K. R. Co. v. Morgan County Court*, 53 Mo. 156. REVIEWED IN *State v. Little Rock, M. R. & T. R. Co.*, 31 Ark. 701; *State ex rel. v. Macon County Court*, 41 Mo. 453; *Steines v. Franklin County*, 48 Mo. 167.

Where ten persons signed a petition for a town vote on the question of subscription

to a railroad, but three were not legal voters as required by law, and there was a majority of one against subscription after rejecting certain illegal votes of which the company had knowledge—*held*, that the town could not be compelled to make the subscription. *People ex rel. v. Cline*, 63 Ill. 394, 7 Am. Ry. Rep. 373.—DISTINGUISHING *Houston v. People ex rel.*, 55 Ill. 398.

In case of a tie in voting on a municipal by-law granting debentures in aid of a railway, there is no authority to the returning officer to give a casting vote, section 152, R. S. O. 1877, ch. 174, not applying to such a vote. *Canada Atl. R. Co. v. Cambridge Twp.*, 15 Can. Sup. Ct. 219; *affirming* 14 Ont. App. 299; *reversing* 11 Ont. 392.

126. A majority of the votes cast.

—By the constitutional provision that a majority of the legal voters of a municipal corporation must vote to authorize a subscription to stock of a railroad is meant a majority of those voting at the election. *Black v. Cohen*, 52 Ga. 621. *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 2 Am. Ry. Rep. 105. *Dunnovan v. Green*, 57 Ill. 63. *People ex rel. v. Harp Sup'rs*, 67 Ill. 62. *Louisville & N. R. Co. v. State*, 8 Heisk. (Tenn.) 663, 19 Am. Ry. Rep. 107.

Where a majority of those voting at an election for the issue of bonds in aid of a railroad vote in favor of the same, whether as a subscription or donation, for the purpose of registration it will be presumed that such majority was a majority of all the legal voters in the municipality. And where the authorities, acting upon such presumption, have admitted the bonds to registration, and the municipality has treated them as properly registered by paying taxes for the payment of accruing interest, and the bonds have passed into the hands of innocent holders, nothing but the clearest and most satisfactory proof will authorize a court to enjoin the collection of a tax levied on account of such bonds, on the ground that the majority voting for such subscription or donation did not constitute a majority of the legal voters. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.—FOLLOWING *Melvin v. Lisenby*, 72 Ill. 63.—*Melvin v. Lisenby*, 72 Ill. 63.—FOLLOWED IN *Prairie v. Lloyd*, 97 Ill. 179.

A law provided that no bonds should be issued to a railroad unless a majority of all the legal voters of the county should vote for the same, and that a majority of the

* Elections. Majority of voters, see note, 15 AM. & ENG. R. CAS. 613.

legal voters at the election should be considered a majority of the legal voters of the county. A vote was had at a regular county election at which 3210 votes were cast, 1278 favoring the subscription, and 1275 against it. *Held*, that the vote did not authorize a subscription, it not receiving a majority of all votes cast at the election. *Chestnutwood v. Hood*, 68 Ill. 132.—DISTINGUISHING *Holcomb v. Davis*, 56 Ill. 413.

127. A majority of the qualified voters.—Where the notice of an election to vote bonds to a railroad contained the condition that they should be such as to entitle them to registration under the act of 1869 requiring a majority of all the legal voters of the township—*held*, that a majority of the votes cast, but less than a majority of the votes in the township, did not authorize the issue of the bonds. *McWhorter v. People ex rel.*, 65 Ill. 290.—FOLLOWED IN *People ex rel. v. Chapman*, 66 Ill. 137.—*People ex rel. v. Chapman*, 66 Ill. 137.—FOLLOWING *McWhorter v. People*, 65 Ill. 290.—*Springfield & I. S. E. R. Co. v. Cold Spring Tp. Sup'rs*, 72 Ill. 603. *Onstott v. People ex rel.*, 123 Ill. 489, 15 N. E. Rep. 34.

Under the act of 1869, § 7, it is unlawful to register bonds with the auditor of state until the railroad in aid of which they have been voted shall be completed near or into the limits of the corporation, and cars are running thereon; and none of the benefits of the act can be claimed unless the subscription or donation creating the corporate debt was first submitted to an election of the legal voters within the corporation, under provisions of laws of the state, and a majority of the legal voters living therein were in favor of such aid, subscription, or donation. *Held*, that, where any of these requirements are wanting, the language of the act being imperative, the auditor has no power to make the assessment of the tax, and the courts will enjoin its collection. *Dunnovan v. Green*, 57 Ill. 63.

But when the bonds are once registered, it will be presumed they were rightfully registered, and the burden of establishing the contrary rests upon the party affirming it. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

The Kansas Curative Act of Feb. 25, 1868 (Gen. St. 892), was intended to cure irregularities in the proceedings had in any county, on the question of county subscription to railroads, and to remove all technical hin-

drances to the carrying into effect of the will of the majority. It was not designed, and did not have the effect, to legalize illegal votes, or to authorize a county subscription of stock and issue of bonds without the vote of a majority of the qualified electors of the county voting upon the question. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs.*, 17 Kan. 29.—APPROVING *Lewis v. Bourbon County Com'rs.*, 12 Kan. 186.

The provision of the N. Y. Act of 1868, § 1, providing that the taxable inhabitants "may at such meeting by a majority vote" decide as to raising a sum for the purposes of the act, required a majority of all the taxable inhabitants, not a majority of the votes cast. *People ex rel. v. Ft. Edward*, 70 N. Y. 28.

It is essential to the validity of bonds issued in aid of railroads or other similar enterprises by counties, townships, and other municipal organizations that the proposition shall have first had the assent of a majority of the qualified voters in the territory affected, to be duly ascertained by an election regularly held for that purpose. *Lynchburg & D. R. Co. v. Person County Com'rs.*, 109 N. Car. 159, 13 S. E. Rep. 723.

Where the returns of such an election ascertained only that "a majority of the votes cast was in favor of subscription," and a declaration to that effect was made by the county commissioners—*held*, that the constitutional requirement had not been observed, and a mandamus to compel the issue of the bonds so alleged to be authorized was properly refused. *Lynchburg & D. R. Co. v. Person County Com'rs.*, 109 N. Car. 159, 13 S. E. Rep. 783.

128. Two-thirds majority.—In order to authorize a subscription by a town to the stock of a railroad company under Me. Pub. Laws 1867, ch. 119, not only the vote to raise the necessary funds and to use them in aid of the road, but also that directing the particular method of affording assistance (whether by loan, or by subscribing for stock, or in some other manner), must appear to have been carried by the assent of two thirds of the voters present and voting at the town meeting at which the subject was acted upon. *Portland & O. R. Co. v. Standish*, 65 Me. 63, 10 Am. Ry. Rep. 111.—DISTINGUISHED IN *Lane v. Embden*, 72 Me. 354.

Where the law requires the assent of a

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town to be indicated by a two-thirds vote, a majority of the voters may recall such assent before it has become binding by acceptance of the town's proposal by the party to whom it is made. If there is any doubtful question under such a provision, it is whether a minority even, comprising more than one third of the legal voters present, cannot withdraw or rescind the former vote. *Belfast & M. L. R. Co. v. Unity*, 62 Me. 148.

The maxim "*omnia præsumuntur rite acta*," etc., cannot be held so applicable to such a state of facts as to authorize an inference that two thirds of the voters at the meeting were in favor of the subscription; but it is rather to be supposed that it was not thought necessary to ascertain anything more than that it received the assent of a majority of those acting upon the subject. *Portland & O. R. Co. v. Standish*, 65 Me. 63, 10 Am. Ry. Rep. 111.—FOLLOWED IN *Stevens v. Anson*, 73 Me. 489.

A town meeting, called to vote aid to a railroad, under a statute which requires a two-thirds vote, may adjourn by a majority vote; and the adjourned meeting is the continuation of the original meeting. *Canton v. Smith*, 65 Me. 203.

A town meeting is called for the purpose of each and every article in the warrant, though one article requires a majority vote, and another a two-thirds vote. *Canton v. Smith*, 65 Me. 203.

Under Miss. Const. art. 12, § 14, the authority of the legislature is necessary to enable a county, city, or town to become a stockholder in a corporation, or lend its credit thereto, and this authority cannot be granted unless two thirds of the qualified voters of such municipality, by a vote, shall assent thereto. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735.—DISAPPROVED IN *Carroll County v. Smith*, 111 U. S. 556.

A provision in the Miss. constitution that the legislature shall not authorize a county to lend its aid to a corporation unless two thirds of the qualified voters shall assent thereto does not require an assenting vote of two thirds of the whole number enrolled as qualified to vote, but only two thirds of those actually voting. *Carroll County v. Smith*, 15 Am. & Eng. R. Cas. 606, 111 U. S. 556, 4 Sup. Ct. Rep. 539.—RECONCILING *Williams v. Cammack*, 27 Miss. 209.—*Mobile Sav. Bank v. Oktibbeha County Sup'rs*, 24 Fed. Rep. 110.

The Mo. Constitution of 1865 provides

that the legislature shall not authorize "any county, city, or town" to become a stockholder in, or to loan its credit to, any corporation or company "unless two thirds of the qualified voters of such county, city, or town * * * shall assent thereto." *Held*, to include townships; and bonds voted a railroad by a township under the "Township Aid Act" of 1868, which requires only two thirds of the votes cast to be in favor of such subscription, are unauthorized and invalid. *Harshman v. Bates County*, 92 U. S. 569.—APPROVED IN *State ex rel. v. Brassfield*, 67 Mo. 331. NOT FOLLOWED IN *Foot v. Johnson County*, 5 Dill. (U. S.) 281. OVERRULED IN *Cass County v. Johnston*, 95 U. S. 360.—*State ex rel. v. Harris*, 96 Mo. 29, 8 S. W. Rep. 794.

The General Railroad Law of Mo., 1866, § 17, empowered incorporated towns to loan their credit to railroads and issue bonds. The act of March 24, 1868, enabled counties, cities, and towns to fund their debts. The state constitution of 1865, art. 11, declares that "the general assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company" unless authorized by two thirds of the qualified voters. *Held*, that the provisions of neither act can be carried out until the vote has been had, as required by the constitution. *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. Rep. 562.

Under N. H. Gen. St. ch. 34, § 16, a two-thirds vote at a legal meeting is necessary to appropriate the money raised, as much as it is to raise the money to aid in the construction of a railroad. *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.

Before any burden can be imposed upon a town under this statute it must be made to appear affirmatively, not only that the money has been raised, but that it has been appropriated to a particular road, by a two-thirds vote of the legal voters of the town present and voting at a legal meeting of such town. *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.

129. Three - fourths majority.—A municipality passed an ordinance to issue bonds in aid of a railroad, if approved by the people, under a statute which only required a majority vote therefor, but before the election was held and the bonds issued a new constitution of the state was adopted which required a three-fourths vote, but the town went on and issued the bonds, recit-

ing that they were issued under the former statute. The election was unanimous in favor of the bonds. *Held*, that the constitution abrogated the provision of the statute, and the bonds were not authorized. *Norton v. Brownsville Taxing Dist.*, 36 Fed. Rep. 99.

130. Failure to vote.—Where a county has contracted to convey certain swamp lands in aid of a railway, and has submitted the ratification of such contract to a vote of the people of the county, it is no objection that it was not submitted to all of the qualified voters, because some were absent in the military service of the United States. *Cedar Rapids & M. R. R. Co. v. Boone County*, 34 Iowa 45, 5 Am. P. Rep. 59.

Unless the law under which the vote is taken intends otherwise, the ballot is the test of the number of electors and that those who refrain from voting acquiesce in what the majority voting do. This is so because of the insuperable difficulty of getting any other mode. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735.

The "assent" of the qualified voters required by section 14, art. 11, of the Mo. Constitution of 1865, before a municipal subscription could be made to the stock of a corporation, was an affirmative, positive act. Mere inaction of the voters by failing to vote did not express assent within the meaning of that section. *State ex rel. v. Brassfield*, 67 Mo. 331.—APPROVING *Harshman v. Bates County*, 92 U. S. 56. CRITICISING THE PREVAILING OPINION, BUT APPROVING DISSENTING OPINION, IN *Cass County v. Johnston*, 95 U. S. 360. REVIEWING AND APPROVING *State v. Sutterfield*, 54 Mo. 392.

131. Determination as to required majority.—Where, under an act in pursuance of section 14, art. 12, of the Miss. Constitution which prohibits the legislature from authorizing any county to subscribe to the capital stock of any corporation unless two thirds of the qualified voters assent thereto, the board of supervisors is constituted the tribunal to determine whether, at an election held for that purpose, the requisite majority has been given; and after such determination, and the issuance of bonds reciting a compliance with preliminary conditions, the county is estopped as against innocent purchasers for value to deny the validity of the bonds upon the ground that, as a matter of fact, less than

two thirds of the qualified electors voted for the subscription, and that the registration lists of the county show this. *Madison County Sup'rs v. Brown*, 29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516.

Although it is a constitutional requirement that the subscription shall not be made except upon a two thirds vote, the legislature is not prohibited from designating a tribunal which is to determine the essential fact as to a proper majority. Nor does the constitution prescribe the evidence upon which such tribunal is to act. It does not make a variable registration list a record, importing verity, from which alone this determination is to be made. It is to be made by the board of supervisors upon investigation, ascertainment, and the exercise of judgment. Therefore, regardless of what the registration lists show, the decision of the board as to the fact of a two-thirds majority is conclusive against the county in any controversy with *bona fide* holders of the bonds. *Madison County Sup'rs v. Brown*, 29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516.—FOLLOWING Mayor, etc., of Vicksburg *v. Lombard*, 51 Miss. 111; *Cutler v. Madison County Sup'rs*, 56 Miss. 115; *Madison County Sup'rs v. Paxton*, 57 Miss. 701.

By section 5 of the Tex. Act of April 12, 1871, a special meeting of the county court shall be held on the first Monday after the return day of such an election, when the court shall ascertain and record the result of the election; and if two thirds of the qualified voters of the county shall have voted in favor of the proposition at such election, then it shall be the duty of the court to make such orders and adopt such regulations as will give practical effect to the proposition so voted for. Under this authority the county court had authority, and it was the duty of the court, to ascertain whether or not two thirds of the qualified voters had voted for the proposition; to do this it had authority to use the appropriate means of informing itself so that a correct conclusion could be reached, and it had the right to revise the list of registered voters of the county and drop from the count names it had ascertained should be dropped from the list. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

132. Certificate of clerk of election.—The certificate of the canvassing officer as to the result of an election to subscribe to railroad stock is *prima facie* evi-

dence of its fairness, but may be impeached for fraud in a proper case. *Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.

If the certificate of the clerks of election required by Iowa Laws of 1870, ch. 102, is reasonably susceptible of a construction which will show a compliance with the provisions of the statute, such construction will be given it notwithstanding any imperfections in form. *Casady v. Lowry*, 49 Iowa 523.

The certificate of the clerk of election required to be executed to the county auditor by ch. 123, Iowa Laws of 1876, before the levy of a tax voted under its provisions is authorized, must contain all the particulars enumerated in said chapter, in addition to a copy of the notice under which the election was held; a reference to such notice for any of the conditions of the tax is not a sufficient compliance with the statute. *Minnesota & I. S. R. Co. v. Hiams*, 53 Iowa 501, 5 N. W. Rep. 703.—DISTINGUISHED IN *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728; *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.

Under the Ala. statute the managers of an election were appointed by the mayor, and were required by the act to certify to him the result of the election; but they were not constituted a special tribunal clothed with the exclusive power of determining the result, nor was their certificate the only evidence of the result which the city council could receive, and upon which they could act. Hence their failure to make such certificate, or the failure of the record of the proceedings of the city council to show that it was made, does not invalidate the proceedings of the city council, nor affect the validity of the tax levied in accordance with the result of the election. *Winter v. Montgomery City Council*, 7 Am. & Eng. R. Cas. 307, 65 Ala. 403.

133. Evidential value of returns, poll books, etc.—Poll books are admissible in evidence to show that a municipal subscription to the stock of a railroad was ratified by a vote of the taxpayers. So are the proceedings of the city council showing the result of the election, and a resolution of the council instructing the mayor to issue the bonds. *Hannibal v. Fauntleroy*, 105 U. S. 408.

When it is proven by the returns of an election that a majority of the taxpayers voted in favor of a municipal subscription

to the stock of a railroad, it is not necessary to prove that the persons voting for the subscription were all taxpayers and entitled to vote. *Hannibal v. Fauntleroy*, 105 U. S. 408.

Where the issue is as to the regularity of a municipal subscription to railroad stock and the election authorizing it, a certified copy of the poll book, which seems to be made out with reasonable conformity with the statute, and is signed by the judge and clerk of the election, and has been properly filed in the clerk's office of the county, and by him certified, under the seal of the court, to be a true copy, is admissible in evidence. *Piatt v. People ex rel.*, 29 Ill. 54.

Where a corporate subscription to a railroad was only authorized upon a favorable vote by a majority of taxpayers, and a call for an election was general, but a large majority of the votes cast were in favor of a subscription, and an ordinance of the town recited that the vote was by the legal voters, and the sworn certificate of the president so stated—*held*, on a bill to enjoin a tax to pay interest on the bonds, that did not negative the legality of the vote, that it would be presumed that a majority of taxpayers did vote for it. *Deker v. Hughes*, 68 Ill. 33.

Where the commissioners omit to prescribe by order the time and place of making the canvass, and where a majority of the votes cast are against the proposition, a canvass made by the commissioners which shows a majority in favor of the proposition, when the canvass appears upon its face to be partial, and not to include the returns from some townships, does not conclude the county as to the vesting of authority in the commissioners, and is notice sufficient to put every one on inquiry as to the actual state of the vote; and when the returns from the uncounted townships are filed in the county clerk's office on the very day of the canvass, and are placed with the other returns and so remain, every one is charged with notice of the actual result of the election. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

Where returns are made of an election voting aid to a railroad declaring that the majority of the legal votes were in favor of the subscription, it will be presumed that the majority did so vote until it is shown to be otherwise. *Woolley v. Louisville Southern R. Co.*, 93 Ky. 223, 19 S. W. Rep. 595.

Where the town clerk's record of the

doings at a town meeting, after mentioning the state of the vote upon the proposition to aid in the construction of a railroad to the amount indicated, declares that it was voted that such sum be hired and appropriated to pay for a specified number of shares without saying by what majority this vote was carried, no implication of law arises that the proportion of legal voters present, and voting upon this proposition necessary for its adoption by the meeting, were in its favor. *Portland & O. R. Co. v. Standish*, 65 Me. 63, 10 Am. Ry. Rep. 111.

134. Proof of contents of lost returns.—Where the record of a notice of an election to vote on the county subscribing to a railroad, and of the result of such election, is lost, it is competent to prove such facts by parol. *Maxey v. Williamson County*, 72 Ill. 207.

Where the application for an election in a town to vote upon a donation to a railroad, and the notice of the election by the town clerk, are shown in writing, and the return of the election is lost or cannot be produced, the holding of the election and the returns showing the result may be shown by parol evidence to sustain the validity of bonds issued under such election. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

135. Curative acts.—The legislature is powerless by subsequent enactment to validate a void election of a town, under the township system, to vote aid to a railroad. *Williams v. Roberts*, 88 Ill. 11, 21 Am. Ry. Rep. 268.

The Kan. Act of Feb., 1868, to cure defects in elections to vote municipal bonds in aid of railroads and to authorize the bonds to issue includes bonds issued prior to its passage. *Johnson County Com'rs v. Thayer*, 94 U. S. 631.

An act amending a railroad charter provided that incorporated towns or townships along the line of the road might vote stock in the road and issue bonds in payment, and that where a favorable vote had already been taken the bonds so voted should be issued and the stock subscribed for. *Held*, that this would make valid bonds issued under such prior vote. *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644, 2 Am. Ry. Rep. 105.—FOLLOWED IN *Carroll County v. Smith*, 111 U. S. 556.

136. Retrospective operation of prohibitory constitutional amendments.—(1) *Mississippi*.—Miss. Const. § 14, 6 D. R. D.—38

ratified Dec. 1, 1869, which declares that "the legislature shall not authorize any county, city, or town to become a stockholder in, or to lend its credit to, any company, association, or corporation unless two thirds of the qualified voters of such county, city, or town, at a special election, or a regular election to be held therein, shall assent thereto," is wholly prospective. It does not abrogate previous acts of the legislature conferring authority to subscribe for stock. *Calhoun County Sup'rs v. Galbraith*, 99 U. S. 214.

(2) *Missouri*.—Railroad charters existing when the new constitution of Missouri of 1865 was adopted, which authorized counties to subscribe to railroad stock and issue their bonds in payment without a vote of the people, were not affected by the provision of the constitution requiring a two-thirds vote. *Huidkoper v. Dallas County*, 3 Dill. (U. S.) 171.—APPROVING State ex rel. v. Macon County Court, 41 Mo. 453; *Smith v. Clark County*, 54 Mo. 58.—*Ray County v. Vansycle*, 96 U. S. 675.—FOLLOWING State v. Macon County Court, 41 Mo. 453; State v. Greene County, 54 Mo. 540; State ex rel. v. Sullivan County Court, 51 Mo. 522; *Callaway County v. Foster*, 93 U. S. 570; *Scotland County v. Thomas*, 94 U. S. 682; *Henry County v. Nicolay*, 95 U. S. 619.—*Louisiana v. Taylor*, 105 U. S. 454.—FOLLOWING State v. Macon County Court, 41 Mo. 453; *Smith v. Clark County*, 54 Mo. 58.—*Scotland County v. Hill*, 132 U. S. 107, 10 Sup. Ct. Rep. 26; affirming 25 Fed. Rep. 395. *Schnuyler County v. Thomas*, 98 U. S. 169.—FOLLOWED IN *Benton County v. Rollens*, 26 Law. Ed. (U. S.) 213.—*Ralls County v. Douglass*, 7 Am. & Eng. R. Cas. 212, 105 U. S. 728.—FOLLOWING State v. Macon County Court, 41 Mo. 453; *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; State v. Sullivan County Court, 51 Mo. 522.—FOLLOWED IN *Dallas County v. McKenzie*, 110 U. S. 686.—*Dallas County v. McKenzie*, 15 Am. & Eng. R. Cas. 622, 110 U. S. 686, 4 Sup. Ct. Rep. 184.—DISAPPROVING State ex rel. v. Dallas County Court, 72 Mo. 329.—FOLLOWING *Ralls County v. Douglass*, 105 U. S. 728.—*Scotland County v. Thomas*, 94 U. S. 682.—FOLLOWING State ex rel. v. Sullivan County Court, 51 Mo. 522; State ex rel. v. Greene County, 54 Mo. 540; *Callaway County v. Foster*, 93 U. S. 567.—FOLLOWED IN *Ray County v. Vansycle*, 96 U. S. 675; *Benton County v.*

Rollens, 26 Law. Ed. (U. S.) 213.—*Macon County v. Shores*, 97 U. S. 272.

Where a railroad chartered in Missouri prior to 1865 was authorized to build branches, and counties were authorized to subscribe thereto, such subscriptions are not subject to the provisions of the state constitution of 1865, providing that authority to make municipal subscriptions to railroads shall not be given except upon a two-thirds vote, although such branch be undertaken as an independent enterprise under a statute passed after the adoption of the constitution. *Henry County v. Nicolay*, 95 U. S. 619. *Cass County v. Gillett*, 100 U. S. 585.—FOLLOWING *Henry County v. Nicolay*, 95 U. S. 619.—*State ex rel. v. Sullivan County Court*, 51 Mo. 522, 3 Am. Ry. Rep. 178.—DISTINGUISHING *State v. Saline County Court*, 51 Mo. 350.—APPROVED IN *Nicolay v. St. Clair County*, 3 Dill. (U. S.) 163. FOLLOWED IN *Thomas v. Scotland County*, 3 Dill. (U. S.) 7; *Smith v. Clark County*, 54 Mo. 58; *Cooper v. Sullivan County*, 65 Mo. 542; *Scotland County v. Thomas*, 94 U. S. 682; *Ray County v. Vansycle*, 96 U. S. 675; *Ralls County v. Douglass*, 105 U. S. 728.

The charter of the Louisiana & Missouri River R. Co., which was granted in 1859, authorized it to construct a railroad by a certain designated route "to the Missouri river at the most eligible point," and provided that it should be "lawful for the county court of any county in which any part of the route of said railroad" might be to subscribe to the stock of the company. The new constitution of Missouri, which went into effect in July, 1865, provided that the general assembly should "not authorize any county, city, or town to become a stockholder in, or to loan its credit to, any company, * * * unless two thirds of the qualified voters of such county, city, or town at a regular or special election" should assent thereto. In 1868 the legislature passed an act claimed to have the effect of amending the original charter, and authorizing the extension of the road to a point beyond the Missouri river, through counties south of the river not on the route of the road as originally chartered. *Held*, that even if the act of 1868 was valid and authorized such extension, yet, as the counties through which the extended part of the route lay were not on the route as designated in the original charter, they were bound by the provision quoted of the constitution, and could not

subscribe to the road without first submitting the question to a vote of the people. *State ex rel. v. Saline County Court*, 51 Mo. 350, 3 Am. Ry. Rep. 149.—REVIEWING *State ex rel. v. Macon County Court*, 41 Mo. 453.

(3) *New York*.—Where the meeting was properly called and a majority vote duly received, the constitutional amendment which went into effect January 1, 1875 (art. 8, § 11), providing that no village, etc., shall "give any money or property or loan its money or credit" to any individual or corporation, prevented further action and rendered all prior proceedings null and void; and therefore a mandamus could not thereafter issue to compel the issuing of village bonds. *People ex rel. v. Ft. Edward*, 70 N. Y. 28.—FOLLOWING *Buffalo & J. R. Co. v. Weeks*, 69 N. Y. 491.

(4) *Tennessee*.—After the adoption of the Tenn. Constitution of 1870, prohibiting any county from aiding or becoming a stockholder in any corporation unless authorized by three fourths of the voters thereof, county authorities have no power to ratify previously issued void railroad aid bonds without a vote of the people. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121.—REAFFIRMING *Aspinwall v. Daviess County Com'rs*, 22 How. (U. S.) 365; *Wadsworth v. Eau Claire County Sup'rs*, 102 U. S. 534.

137. Vote taken before adoption of prohibitory constitutional amendment.—Under the Ill. Constitution of 1870 corporate subscriptions to railroad companies may be made where the same have been authorized by a vote before the adoption of the constitution. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.—DISTINGUISHING *People ex rel. v. Tazewell County Sup'rs*, 22 Ill. 147; *Aspinwall v. Daviess County Com'rs*, 22 How. (U. S.) 367.

A municipal subscription in aid of a corporation not authorized by vote prior to July 2, 1870, is void, and the burden is on those asserting the validity of such bonds to show they were issued under a vote prior to that time. *Wright v. Bishop*, 88 Ill. 302, 21 Am. Ry. Rep. 301.

A county or other municipal corporation has no right to take stock in a railway company and issue its bonds in payment thereof except when the same has been voted for in pursuance of law before the adoption of the constitution of 1870, and not then except upon the terms and conditions speci-

fied in the vote of the people. *Onstott v. People ex rel.*, 123 Ill. 489, 15 N. E. Rep. 34.

The saving clause in the proviso of separate section 2 of the constitution of 1870, in regard to municipal subscriptions, to the effect that the section shall not affect the right to make such subscriptions where the same have been authorized "under existing laws, under a vote of the people," etc., prior to the adoption of the constitution refers to and embraces subscriptions that had been authorized by a vote of the people under laws existing at the time the vote was taken. *Williams v. People ex rel.*, 132 Ill. 574, 24 N. E. Rep. 647.—DISAPPROVING *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192.

That section of the constitution of 1870 which prohibits municipal subscriptions to railroads or private corporations except upon a vote of the people of the municipalities had prior to the adoption of the constitution operates to prohibit any such subscription unless the prior vote in reference thereto was had under an existing law. A mere voluntary vote, even though it was directed by an ordinance of a city in which the proposition was pending, will not avail to remove the restriction. *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 410, 16 Am. Ry. Rep. 494.—QUOTING *Johnson v. Stark County*, 24 Ill. 88.—FOLLOWED IN *Quincy v. Cooke*, 12 Am. & Eng. R. Cas. 645, 107 U. S. 549, 2 Sup. Ct. Rep. 614.

Under section 24 of the schedule of the constitution of 1870, exempting the city of Quincy from the prohibition mentioned so far as the people of that municipality had voted for such purpose prior to the 13th day of December, 1869—held, that a vote on the subject of municipal subscription had by the people of that city in pursuance of an ordinance thereof, but not under any then existing law, was valid and effectual for the purpose of such subscription. *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 410, 16 Am. Ry. Rep. 494.

A subscription by the city of Quincy to the capital stock of the Quincy, Missouri & Pacific R. Co., made after the adoption of the constitution of 1870, in pursuance of a vote of the people of that city had on the 7th day of August, 1869, not, however, under any existing law, was a valid and binding subscription, and the city was authorized to issue its bonds therefor according to the conditions upon which the sub-

scription was made, and this without reference to the validity of that portion of the statute which took effect on the 1st day of July, 1871, purporting to legalize the election mentioned. *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 410, 16 Am. Ry. Rep. 494.

The last clause of section 24 of the schedule of the constitution of 1870 left the power in the legislature to authorize the city of Quincy to make the subscription precisely as it was under the constitution of 1848, under which the subscription could have been authorized without any vote on the subject by the people, and that authority was conferred by the act in force July 1, 1871. *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 410, 16 Am. Ry. Rep. 494.

Ill. Act. of 1869, intended to cure any irregularities which might have intervened in an election previously held for the purpose of voting subscriptions by municipalities to railroad corporations, was repealed by the new constitution of 1870, which prohibited such subscriptions except when made in pursuance of an election held prior to the adoption of the constitution, and the right to issue bonds in such cases depends upon the validity of the election, and not upon the act of 1869. *People ex rel. v. Jackson County Sup'rs*, 92 Ill. 441.

Section 2 of article 14 of Illinois Constitution, which went into operation on July 2, 1870, did not invalidate township bonds issued in aid of a railroad pursuant to an election held on that day, at an hour prior to the closing of the polls of the general election, at which the people voted on the adoption of the constitution, the bonds so issued to be applied in discharge of a donation voted in 1868, to be paid by special tax. *Louisville v. Portsmouth Sav. Bank*, 12 Am. & Eng. R. Cas. 589, 104 U. S. 469.—APPROVING *Harter v. Kernochan*, 103 U. S. 563.—DISTINGUISHED IN *People ex rel. v. Bishop*, 111 Ill. 124.

Where a township election was duly called in pursuance of a statute in June, 1870, upon the question of a donation of \$10,000 in aid of a railway company, to be paid in bonds when the railroad should be completed to a certain place, and the election was set for and held on July 2, 1870, the same day the constitution and the separate article prohibiting municipal aid to railroads or private corporations were submitted to the people, the election officers using, however,

a separate ballot box, and both polls were closed at the same time, about sunset—*held*, that it could not be said the vote for the donation was had prior to the adoption of the article of the constitution prohibiting such donations. *People ex rel. v. Bishop*, 111 Ill. 124.

In determining whether the election in respect to the proposed municipal aid to the railroad, held under such circumstances, was or was not prior in point of time to the adoption of the separate article prohibiting such aid, the court declined to enter upon the inquiry as to the difference in time between sunset at the particular locality where the municipal election was held and sunset at other voting places in the state west of that locality, holding that the term "sunset," as used in the schedule to the constitution, requiring the polls to be kept open on the day of the election in respect to the adoption or rejection of that instrument, and the separate article, until that time, was not used in the precise, mathematical sense, but rather in a more practical sense, requiring only a reasonable approximation to that time. *People ex rel. v. Bishop*, 111 Ill. 124.

Under an act to incorporate a railway company passed in 1867, the county court submitted a proposition to the voters to subscribe \$100,000 to the stock of the company, but gave no notice of such submission to be voted on by the people. In 1869 an act was passed declaring all elections held under the act of 1867 valid and binding. After the constitution of 1870 had taken effect the county court directed its clerk to make the subscription voted. *Held*, that the court having failed to exercise the authority conferred upon it by the curative act of 1869, prior to the adoption of the constitution, the authority itself was revoked by that instrument, and that the subscription and bonds issued in payment thereof were void. *Williams v. People ex rel.*, 132 Ill. 574, 24 N. E. Rep. 647.

138. Required to be held under general election law.—A law provided that an election to vote aid to a railroad should be conducted in the manner provided by law for general elections. *Held*, that an election conducted as an ordinary town meeting, without any registration of voters, and without judges or clerks, conferred no authority to make a subscription. *People ex rel. v. Santa Anna*, 67 Ill. 57.—

FOLLOWED IN *People ex rel. v. Laenna*, 67 Ill. 65. QUOTED IN *Lippincott v. Pana*, 92 Ill. 24.—*People ex rel. v. Laenna*, 67 Ill. 65.—FOLLOWING *People ex rel. v. Santa Anna*, 67 Ill. 57.—*Lippincott v. Pana*, 92 Ill. 24; *affirming* 2 Ill. App. 466.—QUOTING *People v. Santa Anna*, 67 Ill. 57; *People v. Laenna*, 67 Ill. 65.—*Chicago & I. R. Co. v. Mallory*, 5 Am. & Eng. R. Cas. 139, 101 Ill. 583.

Where a law authorizing a municipal subscription to a railway upon vote provided that "no vote shall be taken unless at a regular election for town and county officers"—*held*, that a liberal construction of the act authorized a vote at an election for either town or county officers, and that a vote at a regular election for county officers was a substantial compliance with the law. *Edwards v. People*, 88 Ill. 340.

Where a law authorizing municipal subscriptions to a railroad by towns in counties under township organization required the elections therefor to be held and conducted, and returns thereof made, "as in case of annual elections"—*held*, that the term "annual elections" did not mean town meetings, but general elections, and that notice of the election, under the general election law, was sufficient. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

139. No manner of conducting election prescribed.—Where the act of the legislature is silent as to the manner of holding and conducting an election, then it may be conducted in the manner prescribed by the law of the organization of the body in which it is held. *People ex rel. v. Laenna*, 67 Ill. 65. *People ex rel. v. Dutcher*, 56 Ill. 144, 4 Am. Ry. Rep. 103.

140. Elections held prematurely.—County bonds in aid of a railroad are not invalid by reason of a vote being taken before the passage of the law authorizing it, where the law authorizes the adoption of such vote. *Leavenworth County v. Barnes*, 94 U. S. 70.

An election held after the passage of an act by the legislature authorizing municipal aid to railroads, but before such act goes into effect, is a nullity. *State v. Little Rock, M. R. & T. R. Co.*, 31 Ark. 701.

The taxpayers of a county may maintain a bill in equity impeaching the validity and continued operations of proceedings and resolutions of the board of county commissioners taken professedly under acts of assembly authorizing a subscription by said

board to the capital stock of a railroad company. The popular election required by Md. Act of 1872, ch. 245, should have been held on the fourth Monday of April, 1873, and the election held on the fourth Monday of April, 1872, was a year in advance of the proper time. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

A city charter provided that the council might submit to the legal voters the question of subscribing for railroad stock by giving in some newspaper published in the city at least ten days' notice of the time and place of the election. If a majority of the votes cast were in favor of taking stock, then the council should authorize the mayor to subscribe for the stock, and the council should have power to issue bonds therefor, and to levy a special tax to pay such bonds, principal and interest. The charter further provided that no ordinance of the council should be in force until published. *Held*, that an election was not irregular or illegal because the ordinance authorizing the submission and the notice of the election were both published at the same time and in the same newspaper. *Clark v. Janesville*, 10 Wis. 136.

But on a second appeal and amended pleadings it appeared that the council submitted the question, the people voted affirmatively, the subscription was made, and bonds issued before the city charter was published so as to become operative. *Held*, that after it took effect the council could not make the subscription or issue bonds without again submitting the question to the people; neither could it ratify the subscription already made. *Clark v. Janesville*, 13 Wis. 414.

A resolution of the supervisors of a town to subscribe for railroad stock was passed, and a notice of an election was given after the passage of a statute authorizing such subscription, but before it went into effect; but it was in force before the day of the election. *Held*, that the objection to the regularity of the preliminary proceedings was not sufficient to justify a court of equity to cancel the bonds at the instance of a single taxpayer. *Sauerhering v. Iron Ridge & M. R. Co.*, 25 Wis. 447.

141. Discretion of municipal officers after election.—Where an act of the legislature simply declares that a county board "shall have power" to issue bonds in aid of a railroad "if a majority of the

ballots cast" at an election be favorable thereto, it is still left to the discretion of the board whether it will issue such bonds or not. *Wadsworth v. St. Croix County*, 4 Fed. Rep. 378. *St. Joseph & D. C. R. Co. v. Buchanan County Court*, 39 Mo. 485.

The proposition submitted to a vote of the citizens at an election was whether the city should issue its bonds in aid of a railroad "to an amount not exceeding one million dollars"; and the election having resulted in favor of the proposition, the city council had a discretionary power as to the amount of bonds to be issued, not exceeding one million dollars, and might confine the issue to five hundred thousand dollars. *Winter v. Montgomery City Council*, 7 Am. & Eng. R. Cas. 307, 65 Ala. 403.

A vote at a town meeting, called to vote upon the question of subscribing stock to a railroad, requiring a bond to be given for the completion of the road, "in all respects to the acceptance of the selectmen," gives them discretionary power, not only as to the obligors of the bond, but also as to its form and substance. *Canton v. Smith*, 65 Me. 203.

Wis. Acts of 1867, ch. 93 (under which a contract was made to deliver town bonds to a railroad in exchange for stock) did not confer upon the town officers any discretion as to issuing the bonds after a submission by them of a proposition by the company to a vote of the electors, and an acceptance thereof by such vote; but the agreement spoken of in the act between such officers and the railroad company was preliminary to the submission, and, when made, was a contract between the town and company, with an affirmative vote of the town as a condition precedent. *State ex rel. v. Jennings*, 48 Wis. 549, 4 N. W. Rep. 641.

142. As to vested rights in result of election.—Until the board of county commissioners subscribe to the stock of a railway company, and authorize the payment thereof in the bonds of the county, the vote of the legal electors of the county authorizing such subscription to be made goes for nothing. *People ex rel. v. Pueblo County Com'rs*, 2 Colo. 360, 20 Am. Ry. Rep. 237.

The provisions of a charter authorizing the county court to make a subscription for the stock of a company upon the vote of a majority of the qualified voters of the county conferred a power upon the county court as a civil institution of government,

which could be modified, changed, enlarged, or restrained by the legislative authority. The mere vote to subscribe did not of itself form such a contract with the railroad company as would be protected by article 1, section 10, of the constitution of the United States, as until the subscription was actually made the contract was unexecuted. *Cumberland & O. R. Co. v. Barren County Court*, 10 Bush (Ky.) 604.

Where a railroad company submits a proposition to a town that it will build its road through the town if it will subscribe so much stock, and the proposition has been submitted to a vote, which was favorable, and the bonds have been issued and placed in the hands of a trustee to be held until the road is built, after it is built the proceedings become a contract mutually binding, which cannot be rescinded by the people, nor affected by the adoption of a constitutional amendment which restricts the power of municipalities in such matters. *Bound v. Wisconsin C. R. Co.*, 45 Wis. 543.

143. As a condition precedent to subscription.—Before a county court can subscribe stock in the name of the county an election must be held by the sheriff of the county after giving thirty days' notice of the same, and specifying the amount of stock proposed to be taken, and when payable, and the name of the company in which the stock is proposed to be taken. If a majority of the votes polled be for the subscription then the chairman shall subscribe the amount of stock so voted. All these requisites must be complied with to authorize the subscription of stock by the chairman. *Campbell County v. Knoxville & K. R. Co.*, 6 Coldw. (Tenn.) 598. *Bullock v. Curry*, 2 Metc. (Ky.) 171.

Where a vote of the taxpayers is made a condition precedent to the power of a county to subscribe to railroad stock, and to issue its bonds, it has no power to issue such bonds until such vote is taken. *Leavenworth & D. M. R. Co. v. Platte County Court*, 42 Mo. 171.—REVIEWED IN *Steines v. Franklin County*, 48 Mo. 167.—*Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—QUOTING *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 539.—APPROVED IN *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 17 Kan. 29.

144. Specifying the amount.—In order to obtain the necessary assent of the

voters of a county to the incurring of an indebtedness they must be informed of the amount of such indebtedness; and when neither in the order of the county court calling the election, the notice of the same, the ballots cast thereat, nor in the order of the county court made thereafter, such amount is specified, the taxes levied to pay such indebtedness are void. *St. Louis & S. F. R. Co. v. Apperson*, 97 Mo. 300, 10 S. W. Rep. 478.

A law expressly provided that the subscription should not be made unless a majority of the taxpayers should vote for it, "specifying the amount." The order of the county court submitting the question to the people called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the county court subsequent to the vote declared that the election resulted "in favor of levying a tax of \$70,000." In mandamus against the court to compel the issue of the bonds, and levy of tax for their payment—*held*, that such entry was not a conclusive finding of the court of the fact that the taxpayers voted to subscribe the specific sum of \$70,000, but that under a fair interpretation of the record it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount in the case at bar rendered bonds issued in pursuance of such vote invalid. *State ex rel v. Saline County Court*, 45 Mo. 242.—DISTINGUISHED IN *State v. Saline County Court*, 48 Mo. 390.

An order of the board of supervisors of a county directing an election "whether the board of supervisors of this county shall subscribe to the capital stock of said railway company the sum of \$3500 per mile" is sufficient under a statute which authorizes subscriptions "to an amount not exceeding thirty-five hundred dollars per mile, for each and every mile of railroad the company might build within the county," without stating the maximum amount to be subscribed, or stating length of road in the county, so that it might be ascertained therefrom. *Taylor v. Greenville County Sup'rs*, 86 Va. 506, 29 Am. & Eng. Corp. Cas. 187, 10 S. E. Rep. 433.

145. Bonds in the hands of bona fide holders.*—Mere irregularities in an election to vote bonds for stock in a railroad cannot be taken advantage of as against *bona fide* holders of the bonds, where the bonds recite on their face that an election was held as required by law. *Pana v. Bowler*, 12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704.

In such case the U. S. supreme court will form an independent judgment as to the validity of the bonds, and will not feel bound by an adverse decision of a state court holding them void for the irregularities in the election. *Pana v. Bowler*, 12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704.

Where municipal bonds for stock in a railroad issue in good faith, and there is no irregularity in their consideration, a mere irregularity in the election voting them will not throw upon a holder the burden of showing that he acquired the bonds for value. *Pana v. Bowler*, 12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704.

Under the law a two-thirds majority of the votes, at an election held for that purpose, is necessary to authorize the loan to the railroads. But if the constituted authorities of a city are vested with exclusive power and duty to determine that fact, to canvass the votes and declare the result, then their decision, officially promulgated, that there was a two-thirds majority in favor of the loan estops the city from setting up against a *bona fide* holder the plea that the official declaration of the result is false. This objection is only available to prevent the issuance of the bonds. *Mayor, etc., of Vicksburg v. Lombard*, 51 Miss. 111.—FOLLOWED IN *Madison County Sup'rs v. Brown*, 29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516.

An Ill. statute provided that if a majority of the voters favored a municipal subscription to a railroad "no mistake in the giving of the notice, or in the canvass or return of votes, or in the issuing of the bonds, shall in any way invalidate the bonds so issued." An election was held on a call of twelve taxpayers, when the statute said twenty; and only ten days' notice of the election was given, when the statute said twenty. Subsequently the legislature legalized the bonds issued under this election. *Held*, that the

bonds were valid in the hands of *bona fide* purchasers independently of the act to validate them. *Roberts v. Holles*, 101 U. S. 119. —DISAPPROVING *Williams v. Roberts*, 88 Ill. 11.

(Per Napton, Judge.) The Mo. Act of 1855, and the amendments thereto, required a popular vote to authorize the issue of Clark county railroad bonds; and the bonds recited that they were issued as authorized by the act. *Held*, that the holder would have a right to presume that the acts had been complied with; and in suit on the bond by a *bona fide* holder without actual notice of the facts the defense that no such popular vote had been taken would be unavailable. *Smith v. Clark County*, 54 Mo. 58. —QUOTING *Lexington v. Butler*, 14 Wall. (U. S.) 283; *Flagg v. Mayor, etc., of Palmyra*, 33 Mo. 440; *Wood v. Allegheny County*, 3 Wall. Jr. 267. REFERRING TO *Steines v. Franklin County*, 43 Mo. 167. REVIEWING *Grand Chute v. Winegar*, 15 Wall. 355; *Pendleton v. Amy*, 13 Wall. 297.—FOLLOWED IN *Ralls County v. Douglass*, 105 U. S. 728. REVIEWED IN *State ex rel. v. Garrouette*, 67 Mo. 445.

146. Province of legislature to regulate election.—In the absence of any constitutional restrictions it is competent for the legislature to prescribe the requisite majority to carry a measure of aid, and unless such majority vote for the measure it fails. *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735.

An act regulating the manner of voting in a particular county in "all votes of subscription and taxation therefor for railroad purposes" applies to votes where the question submitted is "whether or not stock shall be subscribed," and not merely to votes where the question of levying a tax is submitted, and must be regarded as an amendment to a railroad charter authorizing the submission of the question "whether or not stock shall be subscribed." *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. Rep. 687.

147. Conditions imposed by voters.—Where a statute does not prohibit it, it is competent for the voters of a village in voting aid to a railroad to impose such conditions upon the issue of bonds as they deem best, provided they are not in violation of any provision of the statute, and not prohibited by any rule of public policy. So it is competent to impose as a condition that a

* See also *post*, 351-376.

depot shall be located at a particular place. *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197. 6 N. W. Rep. 621.—FOLLOWED IN *Hoyt v. Braden*, 27 Minn. 490.

148. Submission of two or more propositions at one election.—It is irregular to submit propositions for subscriptions to more than one railway company at the same time and as a single proposition, so that a voter must vote for all or none. *Williams v. People ex rel.*, 132 Ill. 574. 24 N. E. Rep. 647.—*People ex rel. v. Tazewell County*, 22 Ill. 147.—FOLLOWING *Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338.—*Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338.—DISTINGUISHED IN *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209; *Union Pac. R. Co. v. Merrick County*, 3 Dill. (U. S.) 359. FOLLOWED IN *People ex rel. v. Tazewell County*, 22 Ill. 147. QUOTED IN *Alvis v. Whitney* 43 Ind. 83; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—*Garrigus v. Parke County Com'rs*, 39 Ind. 66.—FOLLOWED IN *Indianapolis, B. & W. R. Co. v. Fountain County Com'rs*, 39 Ind. 215; *Bronenberg v. Madison County Com'rs*, 41 Ind. 502. QUOTED IN *Alvis v. Whitney*, 43 Ind. 83.—*Bronenberg v. Madison County Com'rs*, 41 Ind. 502.—FOLLOWING *Garrigus v. Parke County Com'rs*, 39 Ind. 66.—*Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—QUOTING *Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 373; *McMillan v. Lee County*, 3 Iowa 311; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.—*Christian County Court v. Smith*, (Ky.) 12 S. W. Rep. 134. *Goforth v. Rutherford R. Constr. Co.*, 96 N. Car. 535, 2 S. E. Rep. 361.

A county may be restrained from issuing bonds in pursuance of such a vote, but when issued they are not necessarily void in the hands of a bona fide holder. *Clarke v. Hancock County Sup'rs*, 27 Ill. 305. *Finney v. Lamb*, 54 Ind. 1.

The mere fact that there was a submission of three several propositions at the same time to the vote of the people, all other steps being regular, would not of itself render invalid the proceedings under such submission. *McMillan v. Boyles*, 3 Iowa 311.—QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

When the county judge submitted to a vote of the people three propositions to aid three several railroads by subscribing stock and issuing bonds, and required the electors

to vote on each proposition separately, and also submitted at the same time "whether in addition to the usual taxes an annual tax of not exceeding one per centum *** from year to year should be levied, to be applied to the liquidation of the principal and interest of the bonds"—*held*, that this general provision for a tax applied to all three was not sufficient; that each proposition should be complete in itself not only as to the money to be borrowed, but also as to the tax to repay it. *McMillan v. Boyles*, 3 Iowa 311.

Where a county judge submitted three propositions to a vote of the people to aid three several railroads by subscribing stock and issuing bonds, and stipulated in the proposition and notice to the electors that a majority of the votes given for each proposition should be considered as an adoption of the same, but that the subscription should not be made to either unless there should be a majority of the votes cast in favor of each and all of them—*held*, that this latter clause rendered the vote illegal; that under the law two or more questions could not be connected, nor could the adoption of one depend upon the adoption of all, nor could any condition be imposed to defeat a proposition adopted by a majority. *McMillan v. Boyles*, 3 Iowa 311.

Ky. Act of March 17, 1870, providing, among other things, that not more than one question for taxation shall be submitted to the voters at any one election, is not repealed by Ky. Gen. St. art. 17, ch. 28, § 2, providing the manner in which questions of subscription to the capital stock of railroads is to be submitted to a vote. *Christian County Court v. Smith*, (Ky.) 12 S. W. Rep. 134.

Where an election on a proposition to subscribe to the stock of one railroad is void on account of being voted on at the same time that a proposition is voted on to subscribe to another road, which is prohibited under the statute, the subscription to both roads is not thereby void. *Christian County Court v. Smith*, (Ky.) 12 S. W. Rep. 134.

Where a notice was given that a vote would be had for and against subscribing \$35,000 to the stock of a railroad, and subsequently another notice was given for an election on the same day for another subscription to the same road for another sum, both elections were legal. But the law having limited the subscription to \$35,000, the

vote of the town meeting was wholly unauthorized. *Marshall v. Silliman*, 61 Ill. 218. —FOLLOWED IN *Wiley v. Silliman*, 62 Ill. 170.

A proposition submitted to the legal voters of a county for the issuance and donation of \$36,000 of its bonds to aid in constructing the railroad therein named, containing a provision that the county commissioners should be authorized by a two-thirds vote of the legal voters of the county to issue and give \$36,000 of its bonds to aid in constructing such railroad, and also be authorized by a similar vote of the legal voters of the precincts to which said line of road should be located to issue and give \$39,000 to aid in such construction, such amount of precinct bonds to be made up, etc.—*held*, to vitiate the election, and that the issuance and delivery of the bonds voted thereon would be enjoined. *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. Rep. 5.—REVIEWING AND QUOTING *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.

So held, also, where the proposition submitted to the several precincts of the county was whether the county commissioners should be authorized to issue bonds to a certain amount to the A. Co. or the B. Co. on condition that they, or either of them, should build a line of railroad between certain specified points. *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. Rep. 5.—FOLLOWED IN *State ex rel. v. Roggen*, 22 Neb. 118.

149. Bribery of voters.—If a majority of the electors of a municipal corporation vote in favor of a proposition for the corporation to subscribe to the capital stock of a railroad company, under a law directing such subscription to be made if such majority vote is obtained, the municipal authorities, on proceedings to compel them to make such subscription, have a right to allege and show that the election was not fairly conducted, but was influenced by bribery and corruption practised and perpetrated by the railroad company and its employes. *People v. San Francisco Sup'rs*, 27 Cal. 655.

In a complaint attempting to set aside an election to vote city aid to a railroad on the ground of illegal or bribed votes, an averment "that the majority of those voting in favor of the subscription were not unbribed" is not the equivalent of averring that a majority of the voters were bribed. *Woolley v.*

Louisville Southern R. Co., 93 Ky. 223, 19 S. W. Rep. 595.

An averment "that a large number of voters" were bribed will not be construed to mean that a majority of those voting in favor of the subscription were bribed. *Woolley v. Louisville Southern R. Co.*, 93 Ky. 223, 19 S. W. Rep. 595.

If, pending an election, prominent citizens of a county enter into an agreement with the citizens of a civil district to subscribe an amount equal to the tax of that district, to improve the public road leading from that district to the terminus of the railroad, upon condition that the proposition to take stock receives a majority of the votes of such district, such agreement is not in the nature of a bribe, does not contravene public policy, and will not vitiate any of the proceedings. *Hord v. Rogersville & J. R. Co.*, 3 Head (Tenn.) 208.

150. Fraud in election.—A party complaining of fraud in a municipal election voting aid to a railroad must do so in apt time. If fraud existed, he is supposed to have known it, and should have proceeded at once to enjoin proceedings. It is too late to delay proceedings for four months, until rights have been acquired and liabilities incurred on the faith of the subscription. *Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406. *Butler v. Dunham*, 27 Ill. 474.

151. Change of route after election.—After a corporation has proposed to build a road upon a certain route, and the people of the county have voted to grant aid thereto, the board of supervisors, after accepting a proposition to grant the aid, may authorize the corporation to diverge from the proposed route in part. *Coleman v. Marin County Sup'rs*, 50 Cal. 493.

After a township had voted aid to a railroad, which was to be constructed on a designated line, a law was passed giving the company the right to change its route, and providing that the taxpayers of the township might vote as to whether the bonds previously issued should be used in constructing the road on the new route. The company decided not to change the route, and was pushing the work to completion on the old route when an election was ordered. *Held*, that the county officers were properly enjoined from calling the election. *Murfreesboro R. Co. v. Hertford County Com'rs*, 108 N. Car. 56, 12 S. E. Rep. 952.

152. A vote to subscribe does not authorize a gift.—A county voted to subscribe \$100,000 to the stock of a railroad and to issue its bonds therefor; but before the bonds were issued the county authorities agreed to sell the stock to the company for \$5000 in bonds. As a matter of fact the county only issued \$95,000 in bonds, and received back no stock. *Held*, that the transaction amounted to a gift, and, as both the statute and the vote contemplated a subscription, the bonds were not authorized, and were therefore void. *Post v. Pulaski County*, 49 *Fed. Rep.* 628, 9 *U. S. App.* 1, 1 *C. C. A.* 405; *affirming* 47 *Fed. Rep.* 282; *petition for certiorari denied in* 145 *U. S.* 650, 12 *Sup. Ct. Rep.* 986. — FOLLOWING *Choisser v. People ex rel.*, 140 *Ill.* 21, 29 *N. E. Rep.* 546.

And such bonds, being issued without authority, could not be validated by a subsequent act of the legislature. *Post v. Pulaski County*, 49 *Fed. Rep.* 628, 9 *U. S. App.* 1, 1 *C. C. A.* 405; *affirming* 47 *Fed. Rep.* 282; *petition for certiorari denied in* 145 *U. S.* 650, 12 *Sup. Ct. Rep.* 986.

153. When a popular vote is not required.—The legislature may authorize municipal corporations to subscribe to the stock of railroads without a previous vote. So bonds issued under an act to validate an election and to authorize the municipal authorities to issue bonds were good, independent of the power of the legislature to legalize the election. *Keithsburg v. Frick*, 34 *Ill.* 405. — FOLLOWED IN *St. Joseph Tp. v. Rogers*, 16 *Wall. (U. S.)* 644; *Quincy v. Cooke*, 12 *Am. & Eng. R. Cas.* 645, 107 *U. S.* 549, 2 *Sup. Ct. Rep.* 614; *Schaeffer v. Bonham*, 95 *Ill.* 368. — *Perry v. Keene*, 58 *N. H.* 40. *Howard v. Crawford County*, 1 *Pittsb. (Pa.)* 531.

Under the *Ill. Constitution of 1848* a city council, and not the voters thereof, are its "corporate authorities" for the purpose of making a subscription to railroad stock, and may be authorized to make such subscription without a vote. *Quincy v. Cooke*, 12 *Am. & Eng. R. Cas.* 645, 107 *U. S.* 549, 2 *Sup. Ct. Rep.* 614. — FOLLOWING *Quincy, M. & P. R. Co. v. Morris*, 34 *Ill.* 410; *Keithsburg v. Frick*, 34 *Ill.* 421; *Marshall v. Silliman*, 61 *Ill.* 225; *Williams v. Roberts*, 88 *Ill.* 21.

Where an act of the legislature revised the charter of the city of Vicksburg, defining its limits, creating a board of mayor and alder-

men, and making them successors to the mayor and council, and vesting them with extraordinary power, such as right to issue a large number of bonds, and further providing for an election to be held at a future day named, for the officers in the act named, and repealed all other acts, but, nevertheless, provided that said act take effect after its passage — *held*, that an election was not necessary to put the act into effect, but that the charter went at once into operation, and that the powers conferred by the act were not restricted to the board of mayor and aldermen thereafter "to be elected," but might legally have been exercised by the board of mayor and aldermen who, under the general law for filling vacancies, were appointed for the interim between the date of the passage of the act and the date of the election thereafter directed to be held. *Mayor, etc., of Vicksburg v. Lombard*, 51 *Miss.* 111.

The power of certain counties in Missouri to subscribe to the stock of a railroad conferred by Mo. Act of March 10, 1859, without a vote of the people was not taken away as to defendant county by the act of March 24, 1868. *Foster v. Callaway County*, 3 *Dill. (U. S.)* 200. — REVIEWED IN *Merrithew v. Saline County*, 5 *Dill.* 265. — *Howard County v. Paddock*, 15 *Am. & Eng. R. Cas.* 621, 110 *U. S.* 384, 4 *Sup. Ct. Rep.* 24. — FOLLOWING *Callaway County v. Foster*, 93 *U. S.* 567.

The action of the directors of the Kansas City & Cameron railroad, formerly the Kansas City, Galveston & Lake Superior railroad in determining to build a branch railroad in accordance with the act of March 21, 1868, and the charter of the Kan. C. Gal. & L. Sup. railroad and the acts amendatory thereto, followed by the partial building thereof, and followed by their own consolidation with the Hannibal & St. J. railroad, did not deprive such branch road of the privilege of subscriptions from county courts of the counties along the line of the road without a prior vote of the people therein, such privilege being contained in the original charter of the Kan. C., Gal. & L. Sup. railroad; such branch road was authorized by and was built in conformity to the provisions of the original charter, and under the act of March 21, 1868, though nominally a branch, was in reality a distinct and separate road from the Han. & St. J. railroad. *State ex rel. v. Greene County*, 54

Mo. 540.—FOLLOWED IN *Scotland County v. Thomas*, 94 U. S. 682.

A by-law of a county council in aid of a railway to the extent of \$20,000 which had been submitted to the ratepayers under the Municipal Institutions Acts of 1866 was, on that ground, quashed. *Clement v. Wentworth County*, 22 U. C. C. P. 300.

154. Subscription without election is void.—Municipal corporations have the power to make a subscription to the stock of a railroad company, payable in the bonds of the municipality, upon such terms and conditions with reference to the prosecution of work on the railroad as may be deemed desirable, to provide against loss, but the board of county commissioners has no power to make such subscription in behalf of the county without the approval of the legal voters expressed at an election called pursuant to law. *Packard v. Jefferson County Com'rs*, 2 Colo. 338. *Carpenter v. Buena Vista County*, 5 Dill. (U. S.) 556. *State ex rel. v. Garrouette*, 67 Mo. 445. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

And where it is admitted by the pleadings that there was not a majority of the legal votes cast at the election in favor of subscription, the board of supervisors can neither make a valid subscription, nor make statements or pass resolutions to bind their county. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.

The supervisor elected in a particular town and the town clerk thereof are not such corporate authorities as may, under the constitution, be authorized by the legislature to create a corporate debt without the consent of the people to be affected, and especially is that the rule in regard to supervisors who do not even reside in the town or vote therein. *Schaeffer v. Bonham*, 95 Ill. 368.—FOLLOWING *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Keithsburg v. Frick*, 34 Ill. 420.

The provision in the charter of a Miss. town that the mayor and selectmen should have the power to contract with a railroad company and to subscribe to its stock on "such terms and conditions as they may stipulate and agree upon"—held, not to authorize the mayor and selectmen to issue bonds for a subscription made without a previous vote of the taxpayers. *Katzenberger v. Aberdeen*, 121 U. S. 172, 7 Sup. Ct. Rep. 947.

In all cases where bonds purport to have been issued by a delegated power, and they could not have been issued without such power, it devolves upon a holder thereof suing upon the same to show that the power has been conferred before he can recover, even though there be no plea filed denying the execution of the bonds. Plaintiff's evidence must show that authority to issue the bonds has been given by an election conforming to the law which was favorable to such issue. *Carpenter v. Lathrop*, 51 Mo. 483.

Mo. Act of March 23, 1861, § 2, providing that "it shall not be lawful for the county court of any county to subscribe to the capital stock of any railroad company unless the same has been voted for by a majority of the resident voters who shall vote," repeals the power given by the act of Jan. 11, 1869, to county courts to subscribe to the stock of a certain company without a previous vote. *State ex rel. v. Dallas County Court*, 3 Am. & Eng. R. Cas. 122, 72 Mo. 329.—DISAPPROVED IN *Dallas County v. McKenzie*, 110 U. S. 686.

155. Power cannot be delegated to a committee.—A town cannot delegate its power to any committee to elect which of two or more railroads shall be aided by the town by the appropriation of money raised to aid in the construction of a railroad under the statute. *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.—REVIEWED AND QUOTED IN *Jones v. Hurlburt*, 13 Neb. 125.—*Spurck v. Lincoln & N. W. R. Co.*, 14 Neb. 293, 15 N. W. Rep. 701.—FOLLOWED IN *State ex rel. v. Roggen*, 22 Neb. 118.

What the statute requires to be done by a town at a legal meeting cannot be done by a committee. *Monadnock R. Co. v. Peterborough*, 49 N. H. 281.

156. Ratification of former election.—A town was authorized by the legislature to guarantee to a certain amount the second mortgage bonds of a railroad company on the town's voting at a meeting legally called for the purpose to give such guaranty. The town at a meeting illegally warned voted to authorize its treasurer to guarantee the bonds in its name on certain conditions, one of which was that the other towns on the road should vote to guarantee a certain amount of like bonds, and another that the company's bonds of the same kind to twice the

amount should be delivered to the town as collateral security. A year later, at a meeting regularly warned and held, the town voted "to let the conditions of the vote of the town to guarantee the second mortgage bonds of the N. H., M. & W. Railroad Co. remain as they now stand." *Held*, not to be a ratification of the former invalid vote, nor to constitute, by reference to it, a vote to guarantee the bonds. *Brooklyn Trust Co. v. Hebron*, 51 Conn. 22.

157. Second election to modify result of former.—An election was held under the Kan. Acts of 1865 and 1866 authorizing a subscription, and the issuing of bonds to a railroad company upon certain conditions; and another election was held under the laws as they existed on the 22d of May, 1869, for the purpose of changing in some respects such conditions. *Held*, that said second election was valid. *Morris v. Morris County Com'rs*, 7 Kan. 576.

158. Vote for subscription as an implied vote for taxation.—Where the question of issuing bonds to any railroad company is submitted to the people of a county, but without accompanying the same by a proposition to levy a tax to meet the liability incurred—*held*, that bonds issued in pursuance of such vote are void. *Hamlin v. Meadville*, 6 Neb. 227.

But it is not requisite under the law that there should be a distinct provision for levying a tax separate from the question of borrowing. *McMillan v. Boyles*, 3 Iowa 311.

In voting aid to works of internal improvement, it is not necessary that the proposition shall contain a provision for the levy of a tax to pay the principal of the bonds, but simply to pay the interest as it falls due. As to the principal, it is made the duty of the proper officers to levy taxes to pay it independently of any vote on that subject; but this cannot be done until after the year 1880. *Fremont Bldg. Assoc. v. Sherwin*, 6 Neb. 48. — **DISTINGUISHED IN** *Cook v. Bearrice*, 32 Neb. 80.

A railway charter provided for calling an election to determine whether a subscription should be made to a railroad company, and a tax levied, and the notice to be given of such election, and in a subsequent section empowered the several towns, etc., through or near which the road should be located to "make donations and to issue bonds for the same in the manner" therein-

before provided for to such railroad for the construction of the same. *Held*, that as to donations the failure to submit a formal proposition to the electors for authorizing the levy of a tax would not render the bonds issued under the election void, and that the people in voting the donation of bonds impliedly voted for the levy of the requisite tax to pay them. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

159. Contesting election.—While the Indiana law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof. *Goddard v. Stockman*, 5 Am. & Eng. R. Cas. 164, 74 Ind. 400.

In a proceeding brought by an elector under Kan. Laws 1871, ch. 79, to contest an election held for the purpose of voting the bonds of a county to aid in the construction of a railroad, and to be issued in payment for the stock of the railroad company, the plaintiff must conform strictly to the provisions of that statute, and cannot bring any one as a defendant, or proceed against any person, other than the officers named in the statute; nor can any matter be litigated in such special proceeding except the mere question of the validity of such election. *Chicago, K. & W. R. Co. v. Evans*, 41 Kan. 94, 21 Pac. Rep. 216. — **FOLLOWED IN** *Watts v. Wichita County Com'rs*, 41 Kan. 402, 22 Pac. Rep. 313.

A county court has no jurisdiction of a contest of an election held within a city of the county on the question of voting aid to a work of internal improvement. *Foxworthy v. Lincoln & F. R. Co.*, 13 Neb. 398, 14 N. W. Rep. 394.

In any case where the question of the obligation of a contract of subscription is to be settled because of the want of authority on the part of the county to make it, for want of proper assent on the part of the people of the county, the question of the

result of what is, by accommodation in the use of terms, called an election must necessarily be investigated, not under the idea of contesting an election, but for the purpose of ascertaining whether the contract of subscription made has been authorized according to law, and so binding on the county. *Winston v. Tennessee & P. R. Co.*, 1 *Baxt.* (Tenn.) 60.

160. Burden of proof.—The burden of proof rests upon parties claiming the right to issue municipal bonds in aid of railroads or other private corporations, or to compel the issuing of such bonds, or asserting the validity of such bonds issued for such purposes since the adoption of the present constitution, to show affirmatively that they were authorized by a vote of the municipality, under then existing laws, prior to the adoption of the constitution. *People ex rel. v. Bishop*, 111 Ill. 124.—DISTINGUISHING *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469.—*People ex rel. v. Jackson County Sup'rs*, 92 Ill. 441.

And where, in such proceeding, it appears that the county court, at a time subsequent to the adoption of the new constitution, entered an order reciting that the election previously held was duly held in pursuance of law, and directing the subscription to be made, such finding in respect to the alleged validity of the election could not operate to estop the county from denying that the election was properly held, or relieve the party claiming the benefit of the subscription from the burden of showing it was so held. *People ex rel. v. Jackson County Sup'rs*, 92 Ill. 441.

The record of the county board relating to the issue of county bonds to a railway company contained no recital or finding showing the giving of notice of the election to vote on the proposition of a corporate subscription, and the county clerk, the custodian of the records of the county court, testified that he had made diligent and thorough search of the records and files of his office, and was unable to find any paper or record indicating that any notice of such election was ever given. *Held*, that, as the burden of proof of the giving of notice of the election was upon the party asserting the validity of the bonds, such issue should have been found against him. *Choiasser v. People ex rel.*, 140 Ill. 21, 9 N. E. Rep. 546.

In a suit on a town bond issued in aid of

a railroad, it devolves upon the plaintiff to show with reasonable certainty that authority to issue the bonds has been conferred by a legal election; that the vote has been properly preserved, and has been canvassed by the proper persons authorized to decide whether the vote is favorable to a subscription or not. *Carpenter v. Lathrop*, 51 Mo. 483.

161. Designation of company to be aided.—It is essential to the validity of proceedings under the Kan. law of 1865 that some corporation be named as the recipient of the proposed subscription and bonds, and a vote to aid in the construction of a railroad along a certain route gives no authority to the commissioners to subscribe stock or issue bonds to any corporation. *Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs*, 12 Kan. 230.—FOLLOWING *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—DISTINGUISHED IN *Johnson County Com'rs v. Thayer*, 94 U. S. 631.

As there was nothing in an order of the county court, or in the notice for an election, or even in the election, that authorized a subscription of stock to either the Lexington or Knoxville R. Co., or to the Knoxville & Kentucky R. Co., the action of the county court and the election held in pursuance thereof, and subsequent order of the county court directing the chairman to issue bonds to the Knoxville & Kentucky R. Co., were unauthorized by the act of 1851-52. *Campbell County Justices v. Knoxville & K. R. Co.*, 6 *Coldw.* (Tenn.) 598.

A proposition submitted to the voters of a county in Nebraska in which it is proposed to vote the bonds of such county to a railroad company must designate the donee. A proposition in the alternative to issue to a certain corporation named or to another designated corporation is ineffectual to authorize the issuing of bonds, even if adopted by the legal voters. *State ex rel. v. Roggen*, 22 Neb. 118, 34 N. W. Rep. 108.—FOLLOWING *Jones v. Hurlburt*, 13 Neb. 125; *Spurck v. Lincoln & N. W. R. Co.*, 14 Neb. 293.

A vote in favor of a subscription by a county to railroad stock is not vitiated by being in the alternative, that is, voting upon a proposition to subscribe a certain amount to one company on condition that it submit to certain requirements as to the location of the road and the time of completing it, and, if not, then to make the subscrip-

tion to another company. *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed (Tenn.)* 637.—REVIEWED IN *Winston v. Tennessee & P. R. Co.*, 1 *Baxt. (Tenn.)* 60; *Louisville & N. R. Co. v. State*, 8 *Heisk. (Tenn.)* 663; *Humphreys County v. McAdoo*, 7 *Heisk.* 585.

Where the law under which a vote was taken on the question of corporate subscription did not require the same to be taken in reference to any particular road, but to any railroad leading to or from the town, a vote for railroad subscription without designating any particular road was held to authorize a corporate subscription to a road which passed through the town. *Decker v. Hughes*, 68 *Ill.* 33.

Where a town was authorized to vote a subscription to any company whose road should lead to or from it, a vote was had on the question for or against railroad appropriation in a certain amount, which carried, and under which the corporate authorities subscribed the sum named to the stock of a railway. *Held*, that, although the scope of the vote was larger than was warranted as justifying a donation, yet, as the sum voted was appropriated as a subscription to stock, it would be sustained. *Decker v. Hughes*, 68 *Ill.* 33.

A vote of bonds to the "Mattoon, Sullivan & Decatur R. Co." when the true name was the "Decatur, Sullivan & Mattoon R. Co." will not invalidate the bonds or the election when there is no doubt about the road that was intended. *Moultrie County v. Fairfield*, 7 *Am. & Eng. R. Cas.* 194, 105 *U. S.* 370.

162. Suits to enjoin holding of elections.—Where a municipality has legally a right to pass a by-law granting a sum of money as a bonus to a railway, it would seem premature to apply to restrain the by-law being submitted to the ratepayers, as they might refuse to approve the by-law. *Vickers v. Shuntah*, 22 *Grant's Ch. (U. C.)* 410.—DISTINGUISHING *Helm v. Port Hope*, 22 *Grant's Ch. (U. C.)* 273.

Where the corporation of the town of Port Hope was about submitting to the vote of the ratepayers a by-law authorizing the harbor commissioners of that town to issue debentures to the amount of \$75,000 to aid in completing a railway, but which debentures the corporation had not legally the power of directing to be issued, the court restrained the corporation from pro-

ceeding to take such vote. *Helm v. Port Hope*, 22 *Grant's Ch. (U. C.)* 273.

163. Parties to suit to enjoin proceedings.—The railroad company is not a necessary party defendant in an action brought by a municipal township against the board of county commissioners and the county clerk to perpetually enjoin them as agents of the township from subscribing to the capital stock of the railroad company, and executing bonds of the township in payment therefor, under the pretended authority of a special election held to take the sense of the electors of the township upon the subscription of stock and the issuing of bonds, where the petition alleges that the conditions precedent to the power of the county board to call the election and make any subscription were not complied with. *Dixon Tp. v. Sumner County Com'rs*, 25 *Kan.* 519.—RECONCILING *State v. Anderson*, 5 *Kan.* 90.

164. Who may question regularity of election.—Under the *Ill. Act of 1859* incorporating the Western Air-Line railroad, if a municipal vote be in favor of a subscription to the stock of said road, a supervisor, acting only as a ministerial officer in issuing the bonds, cannot question the regularity of the election. *Piatt v. People ex rel.*, 29 *Ill.* 54.

The town clerk has duties only of a ministerial character, and it seems that when the supervisor, under an election, makes a subscription to a railroad, and executes the bonds of the town in pursuance thereof, the town clerk has no authority to question the legality of the act or refuse to countersign them and make a record thereof, it not being his duty to defend the interests of his town. *People ex rel. v. Cline*, 63 *Ill.* 394, 7 *Am. Ry. Rep.* 373.

165. Estoppel.—Where the people of a county vote in favor of a subscription to the stock of any company that would build a railroad between designated points, and the proper authorities declare the vote to be in favor of the subscription, and so enter it of record, and the bonds are issued, the county is estopped, after the road is built, from asserting that in fact a majority did not vote in favor of the subscription. *Block v. Bourbon County Com'rs*, 99 *U. S.* 686.

The taxpayers of a county voted to fund its bonds issued to a railroad under a statute authorizing municipal corporations to fund their bonds, "which are now binding

or subsisting legal obligations." *Held*, that the vote recognized the old bonds as valid, and that the county was estopped from setting up, in a suit on the new bonds, an irregularity in issuing the old ones. *Jasper County v. Ballou*, 3 *Am. & Eng. R. Cas.* 47, 103 *U. S.* 745.

Where a tax of five per cent. to aid in the construction of a railroad was voted by a majority of all the electors in a township, and the railroad company thereupon constructed the road through the township at an expense of more than double the amount of the tax, the citizens making no objection to the legality of the vote until after the completion of the road—*held*, that the taxpayers were estopped from then objecting to the validity of the notice of election. (Beck, J., dissenting.) *Burlington, C. R. & M. R. Co. v. Stewart*, 39 *Iowa* 267, 20 *Am. Ry. Rep.* 89.—FOLLOWED IN *Lamb v. Burlington, C. R. & M. R. Co.*, 39 *Iowa* 333.

A canvass of the votes of a county showed a majority in favor of subscription to a railroad, and on the faith of the vote the company constructed its road. *Held*, that the county was not estopped from setting up the illegality of the vote by not asserting the illegality before the road was built, where the company knew of the illegality. *People ex rel. v. Logan County Sup'rs*, 63 *Ill.* 374. *People ex rel. v. Cline*, 63 *Ill.* 394, 7 *Am. Ry. Rep.* 373.

Where an election to subscribe to the stock of a railroad is illegal and void, because not conducted by the proper officers, and the supervisor, after such election, makes the subscription, after the building of the road, the town is not estopped from denying the validity of the same. *People ex rel. v. Santa Anna*, 67 *Ill.* 57.—FOLLOWED IN *People ex rel. v. Laenna*, 67 *Ill.* 65.

The fact that after such an election the county, township, or other municipal organization in which the election was held appointed an agent, who made a subscription of stock on behalf of his principal, that the organization acted and was recognized as a stockholder in the corporation in aid of which the bonds were to be issued, and that the latter made contracts with third parties, relying upon the validity of the transaction, will not operate as an estoppel, such acts being *ultra vires*. *Lynchburg & D. R. Co. v. Person County Com'rs*, 109 *N.*

Car. 159, 13 *S. E. Rep.* 783.—DISTINGUISHING *Jones v. Person County Com'rs*, 107 *N. Car.* 248.

166. Power granted in charter of one company does not authorize aid to another.—An act for the incorporation of a company authorized counties to vote on the question of their subscription to the company. *Held*, that such act did not authorize the county court to submit a proposition for voting a subscription to "any" railroad company which would build another road within five years between certain points named. *Williams v. People ex rel.*, 132 *Ill.* 574, 24 *N. E. Rep.* 647.

167. Acts limiting amount of subscription.—Under Ind. statutes townships are not authorized to raise by taxation for, or to appropriate to, railroad purposes to exceed two per cent. on the taxables of the township in any one period of two years. Upon a proper petition of freeholders of the township the proper county board must order an election to be held in the township without regard to the number of such elections previously held unless it appears that the township, within the period of two years, has raised by taxation for, or appropriated to, railroad purposes a sum or sums in excess of two per cent. on the taxables of the township. *Bish v. Stout*, 77 *Ind.* 255.

Chapter 90, Kan. Laws of 1870, does not control or limit the amount of bonds to be voted for under elections granted in accordance with the provisions of chapter 107, Laws of 1876, and the amendments thereto. *State ex rel. v. Rush County Com'rs*, 35 *Kan.* 150, 10 *Pac. Rep.* 535.

Me. Rev. St. ch. 51, § 80, authorizes any town to grant aid to a railroad not to exceed five per cent. of its valuation. By a special statute of 1868, ch. 622, § 1, defendant town was authorized to raise not to exceed \$100,000 to aid a certain railroad. *Held*, that each statute was separate and independent, and authorized the sums therein named. *Stevens v. Anson*, 73 *Me.* 489.—FOLLOWING *Portland & O. R. Co. v. Standish*, 65 *Me.* 66.

As the law stands in Nebraska there is no warrant for creating a county indebtedness in aid of internal improvements exceeding in the aggregate ten per cent. of the assessed value of the taxable property within the county. And even this must have been authorized by at least two thirds of all the votes cast on the proposition to

extend such aid. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.—APPROVED IN *Dixon County v. Field*, 111 U. S. 83. DISTINGUISHED IN *State ex rel. v. Babcock*, 19 Neb. 230. REVIEWED IN *State ex rel. v. Wilkinson*, 20 Neb. 610.

Where a county votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever. *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

168. Trifling irregularities.—Mere informalities in the returns of an election voting aid to a railroad which cannot possibly prejudice any substantial right, or a failure to conform to any requirement of the statute which is directory only, or an error which is clearly clerical, are not sufficient to defeat the appropriation voted. *Irwin v. Lowe*, 89 Ind. 540.

So held of a failure to close an election at five o'clock in the evening, as the statute directs, unless it is made to appear that votes were cast after that time which would change the result. *Piatt v. People ex rel.*, 29 Ill. 54.

And of an agreement between voters to "pair" where the parties on one side violate the agreement and vote. Such agreement is illegal. *Piatt v. People ex rel.*, 29 Ill. 54.

Where the construction of a railroad is secured by a pledge made at the ballot box by the legal voters of a town to deliver to the company the bonds of the town when the road is so constructed, the bonds should be delivered unless the law was in a substantial manner disregarded in the election. *Chicago, D. & V. R. Co. v. Coyer*, 79 Ill. 373.

At a meeting attended by a majority of the legal voters of a town the question of calling an election for the purpose of voting aid to a railroad, the names of freeholders who were willing to sign a petition for such an election were called for and publicly announced, and a committee appointed to prepare the petition. The committee prepared the petition, and signed the names of the freeholders whose names had been so announced. Held, that, such freeholders having made no objection, their silence must be construed as an express assent that their names should be signed by the committee. *Chicago, D. & V. R. Co. v. Coyer*, 79 Ill. 373.

A town election to vote aid to a railroad

in Ill. under the act of March 30, 1869, § 6, providing that it "be held and conducted, and return thereof made, as is provided by law," which is presided over by a moderator, and not by judges of election, is a sufficient compliance with the law, that being the method of electing town officers. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124.

It was objected that an election was illegal, for the reason that the judges of the election were not present in holding it in two townships. Other persons acted as judges, but it was not shown that any essential requirement of the statute was omitted in their selection and qualification. Held, that the objection was without force; that, as the statute authorized the electors present, in case the judges failed to attend, to select others in their place, it would be presumed that the acting judges were legally selected until shown that they were intruders acting without color of office, and even were this shown it seems very doubtful whether it could be allowed to disfranchise the voters of the townships. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.

An election was held in four townships in a certain county on the same day on the subject of each township making an appropriation to aid a railroad, and the inspectors of the several townships organized themselves into a board of canvassers. One of the townships had only one voting precinct, and under the revised statutes of the state the inspector and judges thereof, or any two of them, should constitute the board of canvassers; but the inspectors of each township met jointly with the county auditor and canvassed the vote of each township. Held: (1) that neither the election nor the tax voted was invalidated by such irregular canvass; (2) that the fact that the inspectors of the other elections aided in canvassing the vote of the township where there was only one voting precinct did not invalidate the canvass, but it stood as if made by the proper inspector, aided by the county auditor as his clerk. (Biddle, J., dissenting.) *Mustard v. Hoppers*, 69 Ind. 324.

169. Election without authority of law is a nullity.—A popular vote in favor of a municipal subscription cast at an election held without authority of law does not bind the municipality nor confer the power to make the subscription. *Allen v. Louisiana*, 2 Am. & Eng. R. Cas. 599, 103 U. S. 80. *Barnes v. Lacon*, 84 Ill. 461.

And the legislature cannot by any subsequent act legalize the same. *Barnes v. Lazen*, 84 Ill. 461.

The charter of a railroad authorized municipalities to subscribe to its capital stock, and a vote was taken to subscribe to a certain division of the road. *Held*, that the vote was unauthorized, and the company could not compel the subscription. *McWhorter v. People ex rel.*, 65 Ill. 290.

By the charter of the Dixon, P. & H. R. Co. of March 5, 1867, each town and township through which the road might be located was authorized to subscribe and take stock of the company not exceeding \$35,000, upon a vote of the people in favor of the same. Under this law an election was held in the township of Elmwood upon two propositions for subscription, the first for \$35,000, and the other for \$40,000 additional to the first, both of which were carried and the bonds of the township issued. *Held*, on bill to enjoin the collection of taxes to pay the interest of the bonds, that the subscription of \$35,000 was valid, but as to the \$40,000 the election and subscription were void. *Wiley v. Silliman*, 62 Ill. 170.—FOLLOWING *Marshall v. Silliman*, 61 Ill. 218.

A city was authorized to subscribe to the capital stock of a railway company, upon an affirmative vote of the people, to be paid for in corporate bonds to run not exceeding ten years, and to bear not exceeding ten per cent. interest. *Held*, that a proposal submitted and voted that the bonds to be issued should be made payable in not less than twenty years, and bear interest at the rate of eight per cent. per annum, was materially variant from that authorized by law in respect to the time they had to run before due; and that the submission was in excess of the power conferred, and the vote thereon without any binding authority; and that the issue of the bonds voted could not be coerced. *Cairo & St. L. R. Co. v. Sparta*, 77 Ill. 505.

170. Statute of limitations.—An action was commenced by certain taxpayers in behalf of themselves and others, among other purposes, to declare void an election held to allow certain townships to subscribe stock to a railroad company, on account of irregularities. *Held*: (1) the action could be brought, being equitable in its nature, even though no remedy was given by statute; (2) while no statute of limitations is applicable, still such action should be brought within

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reasonable time, and before the rights of innocent third parties have intervened. *Jones v. Person County Com'rs*, 107 N. Car. 248, 12 S. E. Rep. 69.—DISTINGUISHED IN *Lynchburg & D. R. Co. v. Person County Com'rs*, 109 N. Car. 159.

171. Who authorized to subscribe and issue bonds.—After the voters of a town in Illinois have, at an election held pursuant to law, voted in favor of a donation to aid in the construction of a railroad, the supervisor and clerk are the proper authorities to subscribe for the stock and issue the bonds of the township therefor. *Walnut v. Wade*, 3 Am. & Eng. R. Cas. 36, 103 U. S. 683.

Where a county court is authorized by legislative act to subscribe to the stock of a railroad and issue bonds in payment therefor when the people of the county shall vote in favor of such subscription, when the election has been duly held and the result entered upon the minutes of the court, its authority to make the subscription is complete without any further entry or order of the court that it will make the subscription. *Floyd County Com'rs v. Shorter*, 50 Ga. 489.

A county judge who has signed a petition as a taxpayer asking for the issuing of town bonds is not thereby disqualified for counting the votes and ascertaining whether a majority, in number and amount of taxable property represented, has been given for the bonding of the town or not. If such majority has been given, the county judge has no power in the premises except to obey the statute, which makes it his duty in such case to appoint three commissioners to issue the bonds. *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446.

172. Special laws not repealed by subsequent general laws.—A provision in the charter of a railroad company authorizing county courts to subscribe stock to such railroad without a vote of the people is not repealed by subsequent general laws, nor by the subsequent adoption of the present constitution. *State ex rel. v. Greene County*, 54 Mo. 540.—FOLLOWING *Smith v. Clark County*, 54 Mo. 58.—FOLLOWED IN *Ray County v. Vansycle*, 96 U. S. 675; *Thomas v. Scotland County*, 3 Dill. (U. S.) 7.

The power conceded to counties or other municipal bodies by a railroad charter to take and subscribe stock in such railroad was intended as a privilege to the railroad. *State ex rel. v. Greene County*, 54 Mo. 540.—

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FOLLOWING *Smith v. Clark County*, 54 Mo. 58.

Section 14 of the North Mo. R. charter of 1851 authorized counties along the line of the road to subscribe thereto without the sanction of a popular vote. Section 10 of the act of 1857 creating the Alexandria & Bloomfield R. Co. (Sess. Acts 1856-57, p. 94) made said section 14 a part of the latter charter. *Held*: (1) that the right of subscription conferred by section 14 was not exclusively that of the counties, but was a privilege of the railroads, and might be transferred by section 10 aforesaid to the A. & B. R. Co.; (2) that bonds issued in 1865 by the county court of Clark county in aid of the A. & B. R. Co., under the authority conferred by the charter of 1857, were valid, notwithstanding the inhibition of the act of March 23, 1861 (Sess. Acts 1861, p. 60, § 1). The last named, being a general act, did not repeal the former and special one. *Smith v. Clark County*, 54 Mo. 58.—FOLLOWING *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; *State ex rel. v. Sullivan County Court*, 51 Mo. 522; *State ex rel. v. Macon County Court*, 41 Mo. 453.—APPROVED IN *Huidekoper v. Dallas County*, 3 Dill. (U. S.) 171. FOLLOWED IN *Thomas v. Scotland County*, 3 Dill. 7; *State ex rel. v. Greene County*, 54 Mo. 540; *Louisiana v. Taylor*, 105 U. S. 454.

VIII. VALIDITY AND EFFECT OF THE SUBSCRIPTION.

173. In general.*—The act of 1859 having expressly empowered the corporate authorities of Mobile to aid in the construction of the Mobile & Great Northern railroad, by virtue of the vote of the citizens taken under the act of 1858, the failure of said corporate authorities, in taking the vote of the citizens, to comply with the terms of the said act of 1858 does not affect the validity of their contract with said company. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

Nor is the validity of said contract affected by the fact that the aggregate amount of the bonds issued by said corporate authorities, with the interest thereon accruing up to the time when they respectively fall due,

exceeds one million of dollars, the sum specified in said acts as the maximum of aid to be extended to said railroad company. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

Nor is the validity of said contract at all impaired by the failure to require stock in said railroad company to be issued to the assignee or appointee of the city for the interest it may pay on said bonds. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

If the city received more favorable terms as to time of payment than other subscribers, it does not lie in her mouth, in order to defeat the subscription, to say that other stockholders were thereby defrauded. *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395.—OVERRULED IN *Snyder v. Studebaker*, 19 Ind. 462.

The act of 1865 (Ind. Rev. St. 1881) was enacted upon the theory that, where a railroad company no longer owns the railroad, by reason of a judicial sale, as provided in that act, an unpaid subscription to its stock ought not to be coerced, for the reason that the subscribers cannot acquire an interest in the railway nor have a voice in its management. *Hamilton County Com'rs v. State*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64, 4 N. E. Rep. 589, 17 N. E. Rep. 855.

Where a township votes bonds in aid of a railroad to be built between designated points, and the statute limits the amount to \$4000 per mile of track laid, the company is entitled to bonds, not to exceed the statutory limit for all the main line and side tracks built which are necessary for the efficient operation of the railroad between the points designated. *Atchison, C. & P. R. Co. v. Phillips County Com'rs*, 4 Am. & Eng. R. Cas. 326, 25 Kan. 261.

A proposition by a railroad company that a county make a subscription to its capital stock, to be paid by conveying to the company all the lands which the county owned and which were not occupied for public purposes when the proposition should be accepted, and by transferring all the tax certificates which the county then owned and which should come to its possession before the completion of the road, is sufficiently definite as to the property and its value, though no lands or tax certificates are specifically described. *Hall v. Baker*, 74 Wis. 118, 42 N. W. Rep. 104.

A by-law to take stock in the Bytown & P. R. was quashed: (1) because it ap-

*Subscriptions of municipal corporations to stock of railroads, in general, see notes, 59 AM. DEC. 782; 2 AM. ST. REP. 101; 5 L. R. A. 727.

peared not to have been concurred in by a majority of the assessed inhabitants, as required by 13 & 14 Vict. c. 132; (2) because no sufficient rate was imposed for the payment of the debt and interest, as required by 12 Vict. c. 81. *In re Billings*, 10 U. C. Q. B. 273.

The defendants did not support their by law, and the court refused to hear counsel on behalf of the railway company, as the rule was not directed to them. *In re Billings*, 10 U. C. Q. B. 273.

Under the charter of a railroad company which authorized counties to subscribe for stock, and provided that the company should allow to all holders of stock "interest on the same from the time of paying for said stock up to the time of making the first dividend, and to issue to the holder stock therefor," the railroad company, by declaring a stock dividend of one fourth of one per cent., did not acquire the right to stop the running of interest on stock subscribed and held by a county. The "dividend" intended by the charter was a cash dividend. *Hardin County v. Louisville & N. R. Co.*, 92 Ky. 412, 17 S. W. Rep. 860.

Warrants issued by the board of school commissioners to a railroad company applying for a loan are conclusive that it has done the work required by law, and is free from any adverse lien. But they are not conclusive that the road is one of those authorized by law to apply for the loan. *Houston Tap & B. R. Co. v. Randolph*, 24 Tex. 317.

A railroad company executed a bond and mortgage to a city which had issued bonds in aid of the railroad, and the mortgage conditioned "that the company would pay the interest and principal of all said bonds as the same should become payable and mature, and would save and hold the city harmless from the issue of the same." The company was unable to keep this engagement, and the city obtained legislative authority to issue new bonds for the balance due in renewal, specially providing that the priority and security of the lien of the city should not be thereby impaired. *Held*, that the city was not bound to accept payment offered by the company before the bonds were mature, and when the rate of interest was below six per cent.; neither could the company apply money to a sinking fund authorized by the act of 1868, ch. 601, such an application of the money not being pro-

vided for by the act. *Portland v. Atlantic & St. L. R. Co.*, 74 Me. 241.

Where an act authorizing a county to subscribe to the stock of a railroad provided "that the net profits or dividends upon the stock" should "stand pledged for the payment of the indebtedness and interest which may become demandable from the county under this act"—*held*, upon suit brought to compel payment of the price at which defendant had purchased a portion of said stock from the county, that the statutory pledge of the profits and dividends was intended as a security to the holders of the county bonds issued in payment of the subscription; and, in the absence of any assertion by them of rights under the statutory pledge, the purchaser could not invalidate his contract of purchase on the ground that its terms impaired the obligations of the bondholders' contract. *Knox County Com'rs v. McComb*, 19 Ohio St. 320.

174. Where company becomes insolvent.—Where a railway to whose capital stock a county had made an absolute and unconditional subscription had its franchise and road sold under a deed of trust, and abandoned its organization, becoming insolvent, and the franchise, by act of the legislature and sale, was transferred to a new company, which completed the road—*held*, that the county had no power to donate and deliver a portion of its bonds to the new company as against creditors of the old company, and that such could not be done even under legislative authority, as they were trust funds for the payment of debts *Morgan County v. Thomas*, 76 Ill. 120.

175. Failure to build whole of road.—The people of a certain county voted authority to the board of supervisors to issue bonds in aid of a railroad to a certain amount "for every mile of track that shall be actually constructed." A proposition submitted to the people specified the *termini* of the proposed road; but it was only constructed over a portion of the distance between the points named. *Held*, that the board was authorized to issue bonds to an amount corresponding to the completed portion of the road, and they were valid, (Myrick, McKee, and Thornton, JJ., dissenting.) *Nevada Bank v. Steinmiz*, 64 Cal. 301.

If a railway company, after the issue of bonds by a town in payment of stock subscribed, gives its obligation that if it does

not complete its road by a given time it will pay the town the sum realized by sale of the bonds, with the interest thereon, upon tender of the stock issued to the town, the contract will be regarded as one for the sale and purchase of the stock, and the surrender of the stock will be a sufficient consideration for the undertaking of the company, and the recitals in the agreement of matters of inducement will form no part of the real consideration. *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145, 16 Am. Ry. Rep. 442.

176. When municipality entitled to stock certificates.—A county is released from its obligation to complete the performance of its contract by an adjudication that counties are not authorized to become subscribers to the capital stock of railways, but it does not thereby become entitled to insist that the company should issue to it certificates of stock for the amount already subscribed in contravention of the terms of the subscription. *Wapello County v. Burlington & M. R. R. Co.*, 44 Iowa 585.

177. Equitable lien of municipality.—The equitable lien or charge in favor of a county which has loaned its bonds to a railroad exists and is enforceable not only against the funds in the hands of the receiver of the aided road, but against the purchaser under the decree of foreclosure theretofore rendered, and against whomsoever may hold the property or have custody of its earnings. *Ketchum v. St. Louis*, 101 U. S. 306.

Missouri Act of January 7, 1865, is of such character that all purchasers of bonds issued under mortgages subsequently executed and all purchasers of the property, in whatever mode, were bound to take notice of its provisions. *Ketchum v. St. Louis*, 101 U. S. 306.

178. Governed by law in force when subscription is made.—The validity of a municipal subscription to railroad stock is determined by the law in force when it is actually made, and not by a change in the law that may be made between the time of making the subscription and a formal delivery of bonds. *Callaway County v. Foster*, 93 U. S. 567.—FOLLOWED IN *Howard County v. Paddock*, 110 U. S. 384.

179. Duties of agents or commissioners appointed to subscribe.—Where commissioners are appointed to issue bonds of a town, and are charged with seeing

that the proceeds are applied to the construction of the road, their act in disposing of the bonds is sufficient to give a *bona fide* purchaser good title thereto; and where such commissioners deliver the bonds to contractors in payment for work on the road, and receive credit therefor on the town's subscription, they, in doing so, act within their authority. *Foote v. Hancock*, 15 Blatchf. (U. S.) 343.

A county board of commissioners before it can act must be convened in legal session, either regular, adjourned, or special; and a casual meeting of two out of the three commissioners does not create a legal session. So where two of the commissioners meet, without notifying the third, in special session, and where it appears that notice to the third member was purposely withheld, a resolution directing a subscription to railroad stock is not binding on the county; and it may maintain an action to have canceled bonds delivered in pursuance of such resolution. *Paola & F. R. R. Co. v. Anderson County Com'rs*, 16 Kan. 302.

Where a statute empowers the county court to subscribe to railroad stock, which it has actually done by an order entered of record, it may then appoint an agent to make the entry on the company's books, and receive the certificates of stock. *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294.

Agents who are appointed to carry out the provisions of law relating to municipal subscriptions to railroad stock have no power to make any agreement not expressly authorized by the statute under which they act. So commissioners who are appointed to issue town bonds for stock in a railroad have no right to enter into an agreement that the proceeds of the bonds should be used in purchasing ties for the road, which should remain the property of the commissioners until actually placed in the completed road, and that a portion of the road should be completed within a specified time. *Joslyn v. Dow*, 19 Hun (N. Y.) 494.

And where the company has failed to comply with the above conditions it is not estopped from insisting on the invalidity of such contract, but may tender the stock and insist on a delivery of the bonds. *Joslyn v. Dow*, 19 Hun (N. Y.) 494.—DISTINGUISHING *Bissell v. Michigan S. & N. I. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

And the principal agreement in such case between the commissioners and the company being unauthorized and void, a guaranty of the agreement by a third person is void also. *Joslyn v. Dow*, 19 Hun (N. Y.) 494.—APPLYING *McGregor v. Deal & D. R. Co.*, 16 Eng. L. & Eq. 180.

Commissioners appointed by a town to make a subscription of railroad stock are the agents of the town, and of no other party in that business, and are responsible to no other party for the manner in which it is executed, even though they incorporate conditions in their contract of subscription beyond what is required in the instrument of assent by which they receive their appointment and authority. *Danville v. Montpelier & St. J. R. Co.*, 43 Vt. 144.

The insertion of a condition is an unauthorized act on the part of the commissioners, but is not a void act unless the town chooses to avoid it, and without repudiation an adoption and ratification will be presumed as to the town. *Danville v. Montpelier & St. J. R. Co.*, 43 Vt. 144.

180. What constitutes a valid contract of subscription.—Where a county court passes a resolution reciting that it does thereby, in the name of the county, subscribe a certain amount to the capital stock of a railroad, and this resolution is presented to the company and accepted, and the court notified of the acceptance, the contract of subscription is complete, and the parties are bound thereby. *Bates County v. Winters*, 112 U. S. 325, 5 Sup. Ct. Rep. 157. — APPROVING *Nugent v. Putnam County Sup'rs*, 19 Wall. (U. S.) 241; *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631.—*Davis v. Kendallville*, 5 Biss. (U. S.) 280. *Chicago, K. & W. R. Co. v. Osage County Com'rs*, 38 Kan. 597, 16 Pac. Rep. 828.

An actual manual subscription on the books of the company is not necessary to bind the county as a subscriber, or to entitle it to the stock. *Cass County v. Gillett*, 100 U. S. 585.—FOLLOWING *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631.—*Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.

181. Power to modify a subscription after it is made.—Where a county votes to subscribe a certain amount to the stock of a railroad under a statute which authorizes the subscription, the county

board has no power to alter the subscription voted, nor to compromise a dispute with the company for a less amount. *Bell v. Mobile & O. R. Co.*, 4 Wall. (U. S.) 598.—FOLLOWED IN *Putnam v. New Albany*, 4 Biss. (U. S.) 365.

182. Irregularities cured by subsequent legislation.*—If there be any irregularity, in taking the votes of the electors or otherwise, in issuing city bonds, it may be remedied by legislation. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.

A railroad company was authorized to submit, and a county to accept by popular vote, a provision for the sale of its stock to the county, signed by its president or secretary, and under its common seal. A proposition was made, signed by its vice-president, and under its common seal; and this proposition was accepted. Afterwards a statute was passed providing that no defects or irregularities in any of the proceedings preliminary to the acceptance should invalidate such agreement. Held, that the defect of form in signing the proposition did not invalidate the contract. *Portage County Sup'rs v. Wisconsin C. R. Co.*, 121 Mass. 460.

183. Substantial compliance with statute.—Subscriptions of stock in corporations by county courts must be made in substantial conformity to the mode prescribed in the law authorizing the subscription. *Mercer County Court v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300.

Substantial compliance with the law in every essential feature is all that is necessary. *Redd v. Henry County Sup'rs*, 31 Gratt. (Va.) 695.

The failure to comply strictly with the provisions of the statute which are not mandatory, but merely directory, will not vitiate the proceedings so as to render the subscription invalid. *Redd v. Henry County Sup'rs*, 31 Gratt. (Va.) 695.

A subscription of stock by a municipal corporation, made in substantial compliance with the terms of the statute, cannot be held invalid, nor a tax levied to pay the interest on its bonds enjoined, at the suit of citizens and taxpayers, on account of irregularities, not fraudulent, in any of the proceedings preceding the subscription which

* Ratification by legislature of unauthorized act, see note, 15 AM. & ENG. R. CAS. 575. See also ante, 22, 23.

were not objected to before the subscription was made and the bonds issued; such, for instance, as an informality in the proposition of the railroad company, or the want of an exact conformity between the proposition and the subscription, or the failure of the municipal authorities to enter their action on their minutes within ten days, or to hold the election within thirty days. *Fielder v. Montgomery & E. R. Co.*, 51 Ala. 178.

Proceedings preparatory to issuing the bonds must as substantially comply with the law as in levying a tax for the payment of the debt, although in suits brought on such bonds by innocent holders the court rejects proof of errors in or about the election, or in issuing the bonds. Objections made by taxpayers before the bonds are issued are in time. *Goedgen v. Manitowoc County Sup'rs*, 2 Biss. (U. S.) 328.

The fact that one grand jury requested the commissioners to subscribe twenty thousand shares to the capital stock of a railroad company and the commissioners subscribed but fifteen thousand, in no way invalidated the subscription made. *Com. ex rel. v. Perkins*, 43 Pa. St. 400.

A statute authorized a county to issue its bonds in payment of a subscription to "preferred stock in a railroad company," and further provided that the county should receive preferred stock to the amount of the bonds, which should bear interest at the rate of seven per cent. per annum. *Held*, that the term "preferred stock," as thus used, meant capital stock, and only differed from other stock in the matter of preference as to the seven per cent. dividend. *State ex rel. v. Cheraw & C. R. Co.*, 9 Am. & Eng. R. Cas. 631, 16 So. Car. 524.

And where a certificate of such stock is tendered by the company which simply sets forth that the county is entitled to the stated amount, but impliedly declares that it is not capital stock, it is not sufficient, and a writ of mandamus may be awarded requiring a certificate in substantial compliance with the terms of the statute. *State ex rel. v. Cheraw & C. R. Co.*, 9 Am. & Eng. R. Cas. 631, 16 So. Car. 524.

184. Strict pursuance of statutory requirements.—A municipal corporation cannot, without special authority, subscribe stock, and issue bonds in payment of it, in a railroad corporation. But such authority may be conferred upon a city, when it is expedient; and when it is given by statute,

in any case it must be executed as prescribed in the grant, if executed at all. The terms of the grant cannot be legally departed from or exceeded. *Aurora v. West*, 22 Ind. 88. *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90. *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.—DISTINGUISHING *Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338; *People ex rel. v. Tazewell County*, 22 Ill. 147.—*Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

If the act of the legislature authorize bonds to be issued of a certain denomination and bearing a certain rate of interest, the municipal corporation has no authority to issue bonds for a greater denomination and an increased rate of interest. *Milan Tax-Payers v. Tennessee C. R. Co.*, 11 Lea (Tenn.) 329.—FOLLOWED IN *Kelley v. Milan*, 127 U. S. 139.

Where the statute of a state prescribes the manner in which a special meeting of the board of supervisors of a county shall be called, a special meeting held without observing these requirements is not legal, and has no authority to initiate a proceeding to subscribe for stock in a railroad company and issue bonds in payment therefor, and proceedings based upon the action of such a meeting will be enjoined. *Goedgen v. Manitowoc County Sup'rs*, 2 Biss. (U. S.) 328.

The forms of proceedings in the submission of the question of subscribing stock and issuing bonds to a railroad corporation are designed as a protection to the taxpayer, and a due observance of these forms is essential to valid action. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—DISTINGUISHED IN *Johnson County Com'rs v. Thayer*, 94 U. S. 631.

An act authorized counties to subscribe to the stock of railroads after the same had been "recommended by a grand jury and the amount of the subscription ordered and designated." *Held*, that this vested exclusively all discretionary power touching subscriptions in the grand jury, both as to whether a subscription should be made and its amount. Therefore a recommendation by the grand jury that the county subscribe "not to exceed" \$150,000 was not a compliance with the law. *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389.

185. Ultra vires contracts.—A corporation which acts through its agents and

then recognizes the acts of such agents and accepts the benefits thereof cannot afterwards repudiate such acts as *ultra vires*. So where a county through its commissioners accepts preferred stock in a railroad company for bonds which it has voted the company, it cannot, after the road is built, claim that the acceptance of the stock was unauthorized because made before the road was built. *Lancaster County v. Cheraw & C. R. Co.*, 28 So. Car. 134, 5 S. E. Rep. 338. —QUOTING *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258.

A county contracted with a company to take stock to be paid for by bonds, and the directors covenanted that the company should, during the time the bonds had to run, pay interest on the stock to the persons who might hold the bonds in discharge of their interest. The act of incorporation did not authorize the company to pay interest on stock. *Held*, that the contract with the county was *ultra vires*. The directors, in contracting for a bonus to the county on its subscription, were, independently of the act of assembly, acting without authority, and the corporation was not bound. *Pittsburg & S. R. Co. v. Allegheny County*, 79 Pa. St. 210. —FOLLOWING *Pittsburg & C. R. Co. v. Allegheny County*, 63 Pa. St. 126.

186. Election called by wrong officers.—Where, after the adoption of township organization by a county, a law is passed authorizing the county court of that and other counties, through which a railroad is located, to call an election upon the question of corporate subscription to its capital stock, and upon a favorable vote to issue bonds, these acts cannot be exercised by the board of supervisors of such county, and the subscription so made and bonds issued are void. *Schuyler County Sup'rs v. People ex rel.*, 25 Ill. 181. —DISTINGUISHED IN *Clarke v. Hancock County Sup'rs*, 27 Ill. 305. FOLLOWED IN *South Ottawa v. Perkins*, 94 U. S. 260. QUOTED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200.

187. Acceptance by the company.—A proposition to issue bonds to a railway company is in the nature of a contract, upon the acceptance of which both parties are bound by the agreement. *Wullenwaber v. Dunigan*, 30 Neb. 877, 47 N. W. Rep. 420.

The county court of Greene county, Mo., without a vote of the people, by order of

June 20, 1870, subscribed \$400,000 to the capital stock of Kansas City & Memphis R. Co. Order modified October 4, 1870, so as to make subscription to Hannibal & St. Joseph R. Co., to aid in building the K. C. & M. R. April, 1871, order made rescinding former orders, and in July, 1871, order rescinding the rescinding order of April, 1871, and bonds issued, payable to the H. & St. J. R. Co., or bearer. *Held*, that, as there was no acceptance by the latter company of the subscription, there was neither a contract nor a consideration for one, and that it was incompetent for the K. C. & M. R. Co. to accept the subscription. *State ex rel. v. Garroutte*, 67 Mo. 445. —FOLLOWED IN *Weil v. Greene County*, 69 Mo. 281.

The amendatory act of March 23, 1861 (Sess. Acts 1860 and 1861, p. 60, § 2), prohibited such subscription after its passage without such vote to any railroad company, whether it had a pre-existing charter authorizing a subscription by counties or not. *St. Louis v. Alexander*, 23 Mo. 483, strongly criticised and condemned. (Per Sherwood, C.J.) *State ex rel. v. Garroutte*, 67 Mo. 445.

188. Exercise of privileges as a stockholder.—The Indiana statute authorizing townships to aid railway companies by way of taking stock therein contemplates that the township, by being a stockholder, may have such an interest in the property of the corporation as shares of stock usually represent, and such an influence in the management of its affairs as any other holder of a like amount of stock usually has. *Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64, 4 N. E. Rep. 589, 17 N. E. Rep. 855. —DISTINGUISHING *State ex rel. v. Delaware County Com'rs*, 92 Ind. 499.

A district or portion of a county empowered by the charter of a railroad company to vote a subscription of stock to aid in the construction of the road, and, through the county judge, to issue its bonds in its name and under its seal or scroll in payment of the subscription, was thereby created a corporation; and, the subscription having been voted and the bonds issued, no other provision was required to enable the taxing district to become a stockholder in the railroad company, with the power to vote its stock and receive dividends thereon. The district, however, will be deprived of its right to vote the stock or receive the dividends to the extent that the principal of the

bonds may be reduced by the taxpayers. *Kreiger v. Shelby R. Co.*, 84 Ky. 66.

189. Stock may not be surrendered to company.—Where a township is authorized to subscribe for stock in a railroad, it cannot agree to surrender to the company the stock subscribed for; and a contract of subscription containing such a provision is void. *State ex rel. v. Brassfield*, 67 Mo. 331.

Where a county subscribed to the stock of a railroad, to be paid in bonds, and the county agreed to transfer such stock to the company on payment of \$1 on each \$10,000 of stock—*held*, that such agreement was a fraud *per se*, and that a tender of certificates of stock and a demand of the bonds by the company was not good when made on condition that said certificates be at once transferred back to the company. *Macoupin County Court v. People ex rel.*, 58 Ill. 191, 11 Am. Ry. Rep. 98.—FOLLOWED IN *Madison County Court v. People ex rel.*, 58 Ill. 456.—*Madison County Court v. People ex rel.*, 58 Ill. 456, 11 Am. Ry. Rep. 66.—FOLLOWING *Macoupin County Court v. People ex rel.*, 58 Ill. 191.

190. Power to sell stock.—It was the intention of N. Y. Act of 1867, ch. 747, relating to an extension of the time for completing the Albany & Susquehanna railroad, to authorize the supervisor of a town to recover any money received on sale of railroad stock belonging to the town which the railroad commissioners should wrongfully neglect or refuse to account for; and where an action has been commenced, it is not necessary for the continuance of the action to substitute a successor in office of the original plaintiff. *Griggs v. Griggs*, 56 N. Y. 504; *affirming* 66 Barb. 287.

And such commissioners are properly chargeable with interest on the amount of any funds which they have retained and undertaken to appropriate to their own use. *Griggs v. Griggs*, 56 N. Y. 504; *affirming* 66 Barb. 287.

The Ohio Act of 1852, by necessary implication, repealed the limitation imposed by the act of 1846 on the power of sale of railroad stock subscribed for by counties. *Knox County Com'rs v. McComb*, 19 Ohio St. 320.

191. Exchange for stock of other companies.—Where certain commissioners are given authority by statute to subscribe, in the name of the city, to the stock

of a railroad, and, under certain conditions, to sell the same, the power to sell does not include the power to dispose of the stock by barter or by exchange for the stock of another company. *Cleveland v. State Bank*, 16 Ohio St. 236.

Where a special statute constitutes certain persons named therein commissioners for a municipal corporation, and confers on them power to subscribe, in the name of the city, to the stock of a railroad, a following clause authorizing them "to do whatever else may be necessary to secure and advance the interests of the city in the premises" does not work an enlargement of the powers specifically granted, but the phrase "in the premises" limits the discretion conferred to the manner of the execution of the special grants of power, and they have no power to exchange the stock for stock in another company. *Cleveland v. State Bank*, 16 Ohio St. 236.

192. Issuance of stock certificates to individual taxpayers.—Section 30 of the Mo. Act of Feb., 1853, authorizing the formation of railroad associations (Sess. Acts 1853, p. 121), has in view subscriptions made after the passage of said act—not subscriptions made prior thereto. Section 33 of that act, which authorizes the levy of a special tax to pay interest on bonds theretofore issued, and to provide a sinking fund to pay the principal, grants no stock rights to individual taxpayers. The stock subscribed prior to the passage of this act, under the authority of section 14 of the act of 1849 (Sess. Acts 1849, p. 222), belonged to the county subscribing it and contracting to pay for it, notwithstanding it may have been paid for by the proceeds of special taxes levied under section 33 of the act of 1853, above quoted. *Ridings v. Hall*, 48 Mo. 100.

193. Void in part.—Where a power created by statute has been fully executed, and something not authorized by the statute has been added, but which is clearly distinguishable from the rightful execution, the execution of the power is good so far as authorized by the statute, and void only as to the excess. *So held* where county commissioners in issuing bonds in aid of a railroad added a clause not authorized by their authority. *Knox County Com'rs v. Nichols*, 14 Ohio St. 260.

194. Mode of payment for stock.—Where a city is authorized to issue bonds

to raise money to pay for stock in a railroad, the bonds may be used directly in paying for the stock. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384.

The company may take the bonds themselves at par in exchange for stock. *Decker v. Hughes*, 68 Ill. 33.

An act of assembly authorized a county to subscribe for stock in a railroad company, and to pay for it in the bonds of the county, bearing interest, to be issued for that purpose, the county to make provision for the payment of interest as in other cases of its bonds, and the railroad company to receive bonds at par as cash. *Held*, that the act contemplated an exchange of the stock as a full equivalent for the bonds, and that the county should occupy no better position than other stockholders. *Pittsburg & S. R. Co. v. Allegheny County*, 79 Pa. St. 210.

195. Effect of division of municipality.—That portion of a town which has been separated from the remainder and created a new township will be liable for its share of the indebtedness upon bonds subsequently issued for a subscription to railroad stock, in accordance with a vote passed by the original town prior to such division, and this indebtedness exists at the time the vote is taken. *Hensley Tp. v. People ex rel.*, 84 Ill. 544.

196. Acts which work an estoppel.—Where a county is authorized to subscribe for railroad stock, and passes a resolution reciting that the subscription has been made, and the bonds have been issued and delivered, and the county has accepted the stock, and has voted the same, and has levied a tax to pay interest on the bonds, it is estopped from denying the validity of the subscription. *Nugent v. Putnam County Sup'rs*, 19 Wall. (U. S.) 241; *reversing* 3 Biss. 105.—APPROVED IN *Bates County v. Winters*, 112 U. S. 325.

Where a county is authorized to subscribe for railroad stock, and it receives the stock to be issued when the road is completed, if it retains the stock it will be estopped from denying that the road is completed. *Lancaster County v. Cheraw & C. R. Co.*, 28 So. Car. 134, 5 S. E. Rep. 338.

A certificate of preferred stock was dated Jan. 1, 1881, and bore interest from that date, but was not delivered until the fall of 1882. *Held*, that the stock should be regarded as the accepted substitute as of its

date for the county's bond. *Lancaster County v. Cheraw & C. R. Co.*, 28 So. Car. 134, 5 S. E. Rep. 338.

A county subscribed \$50,000 to the stock of a railroad, the *bona fides* of which was never questioned. Afterwards a statute was passed declaring such subscription valid and binding. The county acted on it for a number of years and paid in on calls \$15,000. *Held*, that all defects in the original subscription were cured. *Grand Junction R. Co. v. Hastings County*, 25 Grant's Ch. (U. C.) 40.

197. Contract to subscribe as well as vote essential.—All the acts of county commissioners and of the voters of a county in taking steps to raise money to take stock in an incorporated company are between themselves, one the principal and the other the agent; there is no contract with the incorporated company, nor has it any right in, or control over, the matter until the money is raised and the stock taken. *Crawford County Com'rs v. Louisville, N. A. & St. L. A. L. R. Co.*, 39 Ind. 192, 10 Am. Ry. Rep. 416.

The simple voting of the aid by the township is not a subscription to the stock; but the subscription is to be made by the county board, which for that purpose acts as the agent of the township, and until it executes that power and authority there is no perfected subscription. *Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64, 4 N. E. Rep. 589, 17 N. E. Rep. 855. *State ex rel. v. Roscoe*, 25 Minn. 445.

And it makes no difference that the vote of the county is to subscribe for the stock and issue bonds upon certain conditions, which conditions the railway company afterwards performs. *Land Grant R. & T. Co. v. Davis County Com'rs*, 6 Kan. 256.

Where the stock has not been subscribed for, and no express contract is made by the county to subscribe therefor, the county is not bound to issue the bonds upon tender of the stock by the railway company to the county. *Land Grant R. & T. Co. v. Davis County Com'rs*, 6 Kan. 256.

An order of a county court directing the county judge to subscribe for stock upon contingencies therein named does not of itself amount to a subscription. The county judge's voting the amount of stock proposed to be subscribed for in meetings of the stockholders of the company does not

bind the county to the subscription as by a ratification or estoppel. *Cumberland & O. R. Co. v. Barren County Court*, 10 Bush (Ky.) 604. *Mercer County Court v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300.

198. Municipal officers stockholders of company.—A municipal subscription to the capital stock of a railroad, made in pursuance of an act of assembly, is not invalid because made on the representations of persons interested in the company. *Lawrence County v. North-Western R. Co.*, 32 Pa. St. 144.

Where the action of the common council in voting aid to a railroad company depends upon discretion, councilmen who are stockholders in the railroad company are not competent to act, and a grant of aid carried by their votes will not be valid. *Madison v. Smith*, 83 Ind. 502.

199. Effect of release of private subscribers.—A municipal subscription to the stock of a railroad company that had previously released its private subscribers from their subscriptions is not valid; and a rescission of the contract will be decreed on a bill filed for the purpose. *Crawford County v. Pittsburgh & E. R. Co.*, 32 Pa. St. 141.—**APPROVING** *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 405.—**FOLLOWED IN** *Lawrence County v. North-Western R. Co.*, 32 Pa. St. 144.

Where a township municipality advanced a large sum of money to a railway company under the provisions of the Consolidated Municipal Loan Fund Act, and some of the stockholders of the company were afterwards released from their liability by an act of the legislature, passed nearly eighteen months after the works on the road were stopped for want of funds, and new companies were formed under that and subsequent acts of the legislature which released the new corporation from the construction of the original line of road until a new line had been constructed, and it appeared that there was no immediate prospect of such a result—*held*, that the municipality was not released from liability to the crown. *Norwich v. Attorney-General*, 2 Up. Can. E. & A. 541.

200. Effect of amending company's charter.—Subscriptions to a company's capital stock are not released by unacted-upon amendments to its charter. *Taylor v. Greenville County Sup'rs*, 29 Am.

& Eng. Corp. Cas. 187, 86 Va. 506, 10 S. E. Rep. 433, 13 Va. L. J. 802.

201. Neglect to pass municipal ordinance.—No ordinance was passed by the city council, but on motion the proposition of a railroad company to have a vote of the people taken for a subscription to the stock of the company to the amount of \$300,000 was referred to the mayor with authority to order an election. This could not be done. Therefore the acts of the mayor in the matter were unauthorized and illegal, and could not impose any duty or obligation on the officers of the municipal corporation. *State ex rel. v. Shreveport*, 27 La. Ann. 623.

A proposition submitted to the voters of a county at an election properly called was legally carried, and duly declared carried by the board of county commissioners. Upon the day of the canvass of the votes, and after the proposition had been declared carried, the county clerk asked one of the members of the board in the presence of all the other members, while the board was in session for the transaction of business, if it was his duty now to subscribe for the stock at the proper time; said member, in the presence of the other members, answered that it was. No objection was made to this direction by any member of the board; the clerk understood the answer to be an order from the board for him to go ahead and subscribe the stock; the chairman of the board heard the clerk ask the question concerning the subscription of stock, and the order given him, and also understood thereby that the board directed the clerk to subscribe the stock. The order for the subscription was not entered of record in the proceedings of the board. Soon afterwards the county clerk subscribed the stock as directed, in the name of the county. In an action against the county upon its subscription to compel the county to issue its bonds therefor, it was contended on the part of the county that there was no subscription, as no resolution or order, in writing or otherwise, had been adopted authorizing the subscription made by the county clerk. *Held*: (1) that it was competent to prove by parol evidence that the county clerk was directed by the board of county commissioners to subscribe the stock, and that the evidence of one of the commissioners that he did not hear the order or direction given to the clerk did not render the order invalid; (2) that upon the

facts testified to, the subscription made in the name of the county was valid. *Chicago, K. & W. R. Co. v. Stafford County Com'rs*, 36 Kan. 121, 12 Pac. Rep. 593.

202. Rescission of contract of subscription.—Where a county has subscribed to railroad stock, the individual taxpayers of the county have not such a vested right in such subscription as to prevent the legislature from authorizing its withdrawal, and a release of the stock. *People v. Coon*, 25 Cal. 635.

When the city of Troy had made a valid subscription of \$50,000 to the A. & N. R. Co., and had issued \$25,000 of its bonds in payment of one half the subscription—*held*, that it could make a valid contract whereby, in consideration of its stock in the company and \$6000 in five annual payments, it was relieved of any liability for the remaining \$25,000 of bonds. *Troy v. Atchison & N. R. Co.*, 11 Kan. 519. *Troy v. Atchison & N. R. Co.*, 13 Kan. 70.

Where a county issued bonds in payment of a subscription to the capital stock of a railroad under an act of assembly which provided that they should not be sold under par, and the company disposed of a large quantity of such bonds at sixty-four per cent.—*held*, that the county was entitled to rescind the subscription, to have a return of the bonds remaining in the hands of the company, and to be paid the par value of those disposed of. *Lawrence County v. North-Western R. Co.*, 32 Pa. St. 144.

The parties to whom such bonds have been disposed of at less than par are not necessary parties to a bill to rescind the contract of subscription, nor are they within the original jurisdiction of this court. *Lawrence County v. North-Western R. Co.*, 32 Pa. St. 144. — FOLLOWING Crawford County v. Pittsburgh & E. R. Co., 32 Pa. St. 141.

Bonds issued by counties in payment for stock were prohibited by the statute from being sold at less than par; the company increased the stipulated prices for the work of the contractors 36 per cent. and paid in bonds at par. *Held*, that this was a fraud on the counties, and entitled them to rescission of the contract for the stock. *Lawrence County's Appeal*, 67 Pa. St. 87.

The supervisors of a county having resolved to subscribe the sum of \$100,000 on condition that the town of D. subscribed \$50,000, that subscription cannot subse-

quently be rescinded by them, and a resolution by them to this effect was invalid. And the town of D. having made the subscription of \$50,000, the supervisors may carry out their subscription of \$100,000 and direct the issue of the bonds of the county therefor in the mode prescribed by the statute. *Redd v. Henry County Sup'rs*, 31 Gratt. (Va.) 695.

A city subscribed a large amount to the capital stock of a railroad, but owing to litigation which largely destroyed the value of the bonds it became entirely unable to build the road. Meanwhile the company had pledged \$80,000 of the bonds as collateral to secure a loan of \$30,000. The company was unable to redeem the pledge, and the holders were demanding payment, and threatening to sell the bonds. *Held*, that the city had the right to compromise with the company for a surrender of the bonds upon paying the amount of the company's loan by the city. *New Albany v. Burke*, 11 Wall. (U. S.) 96.

203. Liability of municipality for debts of company.—(1) *In general.*—An act of the legislature authorizing a municipal corporation to subscribe for stock of a railroad company, the subscription to be made upon the condition that the municipal corporation shall not be liable for the debts of the company, and that the provision as to said liability be made a part of and be stipulated in all contracts made by the railroad company for the construction and equipment of its road, does not exempt the municipal corporation from liability for the debts of the railroad company further than such exemption can be secured by persons contracting with the railroad company expressly stipulating in their contracts to waive all claims against the municipal body for payment of the debt. *French v. Teschemaker*, 24 Cal. 518.

Where the county court of a county makes an unconditional subscription to the capital stock of a railway under legal authority, the contract will be complete, and creditors of the company may rely upon it for payment of their debts as upon any other assets of the company, although the company may subsequently abandon all proceedings under its charter on account of its insolvency. *Morgan County v. Thomas*, 76 Ill. 120.

The president of a railway has no authority, by virtue of his office, to consent that a subscription to the company which is abso-

lute and unconditional shall be changed so as to become conditional, to the prejudice of the company or its creditors. *Morgan County v. Thomas*, 76 Ill. 120.

Where a city votes aid to secure the building of a certain part of a railroad, a creditor of the company cannot trustee the town and hold it for a debt not incurred in the building of that part of the road for which the aid was granted. *Pike v. Bangor & C. S. L. R. Co.*, 68 Me. 445, 20 Am. Ry. Rep. 407.

A county subscription for stock in a railroad company, under Tenn. Code, §§ 1142, 1143, rests wholly upon these statutory provisions, by which the county court is limited to the assessment and collection, by taxation, of the specific amount of the subscription, and the company restricted to the remedy of mandamus, specially awarded, for the enforcement of its assignment and collection. Deferred instalments of the subscription are not upon the footing of past due indebtedness bearing interest. *Humphreys County v. McAdoo*, 7 Heisk. (Tenn.) 585.—REVIEWING *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 688.

It is not competent for a railroad creditor to subject an unpaid balance of county subscription to the satisfaction of his claim against the company, by attachment, and decree over against the county, to be made effectual through process of the chancery court to compel the assessment and collection of the necessary taxation, these being, as stated, compellable only by mandamus; but the creditor may, by attachment and injunction, fasten a lien upon the unpaid balance of the subscription, and have secured to him by decree the right of the company to apply to the circuit court to compel the assessment and collection by the county of the necessary tax, and its payment to himself when collected; or the chancellor may carry out by decree any arrangement between the creditor and the company for securing to the former a preference over the other creditors of the latter. *Humphreys County v. McAdoo*, 7 Heisk. (Tenn.) 585.

(2) *Illustrations*.—After the making of an unconditional subscription by a county to a railway, and the issue of its bonds and placing them in the hands of a depository, the company gave an order for \$2000 of them to a *bona fide* creditor, who transferred his order to a third person. *Held*, not ma-

terial whether the delivery to the depository was upon conditions or not, as the order operated as an equitable assignment of \$2000 of the subscription which the county could not disregard after notice of the claim. If the bonds were delivered unconditionally in payment of the subscription, the holder was entitled to the bonds called for, in the order, from the depository, but if not so delivered the county was still bound on its subscription. *Morgan County v. Thomas*, 76 Ill. 120.

Where a contractor for building a railroad had agreed to take the bonds of a county which had made an unconditional subscription, and that they should be applied to payment of work done in that county alone, and upon the representation of this fact the county authorities issued their bonds and placed them in the hands of a third party, and the contractor having abandoned the work the company, on settlement with him, gave him an order on the depository for \$2000 of these bonds, which was for work done out of the county—*held*, that after the contract was abandoned the contractor was no longer bound by it, and had a right to look for payment to any assets of the company, and was not estopped from taking an order for a portion of the county bonds for what was owing him for work done elsewhere than in the county. *Morgan County v. Thomas*, 76 Ill. 120.

An order of a county court for the issue and delivery of bonds in payment of a subscription to a railway recited that the president of the company had certified to the court that the company had placed its road contract, to be completed by a given day from a point in an adjoining county to a point in the county of the court, and that it was provided in the contract for construction of the road that the bonds of such county should be expended for work done in that county, and not elsewhere, etc., and being satisfied, etc., concluded: "It is, therefore, ordered that there be delivered to the" company "the amount of \$50,000 in bonds of this state." *Held*, that such order was not qualified with any conditions that the bonds should be expended in constructing that part of the road in the county. *Morgan County v. Thomas*, 76 Ill. 120.

Plaintiff sued a railroad company and issued trustee process against a city which had subscribed to the company's stock, and claimed to charge the city, as trustee, for

two assessments on the stock of the company. *Held*, that the city was not liable for an assessment made before its subscription was made; and under the charter of the company, which authorized the directors "to make equal assessments" on all of the shares of corporations, the city was not liable on the other assessment, which was against stock held by towns and cities only, not including individual subscriptions. *Pike v. Bangor & C. S. L. R. Co.*, 68 *Me.* 445, 20 *Am. Ry. Rep.* 407.

Two counties each subscribed to the stock of a railroad, on the same terms, about the same time, and under the same act of assembly. *Held*, that there was no joint liability by the two counties, nor a liability to contribute to each other's losses. Neither could one appeal from the adjudication of a question affecting the other. *Lawrence County's Appeal*, 67 *Pa. St.* 87.—DISTINGUISHING *In re Cork & Y. R. Co.*, L. R. 4 Ch. 748; *Henderson v. Royal British Bank*, 7 *El. & Bl.* 356.

To a declaration under 14 & 15 Vict. c. 57, § 19, by judgment creditors of a railway company against a municipality as shareholders defendants pleaded, in substance, that they subscribed for the stock under a by-law which provided that their debentures, payable in 1877, should be issued for the sum subscribed as the same should become payable, and that the company should take such debentures at par; and that the plaintiff knew this before he became a creditor. *Held*, on demurrer, a good defense. *Higgins v. Whitby*, 20 *U. C. Q. B.* 296.

The 19th clause of the statute does not apply in the case of a subscription under the 18th unless such subscription is made in the ordinary manner. *Higgins v. Whitby*, 20 *U. C. Q. B.* 296.

In an action under the statute by judgment creditors of a railway company against a municipal corporation as shareholders, it appeared that the contractors for a portion of the road had received a lease from the railway company of that part for 999 years at a nominal rent, and as an inducement to the defendants and two other municipalities to take stock they had mortgaged their lease to trustees to secure payment to such municipalities of six per cent. on the sums subscribed by them. This mortgage, to which the railway company was a party, provided for the payment by the municipal-

ities of the amount of stock taken by each to the contractors as the work progressed upon the estimates of the company's engineer, and the full amount of defendants' subscription had been thus paid. *Held*, that this was a payment of defendants' stock as against the plaintiffs, who therefore could not recover. *Woodruff v. Peterborough*, 22 *U. C. Q. B.* 274.

IX. WHAT ROADS MAY BE AIDED.

204. In general.—A statute authorizing a town to vote bonds in aid of two railroads empowers it to vote the aid to either one. *First Nat. Bank v. Concord*, 50 *Vt.* 257.

A railroad running through is a railroad running to a city; and if a city is authorized to subscribe stock to a railroad running to it, and it is not made a point in the charter of such road, it can only be made so by subsequent action of the directors of the railroad corporation, and until such action has been had no absolute subscription of stock in such corporation can be made by such city. *Aurora v. West*, 22 *Ind.* 88.

Where a tax was voted in aid of the construction of a railroad, and a narrow gauge road was constructed, the township trustees were guilty of no fraud in certifying to the fact that a railroad had been constructed as contemplated in the notice of election. *Meador v. Lowry*, 45 *Iowa* 684.—FOLLOWED *IN Sioux City & P. R. Co. v. Herron*, 46 *Iowa* 701.

A municipality authorized by the legislature to take stock in a company incorporated for the construction of a line of railroad particularly defined by the act is not bound to issue debentures to a company not incorporated to construct that specific line, a subscription to its stock list by the warden being *ultra vires* and a nullity. *Ex parte New Brunswick R. Co.*, 15 *New Brun.* 78.

A railroad company was chartered and organized under the laws of the territory of Kansas, which provided that, after \$50,000 had been subscribed to its capital stock, and ten per cent. actually paid, and a certificate thereof filed in the office of the secretary of state, the incorporators might organize and "open books for further subscriptions, requiring payments or instalments from time to time." *Held*, that such corporation had the right to accept the benefits of the provisions of chapter 90, Laws of 1870, entitled "An act to enable municipal townships to subscribe for stock in any railroad, and

to provide for the payment of the same," notwithstanding this subscription was to be paid in the bonds of the township, and notwithstanding the bonds were not to be issued until the railroad should have been completed through the township voting the bonds, or to such point in the township as might be agreed upon in the terms of submission to the voters. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 21 Kan. 309.

An act of the legislature of Arkansas, passed in 1868, authorizes any county to subscribe to the stock of any railroad company in that state, provided the subscription shall not exceed \$100,000, and the consent thereto of the inhabitants of the county shall first be obtained at an election held for that purpose. At an election held under that act the voters of a county voted to subscribe \$100,000 each to the stock of two different companies. *Held*: (1) that the act does not restrict the county to a single subscription; (2) that the power to subscribe is general, limited only by the subscription of \$100,000 to the stock of any one company. *Chicot County v. Lewis*, 3 Am. & Eng. R. Cas. 137, 103 U. S. 164.

205. Change of name of road.—A subscription to a railroad is not forfeited by an amendment to the charter changing the name of the road, where the officers and road otherwise remain the same. *Reading v. Wedder*, 66 Ill. 80. *Com. ex rel. v. Pittsburgh Councils*, 41 Pa. St. 278.

A condition upon which a county was to take stock in a railroad to pass through the county, and connect Knoxville with Danville or Lexington, Ky., was that the charter was to be obtained at the meeting of the legislature in 1853. On the 18th of February, 1854, the legislature amended the charter of the Lexington & K. R. Co., by which the name was changed to that of the Knoxville & K. R. Co. *Held*, that this change of name of the road was not even a substantial compliance with the conditions of the proposed subscription, and conferred no authority to issue the bonds of the county except upon the conditions prescribed by the act of 1851-52. While the act of Feb., 1854, may have made valid the action of the county court in ordering the election, and the election held in pursuance thereof, it did not confer upon the chairman of the county court the power to do other acts unauthorized by law, or to issue the bonds as proposed by the

relator. *Campbell County v. Knoxville & K. R. Co.*, 6 Coldw. (Tenn.) 598.

206. Consolidation before subscription completed.—Commissioners appointed to subscribe to the stock of a certain railroad have no power to subscribe to stock of a company formed by the consolidation of that company with another, under a different name and with different termini, and a court cannot compel them to do so. *Rochester, N. & P. R. Co. v. Cuyler*, 7 Lans. (N. Y.) 431.

Where bonds were authorized, and the company to which they were voted consolidated with another, and the bonds were issued to the new or consolidated company, the extinction of the company to which the subscription was voted revoked the power to subscribe. *Harshman v. Bates County*, 92 U. S. 569.—CRITICISED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102. DISTINGUISHED IN *Scotland County v. Thomas*, 94 U. S. 682; *Wilson v. Salamanca Tp.*, 99 U. S. 499. REVIEWED IN *State ex rel. v. Garrouthe*, 67 Mo. 445.—*State ex rel. v. Nemaha County Com'rs*, 10 Kan. 569.—DISTINGUISHED IN *Chicago, K. & W. R. Co. v. Stafford County Com'rs*, 36 Kan. 121.

A Missouri town voted to subscribe to the stock of a railroad. The county court then passed an order that the sum voted "be and is hereby subscribed" to "the said road," and appointed an agent to make the subscription on certain conditions. The agent failed to complete the subscription, so reported, and his report was approved by the court. Afterward the road consolidated with another, and the court, without any new election, made the subscription to the consolidated company. *Held*, that the subscription to the original company never was complete, notwithstanding the order of the court that the sum voted "be and is hereby subscribed," and that the subscription to the consolidated company was unauthorized. *Bates County v. Winters*, 97 U. S. 83.—CRITICISED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.

207. Consolidation after subscription completed.—Where the charter of a company authorizes it to consolidate with other companies, and a municipal subscription is made with knowledge that it is liable to be transferred to another company, and a subsequent transfer takes place to another company, for the purpose of securing the construction of the road and the forming of

a continuous line, it is lawful to deliver the bonds to the new company. *East Lincoln v. Davenport*, 94 U. S. 801.—FOLLOWED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.—*Chickaming Tp. v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620.—FOLLOWING *New Buffalo v. Cambria Iron Co.*, 105 U. S. 73.—*New Buffalo v. Cambria Iron Co.*, 105 U. S. 73.—FOLLOWED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.—*Bates County v. Winters*, 112 U. S. 325, 5 Sup. Ct. Rep. 157.—FOLLOWED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.—*Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313. *Edwards v. People*, 88 Ill. 340. *Atchison, C. & P. R. Co. v. Phillips County Com'rs*, 4 Am. & Eng. R. Cas. 326, 25 Kan. 261.

Such bonds are not invalidated, after a vote according to law, by being issued to another company with which the road to which they were voted has consolidated under a law existing at the time of the vote. *Wilson v. Salamanca Tp.*, 99 U. S. 499.—DISTINGUISHING *Harshman v. Bates County*, 92 U. S. 569. FOLLOWING *Scotland County v. Thomas*, 94 U. S. 682.—APPROVED IN *Menasha v. Hazard*, 102 U. S. 81. FOLLOWED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.

Where a consolidation takes place after a county has subscribed to the stock of one of the companies, bonds issued to the consolidated company are illegal and invalid. *Nugent v. Putnam County*, 3 Biss. (U. S.) 105; reversed in 19 Wall. 241.—REVIEWING *Clearwater v. Meredith*, 1 Wall. 25.

The supervisors had no authority to issue the bonds after the consolidation. *Nugent v. Putnam County*, 3 Biss. (U. S.) 105; reversed in 19 Wall. 241.

The bonds are not made valid by making them payable to the original company, nor by a provision in its charter allowing it to consolidate. *Nugent v. Putnam County*, 3 Biss. (U. S.) 105; reversed in 19 Wall. 241.

208. Subscription after consolidation.—A railroad consolidated with other lines under authority of law before bonds were voted to it. Held, that an issue and delivery of the bonds to the consolidated company was lawful. *Menasha v. Hazard*, 102 U. S. 81.—APPROVING *Scotland County v. Thomas*, 94 U. S. 682; *Wilson v. Salamanca Tp.*, 99 U. S. 499.—FOLLOWED IN *Livingston County v. First Nat. Bank*, 128 U. S. 102.

A railroad was chartered in Missouri with a provision that it should be lawful for the county court to subscribe to the stock of the road in any county in which a part of the road might be. The general law of the state reserved the right to alter or amend the charter. Afterwards the company, by authority of law, consolidated with an Iowa company which enjoyed the same rights. Held, that the power of the counties to subscribe under the original charter passed to the consolidated company. *Scotland County v. Thomas*, 94 U. S. 682; affirming 3 Dill. 7.—APPROVING *State ex rel. v. Greene County*, 54 Mo. 540. DISTINGUISHING *Harshman v. Bates County*, 92 U. S. 569.—APPROVED IN *Menasha v. Hazard*, 102 U. S. 81. FOLLOWED IN *Wilson v. Salamanca Tp.*, 99 U. S. 499; *Livingston County v. First Nat. Bank*, 128 U. S. 102.

Where an act authorizes the issuance of bonds to one road upon twenty days' notice of election, and after the notice has begun to run, and before the election day, an act is passed authorizing the issuance to a consolidated road, the bonds issued to such consolidated road are valid. *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.

Where a statute authorizes a town to subscribe a stated amount to each of two railroads, and they subsequently consolidate, the new company is only entitled to such subscription as the town could have made to either of the former companies. *Pana v. Lippincott*, 2 Ill. App. 466.

The charter of an Illinois railroad provided that "any incorporated town or township in counties acting under township organization along the route of said road may subscribe to the capital stock of said company in any sum not exceeding \$250,000." A certain town subscribed \$50,000. Afterwards the road was consolidated with another, and the town subscribed \$25,000 to the consolidated company. Held, that the second subscription was legal. *Empire Tp. v. Darlington*, 101 U. S. 87.

209. Roads outside of taxing district.—The creation of municipal indebtedness in the subscription to the capital stock of a railroad lying wholly in another state is for a corporate purpose; as in the case of the city of Quincy, situated upon the western border of the state, subscribing to the stock of a railroad to be constructed from a point on the Mississippi river oppo-

site that city, in the state of Missouri, to a point westward in Nebraska. *Quincy, M. & P. R. Co. v. Morris*, 84 Ill. 410, 16 Am. Ry. Rep. 494.

When aid is given by a township for the construction of a railroad through the same, the money need not necessarily be expended on that part of the road within the limits of the township, but it may be expended on the road outside its limits. *Brokaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

No law of Missouri, either constitutional or statutory, in force in 1871 authorized the city of Louisiana in that state to subscribe to the stock of the Quincy, Alton & St. Louis railroad, an Illinois corporation. *Allen v. Louisiana*, 2 Am. & Eng. R. Cas. 599, 103 U. S. 80.

Under the New York statute of May 18, 1869, a county has no authority to issue bonds to aid in the construction of a railroad where the corporation to be aided has no authority to build a road in the county. It is not enough that the corporation is organized to build a road in other counties, and is given the right to procure amendments to its charter so as to build in the county voting the aid. It cannot receive such aid until it has actually procured the amendment. *People ex rel. v. Adirondack Co.*, 57 Barb. (N. Y.) 656; affirmed in 6 Alb. L. J. 174.—FOLLOWED IN *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405; *People ex rel. v. Van Valkenburgh*, 63 Barb. 105.

The city council of Charleston has the power, under its charter, to subscribe to the stock of railroad companies within and without the state, and to tax the inhabitants of the city for the purpose of paying the subscriptions. *State ex rel. v. Mayor, etc., of Charleston*, 10 Rich. (So. Car.) 491. *Gage v. Charleston*, 3 So. Car. 491.

A by-law to aid the North S. R. Co. by a bonus of \$100,000, reciting that the city of Toronto was interested in securing a railroad connection with the townships through which the line would pass, was introduced on a proper petition and read twice in the council; but on motion to go into committee on the by-law it was resolved, by a vote of fourteen to seven, that it would be unwise, in view of the large increase of the city debt, to incur further liability to aid a railroad totally disconnected with the city and more than sixty miles from it, and that

the council, in the interest of the citizens, felt it to be their duty to refuse to submit it to the ratepayers. *Held*, that the council should not be compelled to submit the by-law; and a rule nisi for a mandamus was discharged, with costs. *In re North Simcoe R. Co.*, 36 U. C. Q. B. 101.

210. Company authorized to carry on other business.—Where a corporation is organized with all the usual powers of building and operating a railroad, it is no objection to its receiving municipal subscription to its stock that its charter authorizes it to carry on other branches of business also. *Randolph County v. Post*, 93 U. S. 502.

A court cannot say that an operating railroad is less a railroad, or less valuable to a county through which it passes, because the company proposes to mine and transport coal, to manufacture and transport flour, to carry on iron foundries, to dig or buy raw materials, and to employ men to manufacture them into articles of use, than if it confined itself strictly to railroad business. *Randolph County v. Post*, 93 U. S. 502.

211. Connecting lines.—A railroad charter provided that any county through which the road might run, "and every county through which any other railroad may run with which this road may be joined, connected, or intersected," might aid such road. *Held*, that a road which was chartered to be built through several counties and terminating where the first road commenced was within the provision of the statute, when the first company undertook its construction, and aid might be granted accordingly. *Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452, 4 Am. Ry. Rep. 93.

A city ordinance providing for issuing bonds to a railroad contained a provision that the bonds should not be issued or delivered until the railroad should be constructed from a designated point by a certain route "to some point of connection with a railroad leading to Milwaukee and Chicago," on or before a given date. *Held*, that the words "a railroad leading to Milwaukee and Chicago" embraced not only a railroad whose line reaches those cities, but a railroad connecting either directly or indirectly with a railroad whose line reaches those cities. *State ex rel. v. Hastings*, 24 Minn. 78.

212. Legal incorporation of company a jurisdictional fact. — Under New York Act of May 18, 1869, a county judge cannot bond a town in aid of a railroad except there be a valid, legal corporation. The legal existence of the corporation is a jurisdictional fact. *People ex rel. v. Van Valkenburgh*, 63 Barb. (N. Y.) 105. — FOLLOWING *People ex rel. v. Adirondack Co.*, 57 Barb. (N. Y.) 661.

A subscription to railroad stock ordered by a county court before the company's articles of association have been filed with the secretary of state is void; but the remedy of a taxpayer is to stop the illegal subscription, and not an action to recover back a tax that has been levied and paid on the subscription. *Rubey v. Shain*, 54 Mo. 207. — DISTINGUISHED IN *Cass County v. Johnston*, 95 U. S. 360.

The Allegheny Valley R. Co. is an existing corporation, capable of receiving subscriptions from the city of Pittsburgh, and, of course, from the county of Allegheny. *Com. ex rel. v. Perkins*, 43 Pa. St. 400.

213. Organization of company as a condition precedent. — A railroad company incorporated under the Ala. act entitled "An act to provide for the creation and regulation of railroad companies in the state of Alabama," approved Dec. 29, 1868 (Pamph. Acts, p. 462), is not in a condition to make a proposition for county subscriptions to the capital stock of said company until ten per cent. of its capital stock has been subscribed, and a board of directors elected by the stockholders, and qualified, as provided by the ninth section of said act. *Trammell v. Pennington*, 45 Ala. 673.

A proposition made by the original corporators named in the certificate of incorporation of such company, and not by the president and directors of said company elected and qualified as aforesaid, is not a proposition made in substantial compliance with the first section of the act entitled "An act to authorize the several counties and towns and cities of the state of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider most conducive to their respective interests," approved December 31, 1868 (Pamph. Acts, p. 514). And such a proposition so made does not confer on the commissioners' court of a county any jurisdiction or authority to order an election for such proposition to the qualified electors

of said county, for their acceptance or rejection. *Trammell v. Pennington*, 45 Ala. 673.

An order made on such proposition is void, and an election held under such an order is invalid, and gives to the commissioners' court no authority to make, in behalf of said county, a subscription to the capital stock of the railroad company by whom such proposition is made, nor to deliver and issue to such railroad company, in payment of such subscription, the "bonds of the county," as provided by the sixth section of said act of December 31, 1868. *Trammell v. Pennington*, 45 Ala. 673.

Where the judge of probate and two of the commissioners of a county meet at the court house without the notice required by section 830 of the Revised Code, and call such meeting together as a special term of the commissioners' court, and make an order to submit a proposition of a railroad company, for a subscription by said county to the capital stock of said company, to the qualified electors of said county, for their acceptance or rejection, such an order is made without jurisdiction, is *coram non judge* and void, and an election under such an order is invalid, and confers on the commissioners' court no authority to subscribe to the capital stock of said company, or to issue the bonds of the county in payment of stock so subscribed. *Trammell v. Pennington*, 45 Ala. 673.

A proposition made by the original corporators of a railroad company, and not by the president and directors, and an order made by the judge of probate and two of the commissioners, etc., as aforesaid, and an election held under such an order, are not "acts and things done and performed in substantial compliance" with the provisions of the said act of Dec. 31, 1868; and therefore are not legalized, ratified, and confirmed by the act entitled "An act to legalize, ratify, and confirm all acts and things, of every kind, heretofore done and performed in this state, in substantial compliance with an act of the general assembly of Alabama entitled 'An act to authorize the several towns and counties and cities of the state of Alabama to subscribe to the capital stock of such railroads throughout the state as they may consider conducive to their respective interests,'" approved March 1, 1870 (Pamph. Acts 1869-70, p. 286). The said act of March 1, 1870, as it

only legalizes, ratifies, and confirms "acts and things" done and performed in substantial compliance with the said act of Dec. 31, 1868, is not unconstitutional and void. *Trammell v. Pennington*, 45 Ala. 673.

214. Effect of assignment of road or franchises.—A company appointed a committee to take charge of the construction of a branch road, and to solicit subscriptions thereto. Subsequently the company assigned a portion of its franchise to another company. *Held*, that such assignment would not invalidate a subscription made thereto. *Cass County v. Gillett*, 100 U. S. 585.

A county voted a subscription to a railroad, imposing the conditions that the road should be completed and operated in the county "by lease or otherwise," and that the conditions imposed should be taken as a covenant binding upon the company, "its lessees or assigns." *Held*, that the right to lease or assign the road must have been contemplated, and a subsequent agreement to sell the road after it was completed, in order to obtain money for its construction, did not discharge the county from payment of its subscription. *Southern Kan. & P. R. Co. v. Towner*, 41 Kan. 72, 21 Pac. Rep. 221.

An agreement between two railroad companies whereby the former agreed to "sell, transfer, and assign" to the latter, among other things, "all gifts, donations, bounties, or aid, in any form or shape, which have been or may hereafter be made or given by any person, corporation, municipality, or state to aid in the construction of said railway," is sufficient to comprehend the right of the former to avail itself of a standing offer made to it by a city of bonds to aid in the construction of the railway, which were to be delivered upon the performance of certain conditions, none of which had been performed at the time of the transfer and assignment. *State ex rel. v. Hastings*, 24 Minn. 78. — APPROVED IN *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97.

An agent representing a company to which bonds of a city had been voted demanded the same, and, the matter being brought before the council, the mayor was instructed to notify the agent that the council declined to issue the bonds. In transmitting this information the mayor wrote that the council instructed him to

say that "the city should decline to issue the bonds, claiming that all questions had not been decided by the supreme court," referring to certain litigation regarding the bonds. *Held*, that this amounted to a waiver of any other objection as to the sufficiency of the demand. *State ex rel. v. Hastings*, 24 Minn. 78.

Where the evidence shows that town authorities, the railroad company, and the people who voted bonds to the company all understood that the road might be built by an assignee of the company, and the original contract between the town and the company provides that the aid should be given to that one of two companies which should, "by itself or its assignee," first complete the road, the right of the company to the bonds is not affected by the fact that the road was built by another company. *Lynch v. Eastern, L. F. & M. R. Co.*, 12 Am. & Eng. R. Cas. 652, 57 Wis. 430, 15 N. W. Rep. 743, 825.

215. Road to be aided must be named.—Under the act of 1866, an existing corporation must be named as the recipient of the proposed subscription and bonds, and a submission of the question of issuing bonds "to any corporation now organized or that may hereafter be organized" that shall construct a certain line of road is unauthorized and void. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186. — FOLLOWED IN *Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs*, 12 Kan. 230.

One railroad company cannot accept subscriptions or receive bonds issued for benefit of another railroad company. *Wells v. Greene County*, 69 Mo. 281. — FOLLOWING *State ex rel. v. Garrouette*, 67 Mo. 445.

Where the line to which aid was authorized to be extended by the constitution was part of a state system, having its several termini at points within the state, a line of railway embracing a part of the system, but having one of its terminal points on the boundary line of another state, looking to a connection with the ports of another state, is a line of railway essentially and fundamentally differing from the line to which aid was authorized to be extended. *Holland v. State*, 15 Fla. 455.

216. Roads already built.—Townships have no right to vote aid to railroads already constructed. *Brokaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

The authority to make such subscription ceases as soon as the road is completed through the township, though the people had voted to subscribe before the road was built. *State ex rel. v. Bates County Court*, 57 Mo. 70.—FOLLOWED IN *Cass County v. Johnston*, 95 U. S. 360.

217. Companies incorporated after authority granted.—Where a statute authorizes municipal aid to a certain railroad, and to "any other railroad company duly incorporated and organized for the purpose of constructing railroads," both the company then in existence and such as might be thereafter duly incorporated and organized were included. *James v. Milwaukee*, 16 Wall. (U. S.) 159. *Stebbins v. Pueblo County Com'rs*, 2 McCrary (U. S.) 196, 4 Fed. Rep. 282.

Under Mass. St. 1870, ch. 325, § 3, a town within the limits therein prescribed may subscribe for the stock of a railroad corporation to be organized under St. 1872, ch. 53, and become an associate in its formation. *Kittredge v. North Brookfield*, 138 Mass. 286.

218. Neglect to build a portion of line.—It appeared that the Montpelier & St. Johnsbury R. Co. abandoned the building of a part of the line of road included in its charter, having built only that part lying between St. Johnsbury and West Danville, but it did not appear but that the bonds from which the coupons in question were taken had been already issued. The Essex County R. Co. was authorized to build a road from the Connecticut river to St. Johnsbury, one of the *termini* of the former road. *Held*, that as none of that enterprise to which aid was subscribed had been abandoned, and as there was no condition in the subscription that the Montpelier & St. Johnsbury railroad should be built, the subscription was not avoided by such abandonment. *First Nat. Bank v. Concord*, 50 Vt. 257.

219. Change of route.—An amendment to the charter of a railroad changing the route will not extinguish the power granted by the original charter to certain counties to subscribe to its stock. *Benton County v. Rollens*, 26 Law. Ed. (U. S.) 213.—FOLLOWING *Scotland County v. Thomas*, 94 U. S. 682; *Schuyler County v. Thomas*, 98 U. S. 169.

220. Municipality may select company to be aided.—Under the act of

April 28, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a connection shall be formed between Marysville and Benicia, or any point on the Sacramento river, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection. *Pattison v. Yuba County Sup'rs*, 13 Cal. 175.

Where the only object of the electors of a town in granting aid to a railway company is to procure the construction of a railway from a certain point to such town, the question may be submitted to them in such a form as to provide that the aid shall be given to that one of two companies which shall first complete its road between such points. *Lynch v. Eastern, L. F. & M. R. Co.*, 12 Am. & Eng. R. Cas. 652, 57 Wis. 430, 15 N. W. Rep. 743, 825.

Where a contract for the issuance of bonds in aid of a railway company did not limit the time within which the road should be completed, and no notice is given by the town that unless it be completed within a reasonable time the aid would not be furnished, the company does not lose its rights under the contract by lapse of time, or by the statute of limitations. *Lynch v. Eastern, L. F. & M. R. Co.*, 12 Am. & Eng. R. Cas. 652, 57 Wis. 430, 15 N. W. Rep. 743, 825.

It was urged that an order for an election to vote municipal aid to a railroad was invalid because no corporation was named as the proposed recipient of the subscription. *Held*, that it is sufficient if the route is designated, leaving it to the county authorities to select the particular corporation to receive the subscription. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267.

221. Company to which aid was first voted.—When the board of county commissioners is authorized by a favorable vote of the electors of a township to subscribe on behalf of said township in the full amount that the township is authorized by law to subscribe to the capital stock of a railroad company that purposes to build its line through said township, on the terms and conditions prescribed in the vote, and a subscription is duly made and accepted in writing by the railroad company, the subscription and its acceptance create a con-

tract binding on the township; and when the railroad company performs all the terms and conditions, it is entitled to the bonds of the township in preference to another railroad to whose capital stock a subsequent subscription was made, but which first complied with the terms and conditions of such subsequent subscription. *Chicago, K. & W. R. Co. v. Osage County Com'rs*, 38 Kan. 597, 16 Pac. Rep. 828.

222. For construction of branch road.—The vote of a subscription and the issuance of corporate bonds to a particular and short division of a railroad will not confer any authority to issue bonds in aid of the construction of the entire line of the road, and payable to the company representing the whole of the proposed road. *Big Grove v. Wells*, 65 Ill. 263.

Under the Mo. Act of March 21, 1868, entitled "An act to aid in the building of branch railroads," township bonds voted to the "Pacific Railroad," but issued to the "Pleasant Hill and Lawrence Branch of the Pacific Railroad," are valid, it appearing that the latter is a branch of the former. *Cass County v. Jordan*, 95 U. S. 373.

223. Division of road.—Where a company is chartered to build a road of considerable length, but subsequently the legislature divides it into three parts or divisions, creating each a new corporation, a previous vote by a county to issue bonds to the original company will not authorize the issuing of them to one of the divisions or new corporations. *Marsh v. Fulton County*, 10 Wall. (U. S.) 676.—FOLLOWED IN *Kelley v. Milan*, 127 U. S. 139. REVIEWED IN *State ex rel. v. Garrouette*, 67 Mo. 445.

X. CONDITIONAL SUBSCRIPTIONS.

224. In general.*—Where a paper is circulated among electors, with the consent of a majority of the directors of a railway company for which a tax is about to be voted, with the corporate seal attached, and signed by the president, the conditions in such paper are binding on the company. *Meeker v. Ashley*, 56 Iowa 188, 9 N. W. Rep. 124.

Where a county subscription is made to railroad stock with certain conditions attached, any citizen and taxpayer of the county may maintain a suit for an injunc-

tion to prevent the company from receiving the bonds before it has complied with the conditions imposed, and to compel a surrender and cancellation of any that may have been issued. *Wagner v. Meety*, 69 Mo. 150.

To a complaint by an assignee of a subscription to pay or donate money to aid in the construction of a railroad, the money to be paid on certain conditions, an answer alleging that the assignor of the subscription refused and declined to accept it or act on it, and publicly abandoned the enterprise, is good. *Smith v. Davidson*, 45 Ind. 396.

The courts will not engraft a condition upon a contract in contravention of the expressed intention of the parties (suit upon railroad subsidy notes made payable as the work progressed), and the court below erred in holding that the failure of the railroad company to maintain its depot as originally located worked a forfeiture of the right of recovery upon the note sued upon. *Williams v. Ft. Worth & N. O. R. Co.*, 82 Tex. 553, 18 S. W. Rep. 206.

Plaintiff executed its negotiable coupon bonds, which, by their terms, bore interest at the rate of six per cent., and deposited them in escrow, to be delivered to the defendant only upon the performance of certain conditions. Defendant wrongfully got possession of the bonds without having performed the conditions, and sold them. Held, that the measure of plaintiff's damages (the bonds still outstanding) was the amount of the bonds at the time of the recovery, interest being computed at six per cent., upon the principal of the bonds to the date of judgment, and also upon coupons maturing before the judgment at the legal rate of seven per cent. from their maturity until judgment. *Winona v. Minnesota R. Constr. Co.*, 29 Minn. 68, 11 N. W. Rep. 228.

A town voted to subscribe to railroad stock and to issue its bonds in payment, upon certain specified conditions, and the court appointed three commissioners to make the subscription, two of which acted and made the subscription absolute in form, but upon the belief, induced by representations of the company, that they could not be compelled to deliver the bonds until an agreement was entered into, as authorized by N. Y. Act of 1870, ch. 507. The company never performed the conditions imposed. Held, that making the subscription without the conditions annexed did not

* Conditional subscriptions to stock of railroad companies, see note, 44 AM. & ENG. R. CAS. 256.

estop the commissioners from objecting or questioning the use to be made of the proceeds, and from denying the right of the company to demand an absolute delivery; therefore the company was not entitled to a mandamus to compel their delivery. *People ex rel. v. Hitchcock*, 2 T. & C. (N. Y.) 134.

It was objected that a statute was invalid for the reason that it attempted to authorize any town or incorporated village, whether immediately on the line of a railroad or not, to subscribe for and take stock in the company. *Held*, that the objection could not be raised by taxpayers of a town which had subscribed, where both the charter of the company and the conditions imposed in making the subscription required that the road should run through the town. *Lawson v. Milwaukee & N. R. Co.*, 30 Wis. 597, 7 Am. Ry. Rep. 270. — FOLLOWING *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, 10 Wis. 196. QUOTING *Phillips v. Albany*, 28 Wis. 340.

225. Conditions imposed by statute.—Under the Ill. Act of Feb., 1855, incorporating the Mount Vernon R. Co., it was not required that the road be actually built to authorize counties to vote aid to it. *Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452, 4 Am. Ry. Rep. 93.

A proviso in a statute authorizing a municipal subscription to a railroad that the bonds shall not be delivered until an amount of work shall have been done on the railroad in the town equal in value to the amount of the bonds, will be construed, not as referring to earthwork alone but will embrace all that enters into the construction of the road—complete for the cars. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

Ind. Rev. St. of 1881, § 4062, providing for an absolute forfeiture of a municipal subscription or donation to a company unless its road was completed within three years, is repealed by the act of 1873, as amended in 1875, and carried into Rev. St. of 1881, § 4069, authorizing the county commissioners to cancel such subscription, if the company has not expended on its road within five years an amount equal to the tax. *Sellers v. Beaver*, 97 Ind. 111.

Under N. Y. Act of 1866, ch. 398, entitled "An act to facilitate the construction of the New York & Oswego Midland railroad, and to authorize towns to subscribe to the capital stock thereof," and which specially authorizes the directors to construct branches

through certain counties when, in the judgment of the directors, the same shall be for the interest of the company, to sustain the jurisdiction of a town to issue bonds it must appear that the directors had established a branch through the county before the bonds were issued. *People ex rel. v. Morgan*, 55 N. Y. 587; reversing 65 Barb. 473, 1 T. & C. 101. — APPLIED IN *Thomas v. Lansing*, 14 Fed. Rep. 618, 21 Blatchf. (U. S.) 119. FOLLOWED IN *Purdy v. Lansing*, 128 U. S. 557.

226. Right of municipality to impose conditions.—(1) *In general.*—Authority to a municipal corporation to subscribe to stock in a railroad includes authority to make the subscription conditional. *Jacks v. Helena*, 41 Ark. 213. *Brokaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543. — QUOTING *Bittinger v. Bell*, 65 Ind. 445.

And the supervisors would have no power in making the subscription to disregard such conditions, nor would the company have any right to demand that they should. *People ex rel. v. Dutcher*, 56 Ill. 144, 4 Am. Ry. Rep. 103. — APPROVED IN *People ex rel. v. Cass County*, 77 Ill. 438. DISTINGUISHED IN *Oregon v. Jennings*, 119 U. S. 74. — *Richeson v. People ex rel.*, 115 Ill. 450, 5 N. E. Rep. 121.

The constitution of 1870 prohibits municipal corporations from making subscriptions or donations to any railroad or private corporation except when authorized under prior laws by a vote of the people, and when so authorized the subscription must be in accordance with the conditions upon which it was voted. After the adoption of the constitution the conditions upon which such a subscription was voted cannot be changed, and a subscription made upon other and different conditions. *Richeson v. People ex rel.*, 115 Ill. 450, 5 N. E. Rep. 121.

Although the law authorizing a municipal subscription to a railway may be silent on the subject, yet the municipality may impose conditions upon which the subscription is to depend, and until such conditions are complied with the courts will not compel the issuing and delivery of the bonds by mandamus. *People ex rel. v. Glann*, 70 Ill. 232.

An arrangement entered into by a town supervisor with a railroad by which he issued one half of the amount of bonds voted for upon assurances of the completion of the road, and withheld the remainder until

the road was completed, is fully within his power, and does not release that portion of a town which has been set apart and created a new township from any portion of its liability upon the bonds. *Hensley Tp. v. People ex rel.*, 84 Ill. 544.

Under N. Y. Act of 1870, ch. 507, as amended in 1871, ch. 925, commissioners appointed by a county judge to subscribe for railroad stock, and to issue the bonds of a town in payment, have no authority to require the road, or any one acting for it, to enter into an agreement that the road shall be finished through the town, and, if not, that the bonds shall be delivered up and the town saved harmless; and such a contract is void and incapable of enforcement. *Wayne v. Sherwood*, 14 Hun (N. Y.) 423, affirmed in 76 N. Y. 599, *mem.*

(2) *Illustrations.*—Conditions annexed to the proposition to subscribe for \$400,000 stock in the Cumberland & Ohio R. Co., submitted to and voted by a majority of the qualified voters of a county, were as follows, to wit: First, that the road should pass through or within six hundred yards of the corporate limits of Shelbyville. Second, that the subscription should not be made until it should be made clearly to appear to the county court that said company had secured a *bona fide* subscription to its capital stock sufficient with that to procure the right of way, grade, and execute the masonry of the road from its northern terminus to the Tennessee line. Third, that the stock taken by Shelby county should, as far as necessary, be used in that county in procuring the right of way, in grading, and the necessary masonry for the roadbed. Fourth, that before said subscription should be made by the county court, or the bonds delivered in payment thereof, the president and directors of said company should by an order of its board direct the county court to issue and deliver one hundred thousand dollars of said bonds to the Shelby County railroad, to be used in Shelby county in extending the Shelby railroad east of Shelbyville. In a proceeding to compel the Shelby county court by mandamus to issue bonds in pursuance of the popular vote of said county on the conditions set forth in the submission—*held*, if it be true that the adoption of either of said four conditions, which were mainly intended as safeguards, could prejudicially affect the rights of any citizen of Shelby

county, they were nevertheless legal and authorized by the charter unless rendered illegal by some other cause than that now under consideration; and especially so as the conditions are consistent with the general object and purposes of the corporation, and not expressly or impliedly inconsistent with any of the provisions of its charter. The proposition under the fourth condition above was not a double proposition for a subscription by the county for stock in each of the two railroads, but for a single subscription of four hundred thousand dollars stock in the Cumberland & Ohio R. Co. Its acceptance involved a pledge to invest one hundred thousand dollars of it in stock in the Shelby railroad, which it was authorized to do under its charter independent of said condition. *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.

Where a township through which a railroad might be located was by a statute "authorized to subscribe to the stock of said railroad"—*held*, that while, under such an authority, the contract of subscription might contain terms and conditions affecting its subject-matter, and the consideration to be paid and received, the making a subscription and paying money for stock could not be made a consideration to sustain a contract giving the township a claim to control the general conduct and discretion of the directors of the railroad company in matters involving the pecuniary interests of the company and its stockholders to an amount far exceeding the subscription of the township. It was not the intention of the legislature to authorize the township to obtain by its contract such a claim, or the directors of the company for the time being so to limit the power and discretion of future boards of directors. *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544.

Where two railroad companies in their agreement for consolidation inserted an article to provide for the completion and running of the route of one of the companies, and the directors of the consolidated company failed to comply with such provisions—*held*, that, if the duty thus created was owing to all the stockholders, one of the stockholders could not sustain an action against the directors to enforce a compliance therewith; and that, if the duty was owing to a class of stockholders, having in respect to the matter an interest or right distinct from another

class, any proceeding to obtain relief, for a refusal or neglect on the part of the directors to discharge the duty, must bring before the court not only the directors of the company, but the two classes of stockholders. *Port Clinton R. Co. v. Cleveland & T. R. Co.*, 13 Ohio St. 544.

227. Conditions precedent.—Where a municipal subscription to railroad stock is made on condition that the road be located through a certain town "satisfactory to the selectmen of said town," such location is a condition precedent to the right to recover against the town on the subscription. It is not enough for the company to allege and prove that the road was "wisely, prudently, and judiciously" located. It must appear that the location was satisfactory to the selectmen. *Bucksport & B. R. Co. v. Brewer*, 67 Me. 295, 16 Am. Ry. Rep. 344.

Railroad aid bonds were voted by a township with a condition precedent to their delivery that the road should not only be in running order, but an equivalent amount of the company's stock should be delivered to the township treasurer, but before this was done a new township was set off from the one which voted the bonds. *Held*, that until this exchange there was no contract relation with the company, and that even if the bonds had been valid a judgment against the old township for the amount could not bind the new township. *Pierson Tp. v. Reynolds Tp. Board*, 49 Mich. 224, 13 N. W. Rep. 525.

The vote by which city bonds were to be issued in aid of a railroad provided that the bonds were to be delivered to certain commissioners in escrow, to be by them delivered to the railroad only if the road be completed by a certain date. *Held*, that the completion of the road by the time specified was a condition precedent, and on failure to comply therewith the company did not become entitled to the bonds. *McManus v. Duluth, C. & N. R. Co.*, 51 Minn. 30, 52 N. W. Rep. 980.

It being necessary for the railroad to cross the lands and railroad of another company, the proper steps should have been seasonably taken to secure the right of way; and delay in the construction resulting from neglect to do so is to be attributed to the fault of the railroad company. *McManus v. Duluth, C. & N. R. Co.*, 51 Minn. 30, 52 N. W. Rep. 980.

Minn. Sp. Laws of 1889, ch. 205, providing

for a popular vote on a proposition to issue bonds in aid of railroads, did not give to the bond commissioners the power of determining conclusively the fact as to whether the conditions upon which the bonds were voted had been complied with. *McManus v. Duluth, C. & N. R. Co.*, 51 Minn. 30, 52 N. W. Rep. 980.

Where a subscription to the stock of a railroad company on behalf of a city is authorized by ordinance, to be made on certain conditions precedent, the subsequent issue of bonds in payment of the subscription proves the conditions to have been either complied with or waived by the city. *Com. ex rel. v. Pittsburgh*, 43 Pa. St. 391.

A city subscribed \$1000 per mile to the stock of a railroad, the bonds to be delivered as the track was laid and the cars running on each section of not less than ten miles, but specially providing that the eastern terminus, general offices, and headquarters of the road should be in the city. The company never built any road itself, but had its general offices, nominally at least, in the city; but it arranged with another company to build sixty-three miles of road, which were operated from its general offices and headquarters in another city. *Held*, that this did not constitute a compliance with the condition. *State ex rel. v. Minneapolis*, 32 Minn. 501, 21 N. W. Rep. 722.

Under the above condition, the operating headquarters and general offices of the road, after construction, should be established and permanently maintained in the city. It is the nature both of a condition precedent to the issue of the bonds, and also a continuing obligation on the company after their issue, and contemplates that these general offices shall be established in the city before the bonds are issued and maintained there afterwards. *State ex rel. v. Minneapolis*, 32 Minn. 501, 21 N. W. Rep. 722.

228. Conditions subsequent.—In a vote of a town for the issue of certain bonds to a railroad company conditions were made that the bonds should be delivered to the railroad company in specified amounts as the work upon the roadbed progressed; and, further, that the subscriptions to said capital stock should be void and of no effect unless an agreement by the railroad company with responsible parties should be made for its iron and rolling stock. These were held not to be conditions prerequisite to the making of the subscriptions and the

issuing of the bonds, but only that the subscriptions and the bonds were to be subject to the conditions. *Eagle v. Kohn*, 84 Ill. 292.

A proposition submitted contained a provision that the amount subscribed be expended only in the event of the railroad being constructed, and running centrally through the county. *Held*, that the construction of the road was not a condition precedent to the issuance of the bonds, for that the language might mean "constructed and running centrally through," etc., since this was the construction placed thereon by the county judge by his act of issuing the bonds. *Clapp v. Cedar County*, 5 Iowa 15.

A railroad company chartered under the territorial law, which prescribes how companies may be chartered and organized, and how subscriptions to the capital stock may be made and collected, may accept the benefits of Kan. Act of 1870, ch. 90, enabling townships to subscribe for railroad stock, and providing for payment in bonds, which are not to be issued until the railroad shall have been completed through the township, or to such point as may be agreed upon. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 21 Kan. 309.

Under the above statute, where a township favors a subscription to railroad stock by a three-fifths vote, and the subscription is made, it is valid, and the county commissioners are bound to issue bonds after a full compliance on the part of the company with the terms and conditions of the vote, notwithstanding that the proposition to submit to a vote contains a condition to be performed on the part of the township, relating to a transfer of its stock, which is a nullity when the condition is subsequent to the subscription. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 21 Kan. 309.

Where a proposition by a township to vote to take stock in a railroad contains a condition that if the county becomes a stockholder in the same company, or issues bonds to aid in a subscription, then the subscription of the town shall be null and void, the township subscription is not avoided by an effort of the county to enforce a pretended subscription on the county, when, on final hearing, such pretended subscription is held invalid, and no bonds are obtained thereunder. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 21 Kan. 309.

A provision in the subscription of a town to railroad stock that the road shall be built "through the town on the line as run by the engineer, with a suitable depot," constitutes a condition subsequent, and will not defeat an action to recover the amount of the subscription, although the condition had not been performed when the action was commenced. *Belfast & M. L. R. Co. v. Brooks*, 60 Me. 568.—DISTINGUISHED IN *Memphis, K. & C. R. Co. v. Thompson*, 1 Am. & Eng. R. Cas. 331, 24 Kan. 170.

Where subscriptions are made to the capital stock of a projected railroad company on condition that the road take a certain designated route, and on the faith of those subscriptions a charter is granted to the company, the subscriptions are binding and the condition void. *Pittsburgh & S. R. Co. v. Woodrow*, 1 Pittsb. (Pa.) 450.—QUOTING *Kennedy v. Erie & W. Plank-Road Co.*, 25 Pa. St. 224. REVIEWING *Cumberland Valley R. Co. v. Baab*, 9 Watts (Pa.) 458.

A county court does not exceed its authority in delivering bonds for the first five miles upon the completion of that part of the road because it had not been "equipped and operated by steam for travel," etc. This has reference to the character of the construction of the road, and its operation was not a prerequisite to the power of the county court in delivering the authorized bonds on the completion of the first section of the road, as required by its charter. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ky. Rep. 172.

229. Waiver of conditions.—Where a county subscribes to railroad stock with a condition requiring the road to be completed within a certain time, and the county subsequently, through its officers, agrees to extend the time for completing the road, and before the expiration of the extended time the county declares the road completed to its satisfaction, delivers its bonds, and receives certificates of stock in the company, this constitutes a waiver, and estops the county from objecting that the road was not completed in time. *Randolph County v. Post*, 93 U. S. 502.—DISTINGUISHED IN *Clark v. Rosedale*, 70 Miss. 542.

If county authorities issue and deliver the bonds of the county to a railroad company before performance of the conditions upon which they were to be issued and delivered, this will be a waiver of the conditions by the county. *Chiniquy v. People ex rel.*, 78 Ill. 570.

230. Conditions not binding on purchasers at foreclosure sale.—A railway corporation which succeeds to the ownership of the property and franchises of another company by purchase under foreclosure will owe a county which has made a conditional subscription to the company no duty not imposed by law, and will take the road and its property absolutely discharged from the contract between the county and the original railway company, as well as the conditions imposed by the vote of the people. *People ex rel. v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 637.

A certain town subscribed to the stock of a company on condition that the road be built to the town and that its machine shops be located there, which conditions were complied with and the subscription paid. Subsequently a different company bought the road with its property and franchises, and removed the shops to another point. *Held*, that, as no lien was retained on the road to secure the conditions in the hands of purchasers, the town had no cause of action for the removal of the shops. *Elizabethtown v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 22 S. W. Rep. 609.

Conditions in a subscription to a railroad, e. g., that the road run by a certain town or on a certain route, etc., are valid, and must be complied with by the company to render the subscriptions binding. *Jacks v. Helena*, 41 Ark. 213.

231. Conditions part of the contract of subscription.—Where a town agrees to take stock in a railroad and issue its bonds when the road has complied with certain conditions, after the company has fully complied with the conditions a law forbidding the bonds is unconstitutional. *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. Rep. 434.

Where county commissioners make a conditional subscription to the stock of a railroad, and the terms and conditions embodied in a resolution of subscription are accepted by the railroad company, they form part of the contract between them; and the railroad company cannot in good faith raise the objection that none but an unconditional subscription was authorized by the act of 1872. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

Although the commissioners could add

no condition to their subscription that was in conflict or inconsistent with the terms prescribed by the act of the legislature, there was nothing in the act to negative their right to add such terms and conditions as would consist with the terms of the power, and were proper for the protection and security of the rights and interests of the community that they represented. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

Assuming that the Maryland Acts of 1872 and 1874 are free of all constitutional objection, the conditional subscription of the commissioners was a valid contract, and as such exhausted the power of the commissioners to make any further subscription. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

When in 1880, before any of the more important conditions of the subscription had been complied with by the railroad company, the latter applied for and obtained an amendment of its charter (act of 1880, ch. 200), and accepted the same, extending the time for the completion of the road, with the condition that it should not in any way be so construed as to bind the county for its subscription unless the county commissioners should give their consent to the continuation thereof, the railroad company thereby in effect released the subscription. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

The county commissioners never having given their consent to a continuation of the original subscription as made, and having no power so to do, the power conferred having been exhausted, an attempt by them to make a new subscription on the 21st of Jan., 1890, on different and conflicting terms and conditions, was simply a nugatory act. *Baltimore & D. P. R. Co. v. Pumphrey*, 74 Md. 86, 21 Atl. Rep. 559.

The contract for a city subscription to railroad stock provided that the bonds issued by the city should be left in escrow, and delivered to the company when certain conditions should be performed, among which was one requiring a railroad truss bridge to be constructed across a river opposite the city, which the road crossed, within three years, the bonds to be returned to the city if the bridge should not be constructed within the time. *Held*, that nothing but a railroad truss bridge would meet the requirements of the contract, even though

another bridge might be as good as, or even better than, such a bridge for the use intended. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415, 6 N. W. Rep. 795, 8 N. W. Rep. 148.

And where the city sues to obtain a return of the bonds, the company cannot have the benefit of a defense that the city has accepted and acquiesced in the kind of bridge built, unless such fact be set up in an answer and sustained by proof. Where no issue of the kind is made in the trial court, the supreme court will not consider evidence, though strong, tending to show such acquiescence and acceptance. *Winona v. Minnesota R. Constr. Co.*, 27 Minn. 415, 6 N. W. Rep. 795, 8 N. W. Rep. 148.

232. Condition that other municipalities subscribe.—Where a town subscription to railroad stock is contingent upon other towns making like subscriptions, the fact that the other towns cannot legally subscribe will invalidate the subscription; but such fact is no ground for an injunction to prevent an issue of bonds, where there is nothing to show that there is any intention to issue them except in strict compliance with the terms of the subscription. *Phillips v. Albany*, 28 Wis. 340, 5 Am. Ry. Rep. 46. —APPROVED IN *Lawson v. Schnellen*, 33 Wis. 288.

233. Condition that road be built and running at stated time.—(1) *General rules.*—Under the Ill. Act of April 16, 1869, providing for municipal subscriptions to railroads, a county has the right to impose, in a vote on a proposition to subscribe, a condition that the bonds shall not issue unless the road be commenced and completed within certain fixed dates. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159.

There is no fraud upon the people in the giving of a written guaranty by the president of a railroad that if the vote of a town results in favor of a subscription the bonds shall not be called for until satisfactory assurances shall be given of the completion of the road. *Hensley Tp. Sup'r v. People ex rel.*, 84 Ill. 544.

To entitle a railroad company to receive the money appropriated, the road need not be perfect in every respect, but it must be so far completed that it may be properly and regularly used for the purpose of transporting freight and passengers. *Brokaw v.*

Gibson County Com'rs, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

When a petition for aid is upon conditions, expressed in the petition, that the road shall be completed through the township and a depot erected thereon by a day named, a failure to perform the conditions forfeits the aid voted, under the provisions of the statute, Ind. Rev. St. 1881, §§ 4045 and 4062; and after such forfeiture the aid so voted will be no obstacle to voting aid to another railroad upon proper petition under § 4045. *Irwin v. Lowe*, 89 Ind. 540.

Where a township votes to subscribe to railroad stock on condition that the road be built within a specified time, a sale of the road at its completion, the company reserving the right to complete the road and to collect the tax, does not defeat its right to collect the subscription after the road is completed, even though the sale be under such conditions as to work a voluntary dissolution of the corporation. *Muscatine Western R. Co. v. Horton*, 38 Iowa 33. —DISTINGUISHED IN *Manning v. Mathews*, 66 Iowa 675; *State v. Central Iowa R. Co.*, 71 Iowa 410, 32 N. W. Rep. 410. REVIEWED IN *Harwood v. Quinby*, 44 Iowa 385.

The act of township trustees in issuing to a railroad company a certificate of compliance with the conditions upon which the tax was voted is judicial, and they are not liable in damages for a refusal to issue it unless they act wilfully or corruptly. *Muscatine Western R. Co. v. Horton*, 38 Iowa 33.

When a city agrees to issue bonds in aid of a railroad provided it is completed to a certain city within a certain time, the company does not comply with the agreement where there is a break in the road of about a mile, one third of which is river and the remainder bottom lands on either side, and over which passengers and freight have to be hauled in wagons and ferried. *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 48 (Gil. 36).

Where a county court makes an order for the subscription of stock to a railroad company upon condition that the road shall be built within a specified time, it is in the power of the county court, by a subsequent order, to suspend the delivery of bonds of the county, issued in payment of the subscription, and remaining in the hands of a trustee, when it appears that the road has not been built within the time specified.

The recitals in the order, however, like any other declarations made by one party to a contract, do not conclude the other party. *Cooper v. Sullivan County*, 65 Mo. 542.

A condition in a vote of a municipal corporation granting aid in the construction of a railroad that it shall be payable when the road is completed for use is complied with when the road is constructed so as to be reasonably safe, fit, and convenient for the public use and accommodation, as new railroads are ordinarily used in similar localities. *Manchester & K. R. Co. v. Keene*, 62 N. H. 81.

A promise to pay a railroad company a sum of money when it shall have constructed the road from L. to V. and kept the same in operation, conveying passengers and freight between said points for the period of one year, is for a valuable consideration and binding. *Rose v. San Antonio & M. G. R. Co.*, 31 Tex. 49.

(2) *Illustrations*.—A town issued its bonds in aid of a railroad, payable on condition that the road be constructed to the town. Subsequently a statute was passed fixing the time within which the road should be completed, but naming a time before the maturity of the bonds. *Held*, that the time thus fixed should be taken as the time within which the condition should be performed. *Green v. Dyersburg*, 2 Flipp. (U. S.) 477.

In an agreement between a town and a railroad company by which the railroad binds itself to pay to the town the proceeds of bonds issued to it by the town upon failure of the railroad from any cause to construct the road through such town, a recital that the company had entered into a contract with one P. by which he had agreed to construct that portion of the road within the following year was construed to fix the time within which the company should pay the money if the road were not completed. *Chicago, P. & S. W. R. Co. v. Marseilles*, 84 Ill. 145, 16 Am. Ry. Rep. 442.

Where a township voted a subscription to a railway to be paid in bonds, not to be delivered until the road was completed and in operation between two points, within five years, and the road was completed within three years to its terminus except about a mile, but by arrangements with another company it operated its trains to its terminus, supplying all the wants of the public, when it tendered stock and demanded the

subscription, which was refused, which refusal prevented the completion of the road within the five years—*held*, that the township could not be excused from issuing its bonds after the entire completion of the road, even after the time limited. *People ex rel. v. Holden*, 82 Ill. 93.

Defendants, as a committee acting in behalf of the citizens of P., entered into an undertaking to furnish the right of way, depot grounds, and cattle yards, and "to obtain subscriptions for the Des Moines Valley R. Co., in accordance with the blank notes furnished by the company for that purpose, to an amount of at least \$10,000, provided said company run its track through P." Defendants obtained a large amount of subscriptions in the form of notes conditioned to be paid as soon as trains were running from K. to P., and containing a proviso that they were to be void if the trains were not thus running on or before a certain date. The road was not completed to P. until about two and a half months after this date. In an equitable proceeding by the company to require defendants, upon their refusal, to make known the name of each subscriber, the amount of each subscription, and to deliver the notes thus held by them over to the company—*held*, on demurrer to the petition containing these averments, that the facts alleged entitled plaintiffs to the relief asked, and that the defendants were mere trustees in holding the subscription notes, and not entitled to interpose the defense, which properly belonged to the subscribers or makers of the notes, and which they might not desire to avail themselves of; that the notes were void because the road was not completed to P. at the date stipulated. *Des Moines Valley R. Co. v. Graff*, 27 Iowa 99.—QUOTED IN *Straughan v. Indianapolis & St. L. R. Co.*, 38 Ind. 185.

Where a condition of a tax voted in aid of a railroad was that the road should be "constructed and operated" to a depot at a certain place by a given time—*held*, that it was sufficiently complied with by the construction of the road to the given point by the time named, and the continuous operation of it thereafter, even though the road was not fully completed, and the depot was only a temporary one, and the service was not first class. *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.

Muscatine Western R. Co. v. Horton, 38 Iowa 33.

A city contracted to subscribe to railroad stock, and to issue its bonds therefor on condition that they should not be issued until the road should be constructed between designated points, according to the terms of a contract, and further providing that they should not issue at all unless the road was constructed and in operation between the points on or before a certain date. *Held*, that the latter provision was of the essence of the contract, and the company was bound to have its road substantially completed on or before the time fixed to earn the bonds in payment of the subscription. The mere fact that a track was laid and trains running over it was not necessarily a compliance with the conditions. *Memphis, K. & C. R. Co. v. Thompson*, 1 *Am. & Eng. R. Cas.* 331, 24 *Kan.* 170.—*DISTINGUISHING* *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328; *Chamberlain v. Painesville & H. R. Co.*, 15 Ohio St. 225; *Warner v. Callender*, 20 Ohio St. 197; *Belfast & M. L. R. Co. v. Brooks*, 60 Me. 568; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389; *McMillan v. Maysville & L. R. Co.*, 15 B. Mon. (Ky.) 218; *Miller v. Pittsburgh & C. R. Co.*, 40 Pa. St. 237; *North Mo. R. Co. v. Winkler*, 29 Mo. 318.—*DISTINGUISHED IN* *Southern Kan. & P. R. Co. v. Towner*, 41 *Kan.* 72, 21 *Pac. Rep.* 221.

And as time was made the essence of the contract, a completion of the road after the day fixed would not entitle the company to the bonds, although the company had failed to complete it, owing to unusual wet weather and an extraordinary rainfall. *Memphis, K. & C. R. Co. v. Thompson*, 1 *Am. & Eng. R. Cas.* 331, 24 *Kan.* 170.

A town voted to subscribe to railroad stock and issue its bonds in payment of the stock "at such time" as the railroad should be built to a certain place, but providing that it should be completed to the place and the cars running, transporting freight and passengers, on or before a given date; otherwise the subscription would be void. *Held*, that the bonds could not be demanded until the road was completed and cars running thereon. *Portland & O. C. R. Co. v. Hartford*, 58 Me. 23.

Under the requisite legislative authority conferred by Minn. Sp. Laws 1869, ch. 46,

the town of Lime duly adopted a resolution "authorizing and directing its supervisors and their successors in office to issue and deliver to the Minnesota & Northwestern R. Co. (the relator herein) the bonds of said town, with interest coupons attached, to the amount of \$4000, * * * one half of said bonds to be delivered to said company whenever it shall have graded and bridged its road from the city of Mankato for twelve miles in a southerly direction, and the other half to be delivered when the said railroad is completed to Wells, * * * the iron laid, and the cars running thereon. Provided, that said last instalment of bonds shall never be delivered unless said thirty-nine miles of railroad is so completed before the first day of August, A. D. 1872."

Held: (1) the adoption of this resolution created a statutory obligation binding the town to issue the bonds, in accordance with its terms and conditions, upon performance thereof by said company. No written agreement nor formal acceptance was necessary on the part of the company to give effect and validity to the resolution. It was in the nature of a standing offer, of which the company could avail itself, by entering upon the construction of the road, at any time before it was rescinded or withdrawn. (2) that said company was entitled to receive the instalment of bonds therein first specified upon the grading and bridging of the first twelve miles of road from Mankato, though such work was not all done prior to said first day of August, 1872. *State ex rel. v. Lime Sup'rs*, 23 *Minn.* 521.

A proposition for precinct bonds to a railroad company provided that they should be issued "when said road shall be graded, tied, and ironed, and completed ready for the running of trains, and trains running thereon, etc., on or before the 1st day of January, 1880." *Held*, that the company, on compliance with these conditions within the time specified, was entitled to the bonds. *Townsend v. Lamb*, 14 *Neb.* 324, 15 *N. W. Rep.* 727.

234. Location of route and termini.—Where a statute authorizes a company to build a branch starting from a given point "or from any point on the existing road easterly or southerly" from such point, and to end at "any point" on a certain lake or river, thus giving an option over a wide extent of country, "upon such route and location, and through such coun-

ties as the board of directors shall deem most feasible," and authorizes any town, village, or county through or near which the road may pass to subscribe to its stock, the route of the whole extension must be located by the directors, and the two *termini* fixed, before a town can subscribe and issue its bonds. *Thomas v. Lansing*, 14 *Fed. Rep.* 618, 21 *Blatchf.* (U. S.) 119.—FOLLOWING *Marsh v. Fulton County*, 10 *Wall.* (U. S.) 676.—*Mellen v. Lansing*, 19 *Blatchf.* (U. S.) 512, 11 *Fed. Rep.* 820.—DISTINGUISHING *Smith v. Yates*, 15 *Blatchf.* 89.

And such location must be determined by the directors, and not the town commissioners appointed to subscribe to the stock, and the county judge cannot appoint such commissioners until after the directors have designated the municipality to vote the aid. *Thomas v. Lansing*, 14 *Fed. Rep.* 618, 21 *Blatchf.* (U. S.) 119.

And under the above statute towns have no power to issue bonds until the directors of the company shall first fix the location of the road; and where bonds have been issued without this requirement being complied with, a *bona fide* holder thereof cannot recover on them, though the town has been paying interest thereon. *Mellen v. Lansing*, 11 *Fed. Rep.* 829, 20 *Blatchf.* (U. S.) 278.

Under Kan. Act of Feb. 10, 1865, authorizing counties to subscribe to railroad stock, it is not necessary that the actual location of the road be made before an election is held to vote upon the question of the subscription. It is sufficient if the proposition shows the route and terminus of the road in general language. *Johnson County Com'rs v. Thayer*, 94 *U. S.* 631.—DISTINGUISHING *Lewis v. Bourbon County Com'rs*, 12 *Kan.* 186, *Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs*, 12 *Kan.* 234.

So also under N. Y. Act of April 19, 1869, ch. 241, authorizing any town in Orleans county situate along the route of a certain railroad to aid in the building of the road by issuing its bonds. *Smith v. Yates*, 15 *Blatchf.* (U. S.) 89.—DISTINGUISHED IN *Mellen v. Lansing*, 19 *Blatchf.* 512, 11 *Fed. Rep.* 820.

Under the N. Y. Act of 1871, municipal bonds issued for stock in the New York & Oswego Midland railroad before the company has designated all the counties through which the road will pass are unauthorized,

and cannot be the foundation of a judgment against the town issuing them. *Purdy v. Lansing*, 128 *U. S.* 557, 9 *Sup. Ct. Rep.* 172.—FOLLOWING *Mellen v. Lansing*, 20 *Blatchf.* (U. S.) 278; *People ex rel. v. Morgan*, 55 *N. Y.* 587; *Mellen v. Lansing*, 19 *Blatchf.* 512; *Thomas v. Lansing*, 21 *Blatchf.* 119.

It is competent for a railroad company, in submitting to a municipality a proposition for aid, to define therein, as a part of the proposition, the line of the proposed road. *Platteville v. Galena & S. W. R. Co.*, 43 *Wis.* 493, 17 *Am. Ry. Rep.* 1.

Where a town was authorized to subscribe to the capital stock of a railroad, upon condition that it should pass through such town, and voted such subscription to a company whose charter was subsequently amended, changing the name of the company, and required the road to run from one county to another without fixing any definite points, and the bonds were issued and made payable to the company by its new name, it was contended that the company could not construct its road through the town. *Held*, that, as the court could see by reference to a map of the state that the road could be built on a straight line so as to run through the township, the objection that the town was not authorized to make the subscription was not well taken. *Reading v. Wedder*, 66 *Ill.* 80.

Where a county by-law was passed agreeing to subscribe \$80,000 to aid in the construction of a railway and issue debentures therefor under the authority of the clause of the Municipal Acts of 1873, then in force the debentures to be delivered when a company should have begun upon the construction of the road and expended seventy-five per cent. of the amount of the debentures, a mandamus will not be granted to compel delivery of the debentures, the company not having filed their plans and surveys, as required by the Railroad Act (C. S. C. ch. 66), without which they had no authority to begin their work, and were bound to no particular route, for they had not legally located their line, had no power to begin work as they had done, and had not done so in good faith. *In re Stratford & H. R. Co.*, 38 *U. C. Q. B.* 112.—APPROVED IN *Re Langdon & A. J. R. Co.*, 45 *U. C. Q. B.* 47. REVIEWED IN *Grand Junction R. Co. v. Peterborough County*, 6 *Ont. App.* 339.

235. Road must be built on location proposed.—Where a town is author-

ized to subscribe for railroad stock on condition that the road be built through a township within half a mile of a certain court house, and terminate at or near a certain city, the construction of the road across one corner of the township, and terminating nine miles from the designated city, is not such a substantial compliance with the conditions as to authorize an issue of bonds, and if issued they are invalid, and a tax cannot be imposed to pay them, or the interest thereon, even when held by innocent purchasers. *Parker v. Smith*, 3 Ill. App. 356.

Where neither the vote of a county to issue bonds to a railroad nor its charter requires the road to be constructed on any one route, but where the board of supervisors imposes a condition as to location of the road, and makes the delivery of the bonds dependent on the same, the company by accepting such conditions is bound by them. *Alley v. Adams County Sup'rs*, 76 Ill. 101.

Where by the terms of a county's subscription the permanent location of the road by a certain route was an indispensable prerequisite to the delivery of the first ten per cent. of the county bonds, and the company represented and certified to the permanent location of its road as contemplated in the conditions of the subscription, and on the faith of it obtained ten per cent. of the bonds—held, that this, as against the right of the company to demand the remaining bonds, would be taken as the permanent location of the road, and if the company afterwards relocated its road upon a materially different route, it could have no claim for the delivery of the remaining bonds, not having performed the conditions on which the subscription was dependent. *Alley v. Adams County Sup'rs*, 76 Ill. 101.

In such case the company was estopped by its receipt of county bonds, according to the terms of a certificate of its officers, from denying that the road was permanently located on a particular route, as therein represented. *Alley v. Adams County Sup'rs*, 76 Ill. 101.

Where a statute provided for the issuance of the bonds of Lyon county to the V. & T. R. Co. upon its building a first-class railroad from Virginia City to Carson, running within twelve hundred feet west of Trench's mill in Silver City (St. Nev. 1869, 62)—held, that the building of a first-class railroad be-

tween the cities named, but running twenty-four hundred feet west of Trench's mill, though a branch was built up to within four hundred feet, was not a compliance with the condition of the statute, and would not authorize the issuance of the bonds, although an actual compliance was impracticable, and the road as built was of more benefit to the people of the county than if constructed as prescribed. *Virginia & T. R. Co. v. Lyon County Com'rs*, 6 Nev. 68.—DISTINGUISHED IN *Stockton & V. R. Co. v. Stockton*, 51 Cal. 328.

An act provided that the county commissioners of any county through or in which a railroad might be located by a company should be authorized to subscribe to the capital stock of the company, and issue negotiable bonds in payment of such subscription. An alternative mandamus was awarded to require the commissioners to levy a tax to pay bonds purporting on their face to have been issued in payment of such a subscription, and to be payable to bearer, and which were stated to be held by the relator as a *bona fide* holder. The answer to the writ stated that the road had never been located through or in the county. Held, on demurrer, to be a sufficient defense, as showing that the bonds had been issued illegally and without authority of law. *State ex rel. v. Hancock County Com'rs*, 11 Ohio St. 183.—REVIEWING *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 441.—APPROVED IN *Hopple v. Brown Tp.*, 13 Ohio St. 311.

A company authorized to construct a railroad through Wisconsin from the Illinois line to intersect the M. & P. du C. R. Co., west of Monroe, made a proposition to the plaintiff town, stating that it had surveyed and located a line of its road through certain sections in that town, to a point designated in the village of Platteville, and proposed to build the road "on the route indicated" from Galena to the Wisconsin river; and it asked aid of the town to build the road "on the route indicated." The town accepted the proposition, and issued its bonds. Held, that while the proposition does not disclose a survey and location of the line of the road northward beyond the point designated, yet it bound the company to build a continuous line of road from Galena, over the surveyed line, described in the proposition, to the point designated, and from that point to the Wis-

consin river. *Platteville v. Galena & S. W. R. Co.*, 43 Wis. 493, 17 Am. Ry. Rep. 1.

236. Bonds to be delivered upon expenditure of a given sum.—Where a township voted a subscription of \$50,000 to the capital stock of a railway company, to be paid in bonds, and the condition of the vote was that the bonds were to be delivered when work was done in the township to the amount of such bonds—*held*, that the building of the road through the town at a cost of only \$30,000 or even \$41,000 was not a substantial compliance with the conditions, and that the court would not compel the issue of the bonds. *People ex rel. v. Waynesville Sup'r*, 88 Ill. 469, 21 Am. Ry. Rep. 339.

Where a charter authorizing the voting of municipal subscriptions for stock contained a proviso that the bonds should not be issued nor any payment made until an amount of work should be done on the railroad in the town, or on such part of the line of the road as the authorities of the town should designate, equal in value to the amount of the bonds to be issued—*held*, that the charter required any deviation from the conditions therein prescribed to be submitted to the voters, and at the same election at which the subscription was voted. *People ex rel. v. Waynesville Sup'r*, 88 Ill. 469, 21 Am. Ry. Rep. 339.

237. That a station be built at a certain place.—A vote by a county to issue bonds to a given railroad company whose line runs to the county seat is not rendered invalid by a condition that a depot of the company shall be located within a specified distance of the county seat, nor by a condition that the railroad bridge over a large stream in the county shall be so constructed that it may be used as a free wagon bridge. *Union Pac. R. Co. v. Merrick County*, 3 Dill. (U. S.) 359. — **DISTINGUISHING** *Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338.

In a contract between a railroad company and a township which stipulated "that said company will not, and shall not, be entitled to draw out of the hands of the treasurer any money collected out of said tax until said company shall have erected a depot within one mile of the village of New Hampton, in New Hampton township," the words in New Hampton township are merely descriptive. It is a compliance with the contract if the depot be erected

within one mile of New Hampton village. *McGregor & S. C. R. Co. v. Foley*, 38 Iowa 588.

One of the conditions in an agreement to be performed by a railroad company upon which a corporation was to issue its bonds in its aid was "to construct at or near the corner of certain streets in Toronto a freight and passenger station with all necessary accommodations, connected by switches, sidings, or otherwise with said road," upon the council of the town passing a by-law granting a necessary right of way. *Held*, that such condition was not complied with by the erection of a station building not used, nor intended to be used, and for which proper officers, such as station master, ticket agent, etc., were not appointed. *Bickford v. Chatham*, 16 Can. Sup. Ct. 235; *dismissing appeal from 14 Ont. App. 32, which affirms 10 Ont. 257.*

The conditions agreed upon were that defendants should grant and continue to three other roads equal privileges as to working and using defendants' railway; that defendants should have a siding and flag station at or near two named villages on their line, and should cause or procure one of the other roads to erect a station at or near a named point of intersection. *Held*, that these conditions were all legal and valid, and that defendants, having received the debentures for the bonus, could not object that such agreement was *ultra vires*. *Haldimand County v. Hamilton & N. W. R. Co.*, 27 U. C. C. P. 228.

238. Promises by officers of company.—Where the petition for an election to vote a subscription by a town for a railroad provided only that the road should run through the town, without fixing any more definite line, evidence that the officers of the company at the election made speeches declaring that the road would be located through the center of the town, when, in fact, it was subsequently located through the town on one side, without any offer to prove that such declarations were not made in good faith at the time, and were relied on by a sufficient number of voters to have changed the result, is properly excluded. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

A proposition made by a representative of the railroad that he desired that the citizens of a town should procure for the company the right of way through the town and

county and the necessary ground in the city for depot purposes, and also the sum of \$75,000, which he said was but a portion of the extra cost to run the road into town and out again; and also the right-of-way bonds which the citizens executed, were to be all considered as entering into and forming an inducement for the contract. It became the duty of the railroad under the contract to survey and establish a route to a point within the city limits within half a mile of the court house, and to select and mark out the necessary grounds for depot purposes, which, when done, devolved the duty upon the citizens to secure, by purchase or condemnation, the titles to the property, and that the company in failing to do this, and by running the road around to the north line of the city limits, then deflecting so as just to enter the city limits, and running on that line a few hundred yards, and thence deflecting again out of the limits of the city and running several hundred yards to a point where the company established a depot on a tract of land owned by itself, acted in bad faith with the citizens, and therefore the court declined to enforce the obligations executed as a part of the subsidy. *Miller v. Gulf, C. & S. F. R. Co.*, 24 *Am. & Eng. R. Cas.* 158, 65 *Tex.* 659.

239. Written proposals of company accompanying petition.—Under the Miss. Act of 1890 (Laws, p. 690), empowering a town through its officials to subscribe for the stock of a railroad company and to issue bonds in payment when authorized by a vote ordered on petition of freeholders, where in case of election there is such a petition, accompanied by a written proposal on the part of the railroad company that its line will be completed within a certain time, such stipulation, though not in the petition of freeholders or the order for the election or notice thereof, becomes a part of the contract, and on failure to complete the road within the time fixed the town so subscribing may sue on the bond given by the railroad company as a guaranty that the contract will be complied with, or may have cancellation of its bonds in the hands of the company. *Clark v. Rosedale*, 70 *Miss.* 542, 12 *So. Rep.* 600. — **DISTINGUISHING** *Randolph County v. Post*, 93 U. S. 502.

240. Subscription to be paid upon completion of road.—(1) *General rules.*—Where county bonds are issued to a railroad, to be delivered only when the road is

built through the county, a new company succeeding to all the rights, privileges, and franchises of the company to which the bonds issued, upon doing the work, is entitled to the bonds. *Thomas v. Morgan County*, 59 *Ill.* 479.

An adjudication to the effect that a railroad company or its assignees were not entitled to county bonds because work had not been done in the county, as required by the condition for their delivery, is not a bar to their recovery after the work has been done. *Thomas v. Morgan County*, 59 *Ill.* 479.

Where money is raised for the purpose of taking stock in a railroad company, the company cannot have any of the money until it has fully constructed the road so that cars shall pass over the same, and no one but a petitioner or a taxpayer can have a mandate to compel the payment of the money. *Crawford County Com'rs v. Louisville, N. A. & St. L. A. L. R. Co.*, 39 *Ind.* 192, 10 *Am. Ry. Rep.* 416.

A township subscription to railroad stock is not void because it is conditional upon the completion of the road through the township, and through or adjoining a large and growing village therein, and the erection of a depot at or near such village, where it is manifest that the condition is in furtherance of the interests both of the corporation and the public. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 21 *Kan.* 309.

A condition imposed in a municipal subscription that the bonds should be issued only when the road was built of standard gauge and "completed as first class, and in operation," does not require the road to be perfect in every respect, but so far completed that it may be properly and regularly used for the transportation of freight and passengers. *Southern Kan. & P. R. Co. v. Towner*, 41 *Kan.* 72, 21 *Pac. Rep.* 221.

(2) *Illustrations.*—A town voted to guarantee the bonds of a railroad company to a certain amount "to be used in the completion of the road on and after such time as the road should be graded, and cars run upon it between" designated places. *Held*, that this only had the effect of fixing a time for guaranteeing the bonds, and they might be used in the completion of the road before that time. *Douglas v. Chatham*, 41 *Conn.* 211.

A company incurred a debt on account of

work done upon the road, and in payment gave an order upon the custodian of bonds for a sufficient amount of them to satisfy the same, which order was assigned to a third person, but, by reason of there having been no work done upon the road within the county, there was no obligation to deliver the bonds. *Held*, that if the work was subsequently done within the county by the successors of such company, so as to comply with the condition upon which the bonds were to be delivered, then the order issued by the original company would operate as an equitable transfer to the holder thereof, of so much of the county subscription represented by the bonds, as was embraced in the order. *Thomas v. Morgan County*, 59 Ill. 479.

In such case, where the custodian of the bonds, under the direction of the county authorities, refused to deliver the bonds called for by the order of the company, the holder has his remedy in chancery to compel their delivery to him without first proceeding at law against the company as for a debt due from them to him as the assignee of their order. *Thomas v. Morgan County*, 59 Ill. 479.—FOLLOWED IN *Morgan County v. Allen*, 103 U. S. 498.

In an action upon a written contract to pay money upon the completion of the "Delphos, Bluffton and Frankfort" railroad to the town of Decatur, it is competent for the promisor to prove the route and *termini* of the road, but he cannot vary the contract by parol evidence that the agreement was that the road should be extended to Toledo, and a connection secured with other roads leading to that city. *Low v. Studabaker*, 110 Ind. 57, 10 N. E. Rep. 301.

In such case the complaint to enforce payment of the money is not sufficient if it does not aver that the railroad designated in the contract was completed to the point stipulated therein, and where the complaint is bad there is no available error in overruling a demurrer to a bad answer. *Low v. Studabaker*, 110 Ind. 57, 10 N. E. Rep. 301.

Where the issuing of township bonds or warrants to a railroad company is dependent upon the condition that the company shall build, or cause to be built, and have in operation, with cars running thereon, by lease or otherwise, its railroad, from a certain city therein named, at or near the depot of another railroad company in the city—*held*, that the building of its road within

111½ feet of the limits of the city, and an arrangement by it with the other railroad company, whose road it intersects at that point, for the running of its trains over the road from its intersection to its depot within the city, and the operation of the road from the depot in the city over its entire line, will be regarded as a substantial compliance with the condition. *Chicago, K. & W. R. Co. v. Makepeace*, 44 Kan. 676, 24 Pac. Rep. 1104.

A city agreed to issue its bonds in aid of a railroad on condition that the company should "fully construct, equip, and put into successful operation" a railroad into the city before receiving the bonds. *Held*, that this did not necessarily require the company to build a railroad bridge across an intervening river. The condition was satisfied if it provided such facilities for passing the river as, at the time of making the contract, were usual and customary in railroad transportation across the river, and as were adequate and reasonably convenient for such mode of transit. *Hodgman v. St. Paul & C. R. Co.*, 23 Minn. 153.

A county judge in New York on a petition of taxpayers of a town appointed commissioners to subscribe for stock in a railroad when it should be constructed through a certain village. *Held*, that the building of the road was a condition precedent, and that the commissioners had no power to make a contract to deliver bonds before the road was built. *Buffalo & J. R. Co. v. Falconer*, 2 Am. & Eng. R. Cas. 593, 103 U. S. 821.

A contract, under such circumstances, by the commissioners whereby they agreed in advance of the building of the road to subscribe and deliver bonds when the road was constructed is *ultra vires*, and therefore no valid contract existed that could be impaired by the amendment to the state constitution of Jan. 1, 1875, prohibiting municipal aid to railroads. *Buffalo & J. R. Co. v. Falconer*, 2 Am. & Eng. R. Cas. 593, 103 U. S. 821.—DISTINGUISHING *Moultrie County v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631.—APPROVED IN *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781.

241. Bonds to be issued for work done in the county.—Where the bonds of a county, issued in payment of a subscription to a railroad stock, are delivered to bankers upon an understanding that they are to be applied in payment for work done upon the road in that county, and not other-

wise, such understanding is binding upon all persons affected with notice thereof, and as to them the bonds cannot be applied to any other purpose. *Thomas v. Morgan County*, 39 Ill. 496.

In such a case an assignment of part of the bonds to a third party for work not in the county is not binding on the county. The party taking the assignment is put upon inquiry as to the condition. *Thomas v. Morgan County*, 39 Ill. 496.

The fact that the county voted as a stockholder of the company, and paid two years' interest on the bonds, will not be taken as a waiver of the condition, or that the deposit in bank was absolute. *Thomas v. Morgan County*, 39 Ill. 496.—FOLLOWED IN *Morgan County v. Allen*, 103 U. S. 498.

Such a deposit of bonds does not mean that the identical bonds should pay for the work, but if the work was done the bonds should be delivered. *Thomas v. Morgan County*, 39 Ill. 479.

242. Subsequent modification of stipulated conditions.—Where a county submitted the question of taking stock, subject to conditions, in a railroad, the conditions may be removed by a second submission of the entire question to the people. *Mercer County Sup'rs v. Hubbard*, 45 Ill. 139.

The conditions upon which a municipal subscription is voted to a railroad cannot be changed by a subsequent vote except by express statutory authority. *People ex rel. v. Waynesville Sup'r*, 88 Ill. 469, 21 Am. Ry. Rep. 339.

A subscription by a city to the capital stock of a railway company prior to the time the Ill. Constitution of 1870 took effect is subject to the conditions upon which the same was voted by the people of such city. *Eddy v. People ex rel.*, 127 Ill. 428, 20 N. E. Rep. 83.

After the present constitution took effect a municipal corporation had no power to make any new contract in respect to a corporate subscription in aid of a railway company, or to waive any condition upon which such subscription was voted before the constitution was adopted, or to extend the same for the performance of a material condition. *Eddy v. People ex rel.*, 127 Ill. 428, 20 N. E. Rep. 83. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 18 Am. Ry. Rep. 46; *affirming 7 Hun 499*.—DISTINGUISHED IN *Cherry Creek v. Becker*, 123 N. Y. 161. FOLLOWED

IN *People ex rel. v. Ft. Edward*, 70 N. Y. 28; *Wellsborough v. New York & C. R. Co.*, 76 N. Y. 182. QUOTED IN *People ex rel. v. Hutton*, 18 Hun (N. Y.) 116; *Negus v. Brooklyn*, 10 Abb. N. Cas. (N. Y.) 180, 1 Civ. Pro. 471, 62 How. Pr. 291.

Where a county has voted on a proposition to aid in the construction of a railroad, and certain conditions have been submitted to the voters, the company and the board of county commissioners cannot afterwards materially modify such conditions. *Douglas County v. Walbridge*, 38 Wis. 179.

An extension of time to complete the road, granted by the municipal board, is of no validity, because of its want of power to materially vary the contract authorized by the vote. *Clark v. Rosedale*, 70 Miss. 542, 12 So. Rep. 600.

In voting municipal aid to a railroad the power of the voters is exhausted when they vote, and any subsequent action on their part has no validity. Therefore, when aid is voted a company on certain conditions imposed, it is no excuse that the company failed to comply with the conditions "at the request and desire" of the inhabitants of the town. *State ex rel. v. Daviess County Court*, 64 Mo. 30.—FOLLOWED IN *Cass County v. Johnston*, 95 U. S. 360.

Under N. Y. Act of 1871, ch. 925, towns in voting subscriptions to railroad stock may impose terms as conditions precedent to making the subscription and issuing bonds, such as that the road should be located and constructed through the town; and where such conditions are imposed, the commissioners making the subscription cannot substitute other conditions. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 18 Am. Ry. Rep. 46; *affirming 7 Hun 499*.

The provision of the N. Y. Act of 1870 (ch. 507, Laws of 1870) authorizing a railroad company and commissioners to enter into a written agreement as to the delivery of bonds and the purposes for which they were to be used gave the commissioners no authority after the act of 1871 went into effect to make any such agreement, where such a condition precedent had been imposed, until it was complied with. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 18 Am. Ry. Rep. 46; *affirming 7 Hun 499*.

Prior to the adoption of the Ill. Constitution of 1870 a proposition to subscribe \$100,000 to the stock of a railway company, upon condition that the company's road

should be located through the county, and its construction commenced within nine months and completed by the first day of June, 1872, was submitted to a vote of the people of the county and carried. In Feb., 1871, the county board, by an order, extended the time for commencing the work on the road to Jan. 1, 1874. On Nov. 12, 1877, the county board made another order, under which the bonds were issued, but the work on the road was not commenced before Jan., 1877, and not completed before Nov. 1, 1879. *Held*, that the county board had no authority to extend the time of commencing and completing the road, and that the bonds so issued upon the county's subscription were void, and a tax levied to pay interest on them illegal. *Richeson v. People ex rel.*, 115 Ill. 450, 5 N. E. Rep. 121. *Eddy v. People ex rel.*, 127 Ill. 428, 20 N. E. Rep. 83.

243. Use of other road to complete line.—Where the real object of a city subscription to railroad stock is to obtain railroad connection between certain towns, the company does not forfeit the subscription by adopting a section of another road already built, nor by making a change in the route, for a few miles, from the one originally proposed. *Stockton & V. R. Co. v. Stockton*, 51 Cal. 328, 12 Am. Ry. Rep. 85. —DISTINGUISHING *Virginia & T. R. Co. v. Lyon County Com'rs*, 6 Nev. 71.—APPROVED IN *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97. DISTINGUISHED IN *Lamb v. Anderson*, 54 Iowa 190.

A township voted a subscription to a railway with a condition that it was not to be paid until the company should run its first locomotive "over its projected line of road, and from Pekin, Ill., or from Morris, Ill., through Clayton township." *Held*, that the running of the company's trains over the road of another company for the distance of five or six miles, under a lease from such other company, liable to be terminated upon one year's notice, and by that means connecting the township with Pekin, is not a substantial compliance with the condition of the subscription. *People ex rel. v. Clayton*, 88 Ill. 45, 21 Am. Ry. Rep. 281.

Where a tax is voted payable on condition that the road is constructed to a certain point, such condition is not fulfilled by constructing a part and purchasing the remainder. *Meeker v. Ashley*, 56 Iowa 188, 9 N. W. Rep. 124.

A condition in a subscription by a city to railroad stock requiring the road to be completed, ironed, and equipped by a certain time to the city, and to have the same open for transportation of passengers and freight, is substantially complied with by completing the road to a certain point on another road, and contracting for the use of the other road, by which it runs its trains regularly to the city. *State ex rel. v. Clark*, 23 Minn. 422. *Young v. Webster City & S. W. R. Co.*, 75 Iowa 140, 39 N. W. Rep. 234.

XI. DONATIONS; BONUSES.

244. In general.*—The provisions in the charter of the Illinois Southeastern railroad that no town could donate to the company an amount exceeding \$30,000 was removed by the amendatory act of Feb. 24, 1869. *Pana v. Bowler*, 12 Am. & Eng. R. Cas. 563, 107 U. S. 529, 2 Sup. Ct. Rep. 704.

In ascertaining the amount of donations already made by a county to railroads or other works of internal improvement, for the purpose of seeing whether another proposed donation, aggregated with those already made, would be within the limit, unpaid interest due on such previous donation should not be considered. *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. Rep. 5.

The Tex. Act of April 12, 1871, which empowered municipal corporations to make donations to railway companies, practically became a part of the charters of cities and towns which were granted prior to the passage of that act. *Madry v. Cox*, 73 Tex. 538, 11 S. W. Rep. 541.

Subsection 4 of section 471 of 36 Vict. c. 48 must not be construed as authorizing aid only to such railroads as are mentioned in subsection 1 of that section. *Canada Atl. R. Co. v. Ottawa*, 8 Ont. 183.

At a meeting of a township council the reeve, who was in the chair, refused to put a motion which had been duly made and seconded to authorize a bonus of \$50,000 to a railway, whereupon the members voted on the motion without its being put by the chairman, and a majority were in favor of the motion. *Held*, that the reeve had no right to refuse to put the motion, and that the vote was proper and effectual. *Brock v. Toronto & N. R. Co.*, 17 Grant's Ch. (U. C.) 425.

* Donations or loans of credit by municipal corporations to railroads, in general, see note, 59 AM. DEC. 783.

Upon the petition of the freeholders of a township to the board of county commissioners, setting forth that a certain railroad company was duly organized, that the line of the railroad of the company ran through the township, and the construction of the railroad would be of great benefit to the township, and praying an appropriation of a certain sum of money, not exceeding two per cent. of the taxable property of the township, to aid in the construction of the railroad, the said board ordered an election for the purpose of taking the votes of the legal voters of the township upon the subject of appropriating said sum by said township to aid in the construction of said railroad; and, upon the election so ordered resulting in favor of the appropriation, the board, at the session at which it determined the amount to be charged for county purposes for the year 1873, ordered that a tax be levied, of a certain per cent., to be collected on all taxable property of the township, in all respects as other taxes are collected for state and county purposes. *Held*: (1) that, the intention being manifest to raise the money before the subscription or donation should be made, the action of the board was not in violation of section 6, article 10, of the Ind. constitution, prohibiting subscriptions unless the same be paid for at the time; (2) that it sufficiently appeared by the petition that the aid was to be given for the construction of the railroad in the township (*quare*, whether money given by a township in aid of the construction of a railroad must be expended upon that part of the road lying in that township); (3) that, although the road was already constructed through the township and the cars were running thereon, if the road was not thoroughly ballasted, and it did not appear that the full amount of aid proposed was not required to complete the road through the township, the question was not raised whether or not the aid was authorized for the construction of the road in the township; (4) that the prayer of the petition was in conformity with the statute requiring the vote "to be taken upon the subject of appropriating money by such county or by such township for the purpose of aiding in the construction of such railroad as prayed for in said petition," and that the mode of the appropriation of the money, by subscription or by donation, need not be specified in the petition or the order of the board, or be sub-

mitted to the vote; (5) that the intention was sufficiently expressed to levy the tax for the year 1873. *Petty v. Myers*, 49 Ind. 1.

245. Public character of enterprise.—In the eye of the law railroads are modern public highways, created to serve public uses, and, for public purposes, enjoy privileges and franchises which partake of the nature of sovereignty. A donation of money or bonds for the purpose of securing the construction of a railroad is a donation for a public purpose, and the legislature may authorize a municipal corporation to issue its bonds to a company for such a purpose and to levy and collect taxes to pay the same. *Davidson v. Ramsey County Com'rs*, 18 Minn. 482 (*Gil.* 432).—REFERRING TO *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Meyer v. Muscatine*, 1 Wall. 384; *Stewart v. Polk County Sup'rs*, 30 Iowa 9.

Where a railroad is owned by a private corporation, with the right of eminent domain, the "public use" consists in the right of the public to the carriage of persons and property for a proper consideration, and in the power of the state to control the franchise and limit the tolls. But such "public use" will not support taxation to enable a county to make a donation to such a corporation. *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167.—DISAPPROVED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479. NOT FOLLOWED IN *Northern Pac. R. Co. v. Roberts*, 42 Fed. Rep. 734. QUOTED IN *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

246. Donation of swamp lands.—The charter of the Mt. Vernon R. Co., passed Feb. 13, 1855, provided that any county through which that road might run, and every county through which any other railroad might run with which the Mt. Vernon railroad might be joined, connected, or intersected, were authorized to aid in the construction of the same. In 1859 the company issued certain construction bonds, to secure which the county of Wayne conveyed its swamp and overflowed lands in trust. The railroad did not, and could not under its charter, run through Wayne county, nor did any other railroad run through that county with which that road was joined, connected, or intersected. *Held*, that the condition upon which the county might aid in the construction of the railroad did not exist, and the deed of trust executed for that purpose was made without power or author-

ity, and was therefore void. (Dickey, J., dissenting.) *Scates v. King*, 110 Ill. 456.

A county and a railroad company entered into a contract reciting that the county sold to the company its swamp lands at the price of \$1.25 per acre, that a deed of the lands to the company had been placed in escrow, that the company proposed to do certain work, to drain, reclaim, and protect said land for a sum equivalent to the price of the land, and that said proposed work would open up for settlement and cultivation a large portion of the southern part of the county, and also promote the health of the county by a drainage of said lands. The contract further provided that, in consideration of the premises and other valuable considerations, the county agreed to pay the company the price of the lands so sold, and that a deed therefor had been placed in escrow, to be delivered to the company on the completion of the work. The company on its part agreed to build a levee across the swamp of a specified width and to operate a railroad thereon, and also to open continuous ditches along said levee on both sides, if necessary to drain the land, the company to have the right to leave openings in the embankment wherever it saw fit, putting trestle-work in place thereof, and agreeing to drain the surface water when necessary into the places where it erected trestle-work. Held, that the contract was merely a donation of the lands to the company in consideration of building and operating its road, and not a contract to deed swamp lands as payment for reclaiming them. *Cape Girardeau S. W. R. Co. v. Hatton*, 102 Mo. 45, 14 S. W. Rep. 763.

247. Delegation of authority by legislature.—Subscriptions for stock equal with donations are outside of the ordinary purposes of municipal corporations, and the design of both is the same. It is to aid the construction of a public highway, and the promotion of a public use. The inducement to make a subscription may be greater than the inducement to make the donation, but in both the warrant for the exercise of the power is the same. While it is not competent for the legislature to pass a mandatory statute requiring a municipal corporation to contribute to the construction of a railroad, a merely enabling act which authorizes the issue and donation of bonds, if approved by a popular vote, is not open to this objection, and is a constitu-

tional exercise of the legislative power. *Queensbury v. Culver*, 19 Wall. (U. S.) 83.—REAFFIRMING *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667; *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. 678.—*Harter Tp. v. Kernochan*, 3 Am. & Eng. R. Cas. 82, 103 U. S. 562. *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. (U. S.) 678.—DISAPPROVING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 188.—APPLIED IN *Duanesburgh v. Jenkins*, 57 N. Y. 177. DISTINGUISHED IN *People ex rel. v. Batchellor*, 53 N. Y. 128. FOLLOWED IN *Pine Grove Tp. v. Talcott*, 19 Wall. 666. REAFFIRMED IN *Queensbury v. Culver*, 19 Wall. 83.

Counties, cities, towns, and townships might, under the Ill. Constitution of 1848, be empowered by general law, by their charters, or the charters of railroad companies, to subscribe for stock in such companies, or even to make donations to aid in constructing railroads. *Virden v. Allan*, 107 Ill. 505.

A legislative grant of power to a township to make donations to railroads and to issue bonds for the same is not invalid because it fails to provide for determining the amount and terms of the donation, or the amount of bonds to be issued, their terms, and the manner of their execution. *Niantic Sav. Bank v. Douglas*, 5 Ill. App. 579.

Under the Ind. Act of May 4, 1869, "to enable cities to aid in the construction of railroads," etc. (1 Rev. St. 1876, p. 299), a city incorporated under the general laws of the state may, upon the petition of a majority of resident freeholders, make a donation of bonds of the city to a railroad company, to aid the latter in constructing its railroad through or into the corporate limits of such city. *Wilkinson v. Peru*, 61 Ind. 1.

Where a city has donated bonds in aid of a railway, under Ind. Act of 1869, on a petition of a majority of its resident freeholders, and a tax is levied to pay interest on the bonds and to create a sinking fund to pay the principal, a taxpayer can only enjoin the collection of the tax on grounds constituting a valid legal defense to the payment of the bonds in the hands of the present holders. *Wilkinson v. Peru*, 61 Ind. 1.

The term "donation," as used in the above statute, means an absolute gift or grant made without condition or consideration. *Wilkinson v. Peru*, 61 Ind. 1.

A city has authority under the Neb. stat-

ute to donate to one or more railroads or other works of internal improvement its bonds not to exceed in the aggregate ten per cent. of the assessed valuation; and bonds issued for waterworks owned by the city or other purposes are not to be computed in making up the aggregate which the city may donate. *State ex rel. v. Babcock*, 19 Neb. 230, 27 N. W. Rep. 98.—DISTINGUISHING *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310. FOLLOWING *Union Pac. R. Co. v. Colfax County Com'rs*, 4 Neb. 450.

The authority for a city to issue bonds to aid in the construction of railroads or other works of internal improvement is expressly conferred by section 1, ch. 45, Neb. Comp. St. The word "aid" as used in the statute may include donations. *State ex rel. v. Babcock*, 19 Neb. 230, 27 N. W. Rep. 98.

One section of a railroad charter provided that towns, cities, and counties might either subscribe or donate money to the road and issue bonds. The next section provided that a certain county might subscribe not to exceed \$80,000, but said nothing about donations. The county subscribed \$80,000 and donated \$75,000. *Held*, in an action on coupons from the donated bonds, that the county had authority to issue them; but if it be conceded it had not, the coupons were collectable where it appeared that the donation was authorized before the subscription. *Moultrie County v. Fairfield*, 7 Am. & Eng. R. Cas. 194, 105 U. S. 370.

The charter of a railroad company authorized the raising by towns of money by tax and subscription to the capital stock of the corporation, and issuing bonds in payment of the same, upon an affirmative vote, and a subsequent section of the charter provided that donations might be made and bonds issued in the manner "hereinbefore provided." *Held*, that the preceding sections relating to subscriptions were referred to and adopted as the proper mode for making a donation, and that the statute was to be regarded as meaning the same thing as if the power to make donations had been inserted in the preceding sections relating to subscriptions. *Douglas v. Niantic Sav. Bank*, 3 Am. & Eng. R. Cas. 54, 97 Ill. 228.

248. Power to make donation must be expressly granted.—The rule is well settled that there is no inherent power in municipal corporations to aid in

the construction of railroads, either by becoming subscribers to the capital stock of the railroad company or by making donations to such company of money or bonds, but such power can be given only by express legislative provision, and the authority, when conferred, must be strictly pursued. *Choisser v. People ex rel.*, 140 Ill. 21, 29 N. E. Rep. 546. *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244.

Where a subscription by a county of \$100,000 to the capital stock of a railroad company is authorized by a vote of the people, if the company enters into a contract with the county board by which the latter sells its stock to the company for \$30,000 of its bonds, and issues only \$70,000 of bonds, this will amount to a donation by the county of \$70,000 of its bonds to the railroad company, and such bonds, as between the county and the railroad company, will be void. *Sampson v. People ex rel.*, 140 Ill. 466, 30 N. E. Rep. 689. *Choisser v. People ex rel.*, 140 Ill. 21, 29 N. E. Rep. 546.—FOLLOWED IN *Post v. Pulaski County*, 49 Fed. Rep. 628, 9 U. S. App. 1, 1 C. C. A. 405.

A statute empowered a city to loan its credit to a railroad company by issuing bonds. Subsequently the statute was amended so as to authorize the mayor and city council to execute and deliver the whole or any part of the bonds which had been voted to the company, "upon such terms as may be agreed on by the parties." *Held*, that this did not authorize a donation of the bonds, but merely gave the municipal officers unlimited discretion in fixing the terms upon which the bonds should be delivered. *Rogan v. Watertown*, 30 Wis. 259, 8 Am. Ry. Rep. 20.—FOLLOWING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167.

An act incorporating a municipality gave it all the powers of townships under the general municipal law, and in other sections authorized the council to make assessments for necessary expenses, and for the establishment of a lock-up house, and the salary of a constable. *Held*, that this language did not prohibit the council from passing a by-law granting a bonus to a railway company, as the right of doing so when exercised rendered the payments under it necessary expenses. The fact that the railway intended to be benefited was not named, and was really not in existence when the vote on the question was to be taken, con-

stituted no objection to the passing of a by-law for the purpose. *Vickers v. Shuniah*, 22 *Grant's Ch. (U. C.)* 410.

249. Statutory provisions to be strictly pursued.—Under a charter of a railway authorizing any town to donate any sum not exceeding \$30,000 upon an affirmative vote, and providing that no election should be held until the company should file with the county and town clerks a proposition to the inhabitants of the town, and publish the same, such proposition is a necessary preliminary step to calling an election, and without such initiatory step the donation could not be sustained. *Lippincott v. Pana*, 92 *Ill.* 24.—FOLLOWED IN *Fairfield v. Gallatin County*, 100 *U. S.* 47.

By the Ill. Constitution of 1870 all municipal subscriptions and donations are absolutely prohibited except such as were authorized under prior laws by a vote of the people, and these must be executed strictly according to the terms in which they are authorized. It must be upon the terms and conditions as voted. A vote authorizing a subscription will not authorize a donation of municipal bonds. *Choisser v. People ex rel.*, 140 *Ill.* 21, 29 *N. E. Rep.* 546.

The effect of the statute 34 *Vict. c. 48 (O)*, apart from any effect it might have of recognizing the existence of the Grand Junction railway company, was not to legalize the by-law of Peterborough granting a bonus in favor of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company; and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants. *Grand Junction R. Co. v. Peterborough County*, 8 *Can. Sup. Ct.* 76; *affirming* 6 *Ont. App.* 339. *Canada Atl. R. Co. v. Ottawa*, 8 *Ont.* 183. See also, *Canada Atl. R. Co. v. Ottawa*, 12 *Can. Sup. Ct.* 365; *affirming* 12 *Ont. App.* 234, which affirms 8 *Ont.* 201.

250. Donation not authorized by power to subscribe.—A statute or charter of a railroad company authorizing the counties, cities, etc., through or near which the railroad may run to subscribe to the capital stock of such company on certain restrictions and conditions will not authorize a donation by a municipal corporation to aid in the construction of a railroad. The power to aid in building a railroad by

subscribing for a part of its capital stock does not include or even imply the power to make a donation. *Choisser v. People ex rel.*, 140 *Ill.* 21, 29 *N. E. Rep.* 546.

Where a vote of the people of a county authorized the county commissioners to subscribe for stock in a railroad company—*held*, that such authority did not empower the commissioners to donate the bonds of the county to a railroad company. *Hamlin v. Meadville*, 6 *Neb.* 227.

251. Choice between donation and subscription.—Under the statutes of Indiana, the mere fact that the inhabitants of a township have subscribed to stock in aid of the construction of a railway does not entitle the company to demand the money subscribed as a donation; but the taxpayers have a right to determine, by their petition and their votes, whether the aid voted shall be by way of taking stock in the company or by way of donation. *Hamilton County Com'rs v. State ex rel.*, 36 *Am. & Eng. R. Cas.* 210, 115 *Ind.* 64, 4 *N. E. Rep.* 589, 17 *N. E. Rep.* 855.—DISTINGUISHING *Scott v. Hansheer*, 94 *Ind.* 1; *Jussen v. Lake County Com'rs*, 95 *Ind.* 567; *Marion County Com'rs v. Center Tp.*, 105 *Ind.* 422; *Mount Vernon v. Hovey*, 52 *Ind.* 563.

252. Constitutional inhibitions and restrictions.—Under the Colo. Constitution, art. 11 § 2, neither the state, nor any county, city, town, township, or school district, can make any donation or grant to, or in aid of, or become a subscriber or shareholder in any corporation or company. *Colorado C. R. Co. v. Lea*, 5 *Colo.* 192.

The Ill. Constitution of 1870 took away the power of municipalities to issue bonds in aid of railroads. A power granted in 1867 to make a donation to a railroad was taken away by the constitution of 1870, and bonds issued after the latter date are void. *Concord v. Portsmouth Sav. Bank*, 92 *U. S.* 625.—OVERRULED IN *Fairfield v. Gallatin County*, 100 *U. S.* 47; *Enfield v. Jordan*, 119 *U. S.* 680.

The object of the proviso to the section of the new constitution relating to municipal subscriptions was to save such subscriptions and donations voted in aid of railroads and private corporations prior to its adoption. The saving clause, by construction, embraces donations as well as subscriptions, and places them upon the same footing. *Chicago & I. R. Co. v. Pinckney*, 74 *Ill.* 277.—DISTINGUISHED IN *Middle-*

port v. Aetna Life Ins. Co., 82 Ill. 562. FOLLOWED IN *Fairfield v. Gallatin County*, 100 U. S. 47; *Moultrie County v. Fairfield*, 105 U. S. 370.

The provision in the Neb. constitution requiring the secretary and auditor of state to indorse on bonds issued as a donation to a railroad or other work of internal improvement that such bonds were "issued pursuant to law" requires no legislation to carry it into effect, but it is the duty of such officers in a proper case to make such indorsement. The provision applies to all bonds issued for that purpose, and not alone to the five per cent. in excess of the ten per cent. first issued. *State ex rel. v. Babcock*, 19 Neb. 230, 27 N. W. Rep. 98.

A conveyance of its land by a county as a donation to a railroad company is void; and the Wisconsin legislature, having no power to authorize such donation in the first instance, cannot by a subsequent statute validate the conveyance. *Ellis v. Northern Pac. R. Co.*, 77 Wis. 114, 45 N. W. Rep. 811.—FOLLOWING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167.

The latest decision of a state supreme court, holding that the citizen might constitutionally be taxed and the proceeds given as a gratuity or donation to aid in the building of the roads of private railway companies, will be followed in the federal courts, although that decision overrules a long and settled course of adjudication by the same tribunal the other way, and the prior decisions are regarded as sound expositions of the constitution of the state. *King v. Wilson*, 1 Dill. (U. S.) 555.—QUOTING *Smith v. Henry County*, 15 Iowa 385; *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175; *Stewart v. Polk County Sup'rs*, 30 Iowa 9. QUOTING AND REVIEWING *McClure v. Owen*, 26 Iowa 243. REVIEWING *Ten Eyck v. Keokuk*, 15 Iowa 486; *Chamberlain v. Burlington*, 19 Iowa 395; *Hanson v. Vernon*, 27 Iowa 28.—APPROVED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.

A state constitution provided that counties might make donations to railroads not to exceed 10 per cent. of their property on a majority vote, and not to exceed 15 per cent. on a two-thirds vote. The statutes of the state provided that such donation might be voted not to exceed 10 per cent. Held, that the constitution did not authorize a donation of over 10 per cent. without legislative authority, even though the people

gave the constitutional two-thirds vote in favor of the same. *Dixon County v. Field*, 15 Am. & Eng. R. Cas. 595, 111 U. S. 83, 4 Sup. Ct. Rep. 315.—APPROVING *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

253. Popular vote necessary.—Donations may be made by counties and other municipalities in Illinois to railroads, after the adoption of the constitution of 1870, where the same had been authorized by a statute and a vote of the people before the adoption of said constitution. *Fairfield v. Gallatin County*, 100 U. S. 47, 21 Am. Ry. Rep. 438.—FOLLOWING *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Lippincott v. Pana*, 92 Ill. 24; *Chicago & I. R. Co. v. Pinckney*, 74 Ill. 277. OVERRULING *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625.—FOLLOWED IN *Moultrie County v. Fairfield*, 105 U. S. 370; *Enfield v. Jordan*, 119 U. S. 680.

A provision in the Ill. Constitution of 1870 takes away the power of a municipal corporation to subscribe or donate moneys to the stock of railroads except "subscriptions" already authorized by a vote. Held, following the state court, that the word "subscriptions" embraced also "donations." *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358.—FOLLOWING *Fairfield v. Gallatin County*, 100 U. S. 47. OVERRULING *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625.

In order to enable a city council in Indiana to make a donation to a railroad company it is a necessary condition precedent that a majority of all the resident freeholders of the city, without limitation or exception, should sign the petition for that purpose. *Adams v. Mayor, etc., of Kokomo, (Ind.)* 12 Am. & Eng. R. Cas. 585.

The signing of such a petition by a majority of all the resident freeholders, not including minors, idiots, insane persons, and married women, is not sufficient to authorize the city council to vote such a donation. *Adams v. Mayor, etc., of Kokomo, (Ind.)* 12 Am. & Eng. R. Cas. 585.—REVIEWING *NoBLE v. Vincennes*, 42 Ind. 123.

Under our law, public donations to aid in the building of railroads can be made only by the people themselves, by means of an election properly called and held. *Spurck v. Lincoln & N. W. R. Co.*, 14 Neb. 293, 15 N. W. Rep. 701.

In an action to enjoin the issuing of cer-

tain bonds of a city, to be donated to a railroad company upon completion of its road, it appeared that the whole question had not been submitted to the electors of the city, and that no vote had been submitted or adopted for the payment of the principal at any time. *Held*, that an injunction was properly granted. *Cook v. Beatrice*, 32 Neb. 80, 48 N. W. Rep. 828.—DISTINGUISHING *Fremont Bldg. Assoc. v. Sherwin*, 6 Neb. 48.

254. Power to make conditional donations.—Under a statute which authorizes a municipality to pledge its aid to a railroad "by loan or donation, with or without conditions," a resolution of a city voting aid on condition that if any of its citizens should subscribe and pay for any stock of the railroad the latter should deliver to such persons the bonds of the city to that amount, * * * and that its citizens should have the right to subscribe to its stock for a certain time, is a loan or donation within the meaning of the statute. *Taylor v. Ypsilanti*, 12 Am. & Eng. R. Cas. 549, 105 U. S. 60.

A statute which grants to a city rights and powers unknown to the common law, as power to donate the corporate funds in aid of a railroad, should be strictly construed. *Indiana N. & S. R. Co. v. Attica*, 56 Ind. 476.—DISTINGUISHED IN *Bittinger v. Bell*, 65 Ind. 445.

Ind. Act of May 4, 1869, authorized cities to aid in the construction of railroads, either by subscribing to their stock or by making a donation thereto. The term "donation" as used in the statute means an absolute gift or grant, without any condition or consideration. Under it a city is not authorized to make a contract to aid a company by delivering to it a certain sum in money or bonds, in consideration that the company agrees to erect and maintain its machine shops in or near the city. Such agreement is *ultra vires*, and cannot be enforced by the company, even after it has built its road on the faith of such agreement. *Indiana N. & S. R. Co. v. Attica*, 56 Ind. 476.—REVIEWED IN *Goddard v. Stockman*, 74 Ind. 400.

Under an article in the warrant for a town meeting "to see what sum the town will vote to raise and appropriate as a gratuity to" a railroad, "said road to be completed on or before" a day named, the town may lawfully vote a gratuity upon condition that the road be completed in a

reasonable time. *Sawyer v. Manchester & K. R. Co.*, 62 N. H. 135, 13 Am. St. Rep. 541.

By 33 Vict. c. 36, § 7, municipalities were authorized to aid a railroad by way of bonus, subject to such restrictions and conditions as might be mutually agreed upon between the municipality and the directors of the railroad; and by 34 Vict. c. 41, amending this act, the county was authorized on the petition of certain townships and villages of the county to grant such aid, and issue the debentures of the county, payable by special rates and assessments in such townships. *Held*, that the powers given by the first act to agree as to the conditions on which such aid should be granted would apply to aid granted under the subsequent act. *Haldimand County v. Hamilton & N. W. R. Co.*, 27 U. C. C. P. 228.

255. Effect of performance of conditions.—Where a donation by a county to a railroad had been voted and the donation made on the books of the railroad previous to 1870, and the company had by that time partly done the work required by the county as a condition, this created a contract between the railroad and the county; and the bonds issued after 1870 to carry out that contract are not invalidated by the provisions of the Illinois Constitution of 1870 forbidding such subscriptions. *Clay County v. Society for Savings*, 5 Am. & Eng. R. Cas. 170, 104 U. S. 579. To same effect see *State ex rel. v. Lake City*, 25 Minn. 404.

A railroad company having obtained a bonus from the plaintiffs upon condition that its machine shops should be "located and maintained" within the city limits did so erect and maintain them for some years, until, authorized by legislation, it amalgamated with and lost its identity in another company, all the engagements and agreements of the amalgamated companies being preserved. The amalgamated railroad was afterwards leased in perpetuity to a much larger railroad company, who removed the shops outside the city limits. *Held*, that, although all engagements and agreements made by the original company were preserved, the amalgamation and leasing in perpetuity by the larger company of the smaller under the authority of parliament imposed new relations upon the amalgamated road which worked a change in the policy as to the site and size of the machine shops, and that the engagement had been

satisfied by the maintenance of the said shops by the original company during its independent existence. *Toronto v. Ontario & Q. R. Co.*, 22 Ont. 344.—QUOTING Nottawasaga Tp. v. Hamilton & N. W. R. Co., 16 Ont. App. 67; *Texas & P. R. Co. v. Marshall*, 136 U. S. 393. REVIEWING *Wallace Tp. v. Great Western R. Co.*, 3 Ont. App. 44; *Geauyenu v. Great Western R. Co.*, 3 Ont. App. 412.

256. Completion of road as a condition precedent.*—A general order of the board of commissioners to invest a donation voted to aid in the construction of a railroad in the stock of such company, and the approval by said board of an assignment of an unpaid balance of such donation, operate as a subscription to the stock of the company. *State v. Delaware County Com'rs*, 92 Ind. 499.—DISTINGUISHED IN *Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64.

The failure of such railroad company to complete its road within three years from the time such donation is made does not work a forfeiture of such donation, in the absence of an order of the county commissioners made in pursuance of the act of March 11, 1875. *State v. Delaware County Com'rs*, 92 Ind. 499.

Where a donation was voted by a township under the Ind. Act of 1869, to aid in the construction of a railroad, and there was no forfeiture under section 18 of that act, nor under the act of 1873 by which such section was repealed, nor under any subsequent act, the railroad company is entitled to the money donated, although its road was not completed until 1880. *Marion County Com'rs v. Center Tp.*, 105 Ind. 422, 2 N. E. Rep. 368, 7 N. E. Rep. 189.—DISTINGUISHED IN *Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64.

Where a municipality passes a by-law providing that upon the completion, etc., of a certain railway in a certain manner within a certain time the city would give the company a certain bonus—*held*, that the certificate of the engineer of the substantial completion, etc., of the works specified by the by-law established a sufficient performance to satisfy the requirements of the by-law,

* Contract to make a donation upon the completion of a railroad. How far the completion is a condition precedent, see 24 AM. & ENG. R. CAS. 350, *abstr.*

coupled with the fact that the road is actually running. *Bickford v. Chatham*, 14 Ont. App. 32; *affirming* 10 Ont. 257; *appeal dismissed* in 16 Can. Sup. Ct. 235.

257. Specific performance of conditions.—A town agreed to pass a by-law granting a bonus to a company subject to the performance of certain specified conditions. The by-law subsequently approved by the ratepayers and passed by the town council did not contain all the conditions of the agreement. In an action to compel the delivery of debentures for the amount of the bonus the town pleaded non-performance of the conditions, and prayed specific performance thereof by the plaintiffs. *Held*, per Ritchie, C.J., Strong, Fournier, and Henry, JJ., *Taschereau* and Gwynne, JJ., *contra*, that the title to the debentures depended upon prior performance of the conditions in the by-law alone, and, they having been complied with, the debentures should issue; but, per Ritchie, C.J., Strong and Henry, JJ., Fournier, J., *contra*, that specific performance was not an appropriate remedy in such a case, and the defendants could only claim damages for non-performance. *Bickford v. Chatham*, 16 Can. Sup. Ct. 235; *dismissing appeal from* 14 Ont. App. 32, *which affirms* 10 Ont. 257.—DISTINGUISHING *Wilson v. Northampton & B. J. R. Co.*, 9 Ch. 279.

The act incorporating the railroad company contained provisions respecting bonuses granted to it by municipalities not found in the Municipal Act. *Held*, that such special act was not restrictive of the Municipal Act, and it was only necessary that the provisions of the latter should be followed to pass a valid by-law granting such a bonus. *Bickford v. Chatham*, 16 Can. Sup. Ct. 235; *dismissing appeal from* 14 Ont. App. 32, *which affirms* 10 Ont. 257.

258. Using road of another company.—A donation note was given to a company in consideration of and conditioned upon the proposed construction from Toledo, Ohio, to Marshall, Michigan, and the erection of repair shops at the last-named city. The company built its road to Dundee, and secured the right to use the track of another road from Dundee to Toledo in common with the owner. The road over which such rights were thus secured was to remain in the possession and under the control of its owner, and all persons employed by either road were to be under the direction of, and

subject to suspension or dismissal by, such owner, etc. *Held*, that while it was not necessary that the payee in the note should literally build the road to Toledo, it was evidently expected that it should have a road under its own control covering the entire distance, and its repair shops at Marshall for the whole road, the improvement being contemplated as a permanent one. *Brown v. Dibble*, 30 *Am. & Eng. R. Cas.* 241, 65 *Mich.* 520, 32 *N. W. Rep.* 656.

Defendant gave a donation note "payable one day after the grading shall be done and the ties on the ground sufficient for the roadbed of the Owosso and Northwestern railroad, between Owosso and Elsie." This road was not built but afterwards another company built a railroad between the points named, "partly on the old line, and partly on a shorter and more direct line," and the payees, who were contractors on said old road, sued on the note. *Held*, that the construction of the roadbed mentioned in the note was a material part of the contract, without which the defendant was not liable, and judgment should have passed in his favor. *Sickels v. Anderson*, 63 *Mich.* 421, 30 *N. W. Rep.* 78.—**DISTINGUISHING** Toledo & A. A. R. Co. v. Johnson, 55 *Mich.* 456.

250. Bonus to secure a depot.—The legislature of Mississippi has power—subject to the constitutional restriction that two thirds of the qualified voters of a town in the state, at a special election or regular election to be held in such town, shall assent—to authorize a town to aid a railroad; and such aid may be given by issuing and delivering interest-bearing bonds, as a donation, to secure the permanent location in the town of a depot of the road. *New Orleans, St. L. & C. R. Co. v. McDonald*, 53 *Miss.* 240.—**QUOTED IN** Northern Pac. R. Co. v. Roberts, 42 *Fed. Rep.* 734.

260. Procured by bribery of voters.—Where a by-law granting a bonus to a railway company has been carried by the electors, a municipal council may refuse finally to pass the same because the passage of the by-law has been procured by bribery, and may set up such bribery in answer to an application for a mandamus. *In re Langdon & A. J. R. Co.*, 45 *U. C. Q. B.* 47.

Semble, that a mandamus should not be granted at the instance of any railway company or person to be benefited by such by-law, where a single act of bribery or corruption has been brought home to the applicant.

In re Langdon & A. J. R. Co., 45 *U. C. Q. B.* 47.—**APPROVING** *In re Stratford & H. R. Co.*, 38 *U. C. Q. B.* 113.

261. Location of road within municipal boundaries.—The order of the board of commissioners placing a special tax on the duplicate is conclusive as to the fact of the location of the road within the township, and cannot be questioned in a proceeding for an injunction. *Nixon v. Campbell*, 24 *Am. & Eng. R. Cas.* 605, 106 *Ind.* 47, 4 *N. E. Rep.* 296, 7 *N. E. Rep.* 258.

The legislature of Nebraska has power to authorize counties to donate money to a railroad outside of the county or state, or to donate the money directly to the railroad. *Chicago, B. & Q. R. Co. v. Otoe County*, 16 *Wall.* (U. S.) 667, 4 *Am. Ry. Rep.* 82.—**QUOTED IN** Hamlin v. Meadville, 6 *Neb.* 227. **REAFFIRMED IN** *Queensbury v. Culver*, 19 *Wall.* 83.

262. Forfeiture of donation.—The Indiana statute provides that "a failure on the part of the railroad company to commence work upon the railroad in said county within one year from the levying of such special tax," etc., "shall forfeit the rights of such company to such donation." *Held*, that the company must commence work in good faith, with the honest purpose of constructing the road within a reasonable time, taking into consideration the extent and character of the work to be done; and that to do work manifestly to evade forfeiture is not "to commence work" within the meaning of the statute. *Detroit, E. R. & I. R. Co. v. Bearss*, 39 *Ind.* 598, 10 *Am. Ry. Rep.* 382.

Ind. Act of 1869, so far as it relates to a forfeiture of a donation which has been voted to a railroad by a failure to complete the road within three years, is repealed by the act of Jan. 30, 1873, providing a different cause of forfeiture and the manner of taking advantage of the same. *Marion County Com'rs v. Center Tp.*, 105 *Ind.* 422, 2 *N. E. Rep.* 368, 7 *N. E. Rep.* 189.—**APPROVED AND FOLLOWED IN** *Nixon v. Campbell*, 24 *Am. & Eng. R. Cas.* 605, 106 *Ind.* 47.

Under *Ind. Act of Jan. 30, 1873*, there can only be a forfeiture when the county board, on the application of twenty-five freeholders and after notice, makes an order canceling the donation. *Marion County Com'rs v. Center Tp.*, 105 *Ind.* 422, 2 *N. E. Rep.* 368, 7 *N. E. Rep.* 189.

Such an order cannot be made until after

the expiration of three years from the placing of the tax upon the duplicate, and, if before that time the company should expend in the construction of its road in the township a sum equal to the donation, there can be no forfeiture. *Marion County Com'rs v. Center Tp.*, 105 Ind. 422, 2 N. E. Rep. 368, 7 N. E. Rep. 189.

The mere failure to locate, within a prescribed time, a railroad to which a public donation has been made is not, under existing statutes, a cause for forfeiture of the right to such donation, and where the road has actually been located and the required amount of money expended in its construction within the township, the collection of the special tax cannot be enjoined. *Nixon v. Campbell*, 24 Am. & Eng. R. Cas. 605, 106 Ind. 47, 4 N. E. Rep. 296, 7 N. E. Rep. 258.—APPROVING AND FOLLOWING *Marion County Com'rs v. Center Tp.*, 105 Ind. 422.

203. Consolidation after donation voted.—The common council of a city incorporated under the Indiana general law for the incorporation of cities, upon petition of a majority of the resident freeholders of the city, made an order for the donation of a certain amount in the bonds of the city to a railroad company, incorporated under the laws of the state, to aid in the construction of its railroad running into said city. Before the bonds had been actually issued the company was consolidated with another company, incorporated under the laws of an adjoining state, the consolidated company taking a new name; and afterwards, without further petition or further order of donation, the bonds of the city so ordered were issued and delivered to the consolidated company, being made payable to bearer, and reciting that they were issued by authority of the act of March 14, 1867, and in pursuance of the proper petition and order of the common council of said city, of a given date, making a subscription in bonds of said city to aid the railroad named in said petition and order, "now consolidated with and forming a part of" said consolidated company, giving its name; and afterwards said bonds were sold to a purchaser without notice, and the city for some years regularly paid the interest thereon. In a suit by a tax-payer of said city for an injunction, to restrain the collection of a certain amount of tax assessed against him for the payment of the interest on said bonds and to create a

sinking fund for the payment of the principal, no irregularity in the petition of the freeholders or in said order of the common council making the donation was shown, and no irregularity in the consolidation of said railroad companies was claimed. *Held*, that an injunction would not lie. *Mount Vernon v. Hovey*, 52 Ind. 563.—DISTINGUISHED IN *Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64.

In 1874 a county gave a bonus of \$65,000 to be used in the construction of a railway upon the condition that the company should remain "independent" for twenty-one years. In 1888 the company became in effect merged in the Grand Trunk R. Co. and ceased to be an independent line. *Held*, that there had been a breach of the condition entitling the plaintiffs to recover the whole amount of the bonus as liquidated damages. *Halton County v. Grand Trunk R. Co.*, 19 Ont. App. 252.

204. Alteration of route.—Alterations in the line of a road which do not change the terminal points nor materially affect the general route will not defeat the right of the company to a donation. *Marion County Com'rs v. Center Tp.*, 105 Ind. 422, 2 N. E. Rep. 368, 7 N. E. Rep. 189.

205. Liability of districts annexed to municipality after donation.—The donation made by the town of Bonham in 1873 to the Texas & Pacific railroad on a vote of its citizens, under the act of April 12, 1871, is valid and binding on the town. It was for the legislature to determine whether afterwards, when the town was incorporated as a city, its limits should be extended by charter, and this without regard to the wishes of those included by the extension. The property thus included by the extended limits becomes, in the absence of legislation to the contrary, subject to taxation for all municipal indebtedness existing before the limits of the municipal government were extended. *Madry v. Cox*, 73 Tex. 538, 11 S. W. Rep. 541.

206. Right to pay donation in bonds.—Where a statute authorizes the donation of money by a municipal corporation to aid in the construction of a railroad, and provides for levying a tax to raise the amount to be donated, the officers of the municipality cannot adopt any other mode of payment. Bonds issued by them for the purpose are void. *Middleport v. Etna Life*

Ins. Co., 82 Ill. 562.—EXPLAINED IN *Abington v. Cabeen*, 12 Am. & Eng. R. Cas. 581, 106 Ill. 200.

Where the voters of a town vote to make a donation in aid of a railroad, for which a tax is to be levied and the money paid to the company, it is a proposition entirely distinct from one to create a debt in respect to such donation, and a vote of that character will not be construed to authorize the issue of the bonds of the town for the amount so voted. *Schaeffer v. Bonham*, 95 Ill. 368, *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562. —FOLLOWED IN *Schaeffer v. Bonham*, 95 Ill. 368; *Fairfield v. Gallatin County*, 100 U. S. 47.

A railway charter authorized any incorporated city or town on the line of the proposed road to make donations to the company, not exceeding \$10,000, to be paid by immediate taxation, giving no power to issue bonds in payment, and an amendment to the charter named villages, counties, and townships as corporations to which power was given, on a vote of the people, to make donations to the proposed railroad, and to issue interest-bearing bonds in payment thereof. *Held*, that bonds issued by an incorporated town after the passage of the amendatory act of 1869, upon a vote for a donation to the company, were illegal and void, being issued without sanction of law. The word town, being omitted from the act authorizing the issue of bonds, cannot be supplied by judicial construction. *Welch v. Post*, 3 Am. & Eng. R. Cas. 158, 99 Ill. 471.

Under an authority to a town to vote a donation in aid of a railroad, and to levy and collect taxes to pay the same, or to vote such aid and to borrow money to pay the same, and to issue interest-bearing bonds to pay such loans, the company cannot be compelled to take bonds of the town in payment, nor can it compel the town authorities to issue bonds to it. *Chicago, D. & V. R. Co. v. St. Anne*, 101 Ill. 151.

County bonds in payment of a donation to a railroad, authorized in 1869, were not invalidated by the Ill. Constitution of 1870, taking away the power of municipalities to subscribe or donate money to railroads, but saving the right to issue bonds "authorized under existing laws by a vote of the people." *Moultrie County v. Fairfield*, 7 Am. & Eng. R. Cas. 194, 105 U. S. 370.—FOLLOWING *Chicago & I. R. Co. v. Pinckney*,

74 Ill. 277; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562; *Lippincott v. Pana*, 92 Ill. 24; *Fairfield v. Gallatin County*, 100 U. S. 47.

An Illinois town on Nov. 20 1869, voted a donation to a railroad, but said nothing about issuing bonds. In 1870 a new constitution was adopted taking away the power of municipalities to subscribe or make donations to railroads, except that subscriptions or donations already voted might be completed. In 1871 the town made the donation and issued its bonds for the amount. *Held*, that if it ever possessed the power to issue bonds it was taken away by the new constitution, as the vote did not authorize the issue of bonds. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937. —FOLLOWING *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 568; *Aspinwall v. Daviess County Com'rs*, 22 How. (U. S.) 364; *Wadsworth v. Eau Claire County Sup'rs*, 102 U. S. 534.

In an action by the state, on the relation of the president of a railroad company, against the mayor and common council of a city, for a mandate compelling the issue and delivery to such company of a certain amount in bonds of such city, the complaint alleged that a petition was presented to defendants by a majority of the resident freeholders of such city representing that such company had been organized for the purpose of constructing a railroad from a certain point to such city and asking the common council "to make a donation to said company of" a sum specified, to aid "in the construction of said railroad, to be paid in the bonds of said city, within such time, and at such rate of interest, as" the common council should "deem proper"; that, upon the report of a committee of the common council that a majority of such freeholders had signed the petition, but without adopting such report, a resolution was adopted by the common council, declaring that such donation should be made, and directing that an ordinance making the same should be prepared; that such ordinance had been defeated; and that such railroad had been completed. A copy of the petition, and also of the proceedings of the council, were made exhibits. *Held*: (1) that the complaint showed a *prima facie* case for allowing a writ of mandate; (2) that, no terms upon which such bonds should issue, and no rate of interest thereon, having been

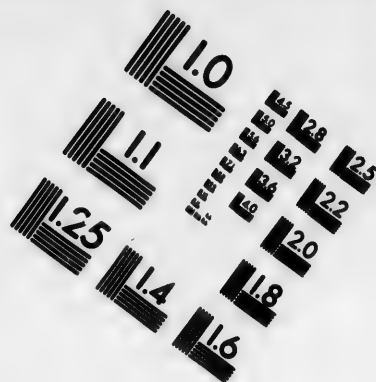
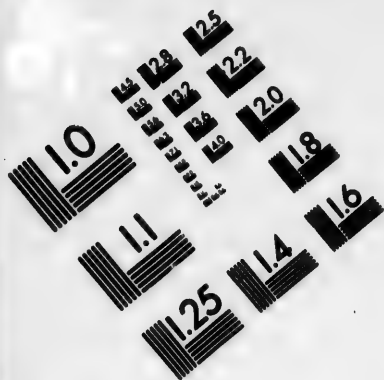
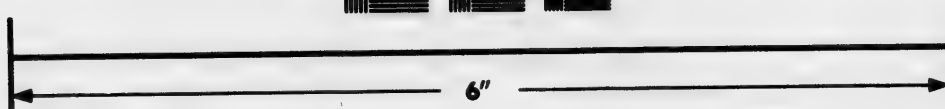
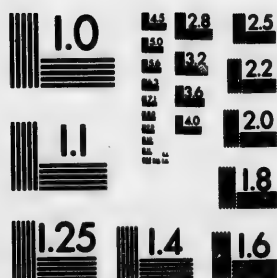


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specified in the petition, it might be construed as asking the issue of a single bond for the whole amount without interest, the council having no power to fix a rate of interest. *Mayor, etc., of Kokomo v. State ex rel.*, 57 Ind. 152.

The fact that at the time such petition was presented, and thence until the commencement of the action for a mandate, one of the members of the common council had been a stockholder, director, and officer of such railroad company did not disqualify him to act upon the petition, or the common council to pass an ordinance making the donation, and constitutes no defense to the action. *Mayor, etc., of Kokomo v. State ex rel.*, 57 Ind. 152.

The action of the common council in adopting a resolution declaring that the donation petitioned for should be made does not estop the defendants in such action from denying that such petition had been signed by a majority of the resident freeholders. *Mayor, etc., of Kokomo v. State ex rel.*, 57 Ind. 152.

The defendant in such action answered that the signatures to such petition had been procured by fraud, in that the petition had been signed in blank as to the amount to be donated upon the representation of the person circulating the petition for signatures that the blank would be filled by inserting an amount much less than had been afterward actually inserted. *Held*, that the answer was insufficient. By so signing in blank petitioners conferred upon the person to whom the petition was by them intrusted an implied authority to fill such blank. And as, under such petition, the city would be entitled to receive no stock in such company, false representations as to the amount of stock to be received by the city were immaterial. *Mayor, etc., of Kokomo v. State ex rel.*, 57 Ind. 152.

Kan. Act of Feb. 28, 1868, authorized a city to issue \$25,000 in bonds for the purpose of procuring a right of way through the city for a railroad and other necessary grounds to be donated to the company. Instead of procuring the grounds and donating them the city authorities donated the bonds. *Held*, that they were binding on the city. *Converse v. Ft. Scott*, 92 U. S. 503.

267. By-laws donating municipal debentures.—A railway charter provided that on receiving certain petitions the corporation of the county, etc., should submit

to the electors a by-law to aid the company by a bonus, and should deliver to trustees the debentures for any such bonus when granted. The company, as an inducement to the passing of such a by-law, gave a bond conditioned to build the road within a certain time, and to repay the bonus to the county in the event of ceasing within twenty-one years to be an independent company. *Held*, that a mandamus would not be granted to compel the corporation to hand over the debentures to the trustees appointed to receive them, there being ground for apprehension, owing to the delay, that the bond could not be performed. *In re Hamilton & N. W. R. Co.*, 39 U. C. Q. B. 93.

A by-law was passed by a county granting a bonus of \$50,000 to a railroad company, and authorizing debentures of the county to be issued therefor, to be provided for by a rate levied upon the town of Woodstock and the township of North Norwich. This by-law was legalized by 37 Vict. c. 57, § 26, O, which provided that the company should indemnify the township to the extent of \$10,000 against any excess above two fifths of said debentures, and should give a bond securing such indemnity, which bond had been given. *Held*, that the liability of the township under this by-law was a debt of the township, although secured by debentures of the county, and within the power of the arbitrators to dispose of as well as the bond. *In re North Norwich Tp.*, 44 U. C. Q. B. 34.

It was awarded as to the bond that the village should be interested in it to the extent of \$10,009, and the township to the extent of \$8991 for each \$10,000 thereof, and so in like proportion for any greater or less amount payable in respect thereof, and as to the money payable under the by-law that the village should pay \$1 and the township \$8 for each \$6 thereof. *Held*, that this mode of disposition was authorized, and unobjectionable. *In re North Norwich Tp.*, 44 U. C. Q. B. 34.

The award purported to be made "with the consent of the parties." *Held*, that such consent referred to the matter being disposed of, and not to the mode of disposition. *In re North Norwich Tp.*, 44 U. C. Q. B. 34.

A municipal corporation having passed a by-law giving a certain sum in debentures by way of bonus to a railroad, the company

executed a bond to the township reciting that the township had agreed to give the bonus on condition, amongst other things, that sixty continuous miles of the road should be built within two years, that the debentures should not be disposed of by the company until the contracts had been let and the work commenced, and that if the road were not commenced and built as mentioned the debentures should be returned to the municipality; and the condition of the bonds was that in case of failure the company would on demand pay over to the township the sum of \$50,000, or return the debentures. The contracts having been let and work commenced as stipulated—*held*, in view of the whole instrument, that the company should not be restrained from disposing of the debentures before the completion of the work. *Brock v. Toronto & N. R. Co.*, 17 *Grant's Ch. (U. C.)* 425.

A proposed by-law for granting to a railroad company a bonus of \$44,000 was assented to by the ratepayers of a township; and to induce the council afterwards to ratify the by-law the company entered into a bond, undertaking that if certain other townships should deliver to the company certain debentures expected from them the company would give to said township \$6000 of preferential bonds of the company, the company having a limited statutory authority to issue preferential bonds "for raising money to prosecute the undertaking." One of the townships failed to give the debentures expected from it, and the company, instead of giving its preferential bonds, gave an ordinary bond for the \$6000. *Held*, that the company had no authority to give its preferential bonds for the purpose of carrying out its bargain with the municipal council. *Eldon Tp. v. Toronto & N. R. Co.*, 24 *Grant's Ch. (U. C.)* 396.

The default of one of the other townships to give the debentures expected from it entitled plaintiff township to demand preferential bonds from the company even if the company had had authority to grant them. *Eldon Tp. v. Toronto & N. R. Co.*, 24 *Grant's Ch. (U. C.)* 396.

The giving of the bond which the company did give was no waiver of the objection as an answer to the municipality's demand of preferential bonds. *Eldon Tp. v. Toronto & N. R. Co.*, 24 *Grant's Ch. (U. C.)* 396.

XII. BONDS.

1. Issuing.

a. Power to Issue.

268. The power wholly denied.*—

The counties of a state have no power to borrow money or subscribe stock to aid in the construction of railroads; and the issuing of bonds by the counties or the transfer of them by the corporations to whom they are issued may be restrained by injunction. (Woodward, J., dissenting.) *Stokes v. Scott County*, 10 *Iowa* 166.—*OVERRULING Dubuque County v. Dubuque & P. R. Co.*, 4 *Greene (Iowa)* 1. *REVIEWING State v. Bissell*, 4 *Greene* 328; *McMillan v. Boyles*, 3 *Iowa* 311; *Clapp v. Cedar County*, 5 *Iowa* 15; *Ring v. Johnson County*, 6 *Iowa* 265; *McMillen v. Boyles*, 6 *Iowa* 304.—*FOLLOWED IN State ex rel. v. Wapello County*, 13 *Iowa* 388. *REAFFIRMED IN Smith v. Henry County*, 15 *Iowa* 385.—*Myers v. Johnson County*, 14 *Iowa* 47.—*FOLLOWING State ex rel. v. Wapello County*, 13 *Iowa* 388.—*FOLLOWED IN McClure v. Owen*, 26 *Iowa* 243.—*Chamberlain v. Burlington*, 19 *Iowa* 395.

269. No implied power—Express grant necessary.—A municipal corporation cannot subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless the power so to do has been expressly conferred by law. *Lewis v. Clarendon*, 5 *Dill. (U. S.)* 329. *New Orleans, M. & C. R. Co. v. Dunn*, 51 *Ala.* 128. *Duanesburgh v. Jenkins*, 40 *Barb. (N. Y.)* 574.

This rule does not require that the law conferring the power should be construed as strictly as a penal law. *Leavenworth, L. & G. R. Co. v. Douglas County Com'rs*, 18 *Kan.* 169, 15 *Am. Ry. Rep.* 256.

To render municipal securities issued in aid of a railroad valid there must be legislative authority, either express or implied, authorizing their issuance; but the legislature may, by a curative act, remedy irregularities and such other defects as might have been provided for in the original grant of power. The power of the city of Aberdeen, Miss., either under its charter or under the curative act of 1872, to make such a subscription is denied. *Katsenberger v. Aberdeen*, 16 *Fed. Rep.* 745.—*FOLLOWING Knox County Com'rs v. Aspinwall*, 21 *How.*

* See also *ante*, 31.

(U. S.) 539; *Wells v. Pontotoc County Sup'rs*, 102 U. S. 625.

270. When implied from other powers expressly granted.—Where a county is given authority to issue its bonds to pay a subscription to the stock of a railroad, this is sufficient authority to issue negotiable bonds; and where such bonds have been issued, and the county is given power to compromise its indebtedness by issuing to its creditors other obligations of the county, it may issue other negotiable bonds. *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. Rep. 650.

The charter of the city of Mobile confers no express power on the corporate authorities to issue bonds of the city in aid of a railroad to enable it to purchase certain swamp lands within the city, either as a gratuity or in consideration of the location by the company of its machine shops and workshops on the lands; nor is such power necessarily implied in the grant of general police powers, or in any of the special powers expressly conferred; nor can the issue of such bonds be supported by any considerations of supposed benefit to the city, or to the health of its inhabitants, arising from the reclamation, drainage, and improvement of the lands. *New Orleans, M. & C. R. Co. v. Dunn*, 51 Ala. 128.

271. When implied from power to borrow money.—Where the charter of a city authorizes it to borrow money for public purposes, and a statute provides that when any railroad company shall receive the bonds of any city or county upon subscriptions to stock they shall bear interest, and "may be sold by the company," the city has power to subscribe to stock and issue valid bonds in payment. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 220.

Unrestricted power to a municipal corporation "to borrow money for any public purpose" gives it undoubted authority to grant material aid to a railroad as a way for travel and transportation, and for that purpose it may purchase stock and pay for the same, or it may issue bonds as a means of accomplishing the same object. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

Bonds issued under such authority may be sold by the corporation to raise the money, or be delivered to the railroad company for the same purpose; and in either mode the transaction as between the municipal corporation and purchasers of the bonds is a con-

tract of borrowing money within the terms of the charter. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.

Power given a city council to borrow money on the credit of the city and issue its bonds therefor of itself does not confer authority to subscribe to the stock of railroads and issue bonds in payment thereof. *Jonesboro v. Cairo & St. L. R. Co.*, 15 Am. & Eng. R. Cas. 615, 110 U. S. 192, 4 Sup. Ct. Rep. 67.

The grant of power to the trustees of a township to borrow money for the purpose of paying the amount subscribed by the township to the stock of a railroad carries with it the necessary incidental power of executing and delivering such evidences of indebtedness as are sanctioned by the known usages of business in such cases; and it is, therefore, competent for the trustees to issue the negotiable bonds of the township in payment for the stock subscribed, and it is no ground of objection that such bonds were delivered direct to the company, at par, by way of making such payment. *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569.—**APPROVING** *Com. ex rel. v. Allegheny County Com'rs*, 37 Pa. St. 237. **REVIEWING** *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372.

272. When power to subscribe, etc., includes power to issue bonds.

—Where a statute authorizes municipal officers "with the consent of a majority of the corporation comprising said city" to subscribe money to a railroad, and to borrow money to pay the same, the power is thereby conferred upon such officers to issue bonds to pay the subscription. *Milner v. Pensacola*, 2 Woods (U. S.) 632. *Mayor, etc., of Griffin v. Inman*, 57 Ga. 370. *Adams v. Lawrence County*, 2 Pittsb. (Pa.) 60. *Goshorn v. Ohio County Sup'rs*, 1 W. Va. 308.—**APPROVING** *Baltimore & O. R. Co. v. Gallahue*, 12 Gratt. (Va.) 655.

Where a charter provides that the payment of a municipal subscription to stock shall be made upon such terms and in such manner as the company and the county may agree upon, an agreement to pay in coupon bonds is binding, and the bonds are valid securities. *Woods v. Lawrence County*, 1 Black (U. S.) 386.—**FOLLOWED IN** *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553.

A statute authorizing a town to subscribe to the stock of a street railroad, and to tax the property of a certain district to pay the

same, and providing that in making the subscription and in voting the taxes the district shall be governed "by the law regulating the subscription to railroad companies of municipal townships," and the law referred to authorizes municipalities to issue bonds, includes the authority to issue bonds and to vote a tax to pay the same. *Henderson v. Jackson County*, 2 *McCrary* (U. S.) 615, 12 *Fed. Rep.* 676.

Where a city is authorized to subscribe for railroad stock "as fully as any individual," and the statute gives an individual the right, by agreement with a company, to give his bond in payment of a subscription, the city may do the same. *Com. ex rel. v. Pittsburgh Councils*, 41 *Pa. St.* 278.

A statute authorizing a city to subscribe to the stock of a railroad provided that the subscriptions should be paid in "certificates of loan." *Held*, that the city had the power to issue in payment what is ordinarily called "bonds," negotiable and payable to bearer, with interest coupons. "Certificates of loan" and "bonds" are terms meaning the same when applied to such obligations. *Amey v. Mayor, etc., of Allegheny City*, 24 *How.* (U. S.) 364.—FOLLOWED IN *Com. ex rel. v. Allegheny County Com'rs*, 40 *Pa. St.* 348.

273. Power to issue bonds not implied from power to subscribe.—To enable a municipality to subscribe to the stock of a railroad or other corporation the power must be expressly conferred by the legislature; and the power to subscribe does not carry with it the power to issue negotiable bonds in payment of the subscription. That power must be conferred expressly or by reasonable implication of the statute. *Kelley v. Milan*, 127 *U. S.* 139, 8 *Sup. Ct. Rep.* 1101.—FOLLOWING *Pulaski v. Gilmore*, 21 *Fed. Rep.* 870; *Milan Tax-Payers v. Tennessee C. R. Co.*, 11 *Lea* (Tenn.) 330; *Marsh v. Fulton County*, 10 *Wall.* (U. S.) 676; *Wells v. Pontotoc County Sup'rs*, 102 *U. S.* 625; *Ottawa v. Carey*, 108 *U. S.* 110; *Daviess County v. Dickinson*, 117 *U. S.* 657.—FOLLOWED IN *Norton v. Dyersburg*, 127 *U. S.* 160.—*Concord v. Robinson*, 121 *U. S.* 165, 7 *Sup. Ct. Rep.* 937.—FOLLOWING *Claiborne County v. Brooks*, 111 *U. S.* 400; *Wells v. Pontotoc County Sup'rs*, 102 *U. S.* 625; *Ogden v. Daviess County*, 102 *U. S.* 634.—*Wells v. Pontotoc County Sup'rs*, 2 *Am. & Eng. R. Cas.* 605, 102 *U. S.* 625.—APPROVING *Lynde v. Winnebago County*, 16

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Wall. (U. S.) 6. FOLLOWING *Beaman v. Leake County*, 42 *Miss.* 247; *Hawkins v. Carroll County*, 50 *Miss.* 762.—FOLLOWED IN *Kutzenberger v. Aberdeen*, 16 *Fed. Rep.* 745; *Concord v. Robinson*, 121 *U. S.* 165; *Kelley v. Milan*, 127 *U. S.* 139.—*English v. Chicot County*, 26 *Ark.* 454. *Hill v. Memphis*, 134 *U. S.* 198, 10 *Sup. Ct. Rep.* 562. *Oelrich v. Pittsburgh*, 1 *Pittsb. (Pa.)* 522. *Campbell County v. Knoxville & K. R. Co.*, 6 *Coldw. (Tenn.)* 598. *Milan Tax-Payers v. Tennessee C. R. Co.*, 11 *Lea* (Tenn.) 329. *Green v. Dyersburg*, 2 *Flipp.* (U. S.) 477.—DISTINGUISHING *Louisville & N. R. Co. v. Davidson County Court*, 1 *Sneed* (Tenn.) 637.

A provision in a law, authorizing municipalities to subscribe to the stock of railroads, that the money should be paid as soon as the road was constructed is inconsistent with the idea that the subscription could be paid in negotiable bonds. *Concord v. Robinson*, 121 *U. S.* 165, 7 *Sup. Ct. Rep.* 937.

The Missouri Act of Jan. 4, 1860, authorizing the inhabitants of a certain "strip of country" to subscribe to the stock of a railroad passing through it, and to levy a tax to pay the subscription, does not authorize the issuing of bonds to pay such subscription by so anticipating the tax. *Ogden v. Daviess County*, 5 *Am. & Eng. R. Cas.* 145, 102 *U. S.* 634.—FOLLOWED IN *Deland v. Platte County*, 54 *Fed. Rep.* 823; *Concord v. Robinson*, 121 *U. S.* 165.

Neither the Mo. Act of March 3, 1868, amended March 24, 1870, authorizing "municipal townships" to pay former subscriptions to railroad stock in bonds, nor the act of March 24, 1868, authorizing "counties, cities, and towns" to do the same, authorizes the issue of bonds, as these acts apply only to such public corporations as entireties, and not to a "strip of country" containing the aggregation of many parts of such townships, etc. *Ogden v. Daviess County*, 5 *Am. & Eng. R. Cas.* 145, 102 *U. S.* 634.

274. Power to aid railroad does not give power to become stockholder.—A statute authorizing a town to borrow money on its bonds and apply the same in aid of a railroad does not authorize the town to become a stockholder in the railroad, and a purchaser of such bonds, with notice of their exchange for stock, cannot recover on them. *Scipio v. Wright*, 101 *U. S.* 665.—DISTINGUISHING *Gould v. One-*

onta, 71 N. Y. 298. FOLLOWING *Gould v. Sterling*, 23 N. Y. 456; *Starin v. Genoa*, 23 N. Y. 439; *People ex rel. v. Mead*, 24 N. Y. 114; *Horton v. Thompson*, 71 N. Y. 513. —FOLLOWED IN *Thompson v. Perrine*, 103 U. S. 806.

275. Power to sell bonds not power to exchange them for stock.—A statute empowering a town to borrow money on its bonds, and to pay the money to a railroad company in exchange for an equal amount of railroad stock, does not authorize the town to pass the bonds to the company and take the proper amount of stock, and the bonds are void in the hands of one who bought from the company with notice of the facts. *Starin v. Genoa*, 23 N. Y. 439; reversing 29 Barb. 442. —FOLLOWED IN *Scipio v. Wright*, 101 U. S. 665; *Horton v. Thompson*, 71 N. Y. 513. NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. 446.

276. When power to issue bonds authorizes negotiable bonds.—Authority to a town to issue bonds in aid of a railroad carries with it the incidental power to issue them in a negotiable form, and to give them that character usually belonging to this class of securities. *Bushnell v. Beloit*, 10 Wis. 195.

The power in a municipal incorporation to make contracts and expenditures carries with it the implied power to incur indebtedness, and to issue proper obligations therefor. But such implied power does not confer upon it authority to issue commercial security bearing all the incidents of commercial paper. *Hopper v. Covington*, 4 Am. & Eng. R. Cas. 251, 8 Fed. Rep. 777, 10 Biss. (U. S.) 488.

277. Power to issue not power to sell bonds below par.—A power to borrow money on the bonds of a town at a certain interest does not confer authority to sell them bearing that interest at less than par. *Starin v. Genoa*, 23 N. Y. 439; reversing 29 Barb. 442. *Atchison v. Butcher*, 3 Kan. 104.

Where a county subscribes a certain amount to the stock of a railroad, and is authorized to issue its bonds to that amount in payment, it has no power to sell the bonds at a discount, and issue bonds to a greater amount than the amount of the subscription, and bonds issued in excess of the amount of the subscription are invalid. *Daviess County v. Howard*, 13 Bush (Ky.) 101.

278. Powers of unorganized municipalities and portions of townships.—A township not under township organization has no power to become, through the trustees of schools, a stockholder in a railroad company, with power to issue bonds, and levy and collect taxes on the property in the township to pay the bonds. *People ex rel. v. Dupuyt*, 71 Ill. 651.

Mo. Act of Jan. 4, 1860, authorizing "any strip of country," not to exceed ten miles on either side of a certain railroad, to vote a subscription thereto, and authorizing the county court to levy a special tax to be paid to the company, does not authorize the court to issue bonds of the county on behalf of such strip. *Deland v. Platte County*, 54 Fed. Rep. 823. —FOLLOWING *Ogden v. Daviess County*, 102 U. S. 634. —*Dodge v. Platte County*, 2 Am. & Eng. R. Cas. 583, 82 N. Y. 218; reversing 16 Hun 285.

A provision in a statute authorizing the inhabitants of a "strip" along a railroad to vote a subscription to the railroad is not sufficiently complied with by a record of the county court which levies a tax to pay the subscription which merely recites that "the taxable inhabitants aforesaid voted," etc., without any recital as to whether a majority voted in favor of the subscription. *Deland v. Platte County*, 54 Fed. Rep. 823. —DISTINGUISHING *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6. QUOTING *Gause v. Clarksville*, 5 Dill. (U. S.) 172.

Mo. Act of March 23, 1868, entitled "An act to facilitate the construction of railroads in the state of Missouri," and authorizing county courts to make subscriptions to the capital stock of railroads, and to issue bonds therefor on behalf of the townships of the county, relates only to such townships, as such, and does not authorize bonds on behalf of a portion of a township. *Deland v. Platte County*, 54 Fed. Rep. 823. *Dodge v. Platte County*, 2 Am. & Eng. R. Cas. 583, 82 N. Y. 218; reversing 16 Hun 285.

Mo. Act of March 23, 1868, as amended March 24, 1870, providing that "in all cases where, by the provisions of the charter of any railroad company, * * * the taxable inhabitants of a portion of a municipal township of any county in this state have voted, or may hereafter vote, to take stock in such railroad company they are hereby declared entitled to all the privileges, rights, and

benefits conferred upon counties or townships," is in conflict with the state constitution, art. 1, § 28, prohibiting retrospective laws, so far as it relates to votes already taken. *Deland v. Platte County*, 54 *Fed. Rep.* 823. — DISTINGUISHING *Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. Rep. 413; *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736; *Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 Sup. Ct. Rep. 67. FOLLOWING *St. Louis v. Clemens*, 52 Mo. 133.

And the above statute is not relieved of its retrospective character by the constitution of 1865, art. 4, § 27, which declares that "the general assembly shall not pass any local or special law legalizing, except as against the state, the unauthorized or invalid acts of any officer"; nor by the constitution of 1875, art. 4, § 53, which declares that "the general assembly shall not pass any local or special law legalizing the unauthorized acts of any officer or agent of the state, or of any county or municipal authority." *Deland v. Platte County*, 54 *Fed. Rep.* 823.

A city created by the Nebraska Act of March 1, 1879, out of a village possessed of a president and board of trustees may, until the election of a mayor and council, exercise the ordinary powers of a city of the second class, including the ordering of an election to vote bonds and the issuing of bonds duly voted, through the instrumentality and agency of the said president and trustees. *State ex rel. v. Babcock*, 25 *Neb.* 709, 41 *N. W. Rep.* 654.

Under N. Y. Act of 1874, ch. 296, subjecting a certain railroad to taxation, and providing that county taxes collected upon the property of the company used or held by it in any of the towns or municipalities which have issued bonds in aid of the road shall be appropriated to and paid over by them to be applied in payment of such bonds, a village which has issued bonds is entitled to the county taxes collected upon the property of the company within the municipality, although no tax for county purposes is levied upon the village as distinct from the town of which it is a part, and it has no separate relation to the treasurer in the payment of the county taxes. *Oneida v. Madison County Sup'rs*, 49 *N. Y. S. R.* 344, 136 *N. Y.* 269, 32 *N. E. Rep.* 852; *affirming* 40 *N. Y. S. R.* 985.

A statute authorizing "any town or incorporated city or village in any county"

through which a certain railroad might run to issue its bonds in aid thereof applies to cities incorporated after the passage of the statute, and while the railroad is in process of construction; but where the charter of a village forbids it to incur any debt in any year greater than the taxes for such year will pay, and no authority is given it to raise money by taxation to pay bonds issued to a railroad, such village is taken out of the purview of the statute. *Perrin v. New London*, 67 *Wis.* 416, 30 *N. W. Rep.* 623. — LIMITING *Oleson v. Green Bay & L. P. R. Co.*, 36 *Wis.* 383.

279. Powers of officers in issuing the bonds.—Where a statute provides that town bonds are to be signed by the chairman of the board of supervisors, and countersigned by the town clerk, the presumption is that they were issued under the authority of the board of supervisors where they seem to conform strictly to the statute. *Burleigh v. Rochester*, 5 *Fed. Rep.* 667.

It was competent for the justices of the superior court of Cook county, Ga., authorized to issue bonds in payment of a subscription by the county to railroad stock, to issue such bonds when they were not regularly in session as a court. *Com'rs of Roads, etc., v. Shorter*, 50 *Ga.* 489.

Under the Illinois statutes, after a favorable vote on a proposition to issue bonds in aid of a railroad, the municipal authorities are not compelled to issue the bonds, but may exercise their discretion in the matter. *People ex rel. v. Tazewell County*, 22 *Ill.* 147. — DISTINGUISHED IN *Shelby County Court v. Cumberland & O. R. Co.*, 8 *Bush (Ky.)* 209. FOLLOWED IN *Cairo v. Zane*, 149 U. S. 122. QUOTED IN *Alvis v. Whitney*, 43 *Ind.* 83.

When the authority to issue municipal bonds upon the performance of certain conditions precedent is conferred by statute upon a particular tribunal, such tribunal has the sole power to determine the fact whether the conditions have been performed or not. *Belo v. Forsythe County Com'rs*, 76 *N. Car.* 489.

Where a proclamation directing a vote upon a proposition to issue bonds in aid of a railroad contains a stipulation that they shall be issued only in the event of the road being constructed and running centrally through the county, the county judge has a right to issue the bonds on being satisfied that the road will be so built. *State ex rel. v. Bissell*, 4 *Greené (Iowa)* 328. — FOLLOWED

IN *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. REVIEWED IN *Stokes v. Scott County*, 10 Iowa 166.

When authority is given to the officers of a public corporation by an election or otherwise to issue a certain amount of the bonds of the corporation, the officers have the power and the right, whenever there is a sufficient reason therefor, to issue a less amount of the bonds of the corporation. *Chicago, K. & W. R. Co. v. Ozark Tp.*, 46 Kan. 415, 26 Pac. Rep. 710. — QUOTING *Leavenworth County Com'rs v. Miller*, 7 Kan. 528.

A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions or otherwise to complete a specified railroad, and imposing upon them the duty of delivering the bonds when said provision has been made, without indicating any person or tribunal to determine that fact, necessarily delegates that power to the commissioners; and if they, acting in good faith and with reasonable prudence and caution, should decide that such provision has been made, and deliver the bonds, the bonds will not be invalidated, if it should subsequently appear that the means were wholly insufficient. *Knox County Com'rs v. Nichols*, 14 Ohio St. 260. — APPROVED IN *Venice v. Murdock*, 92 U. S. 494.

280. Re-issuing canceled or destroyed bonds.—Where a city has issued valid bonds, it has power to enter into negotiations to have them delivered up and canceled and new bonds issued in exchange without any special grant of authority therefor. *Rogan v. Watertown*, 30 Wis. 259, 8 Am. Ry. Rep. 20.

Where a county has subscribed to railroad stock so as to create a debt, and the county court prepares bonds, but after holding them for several years, uncalled for, orders them to be burned, the court may subsequently re-issue said bonds at the request of the company. *Matthews v. Blount County*, 3 Lea (Tenn.) 120.

281. Constitutional limitations.—A constitutional limitation upon counties from giving bonds in aid of railroads beyond a certain amount does not forbid a municipality within the county from giving its bonds in addition to the maximum amount of bonds allowed to be given by the county proper. *State ex rel. v. Lancaster*

County Com'rs, 6 Neb. 214. — QUOTED IN *Jones v. Hurlburt*, 13 Neb. 125.

On January 1, 1875, when the constitutional amendment took effect which prohibits any town from loaning its money or credit in aid of any corporation, or from becoming the owner of any stock or bonds of a corporation, all action on the part of any town to issue its bonds in aid of a railroad not then completed at once became nugatory, unless where, by operation of law, or by some valid agreement, there had been created prior to that time a right to have such action perfected by the issuing of bonds. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 18 Am. Ry. Rep. 46; affirming 7 Hun 499.

282. Statutory conditions, and limitations of the power.—The legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose, and such legislative permission does not carry with it authority to execute negotiable bonds except subject to restrictions and conditions of the enabling act. *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. Rep. 638.

A charter of a railroad company authorizing townships, corporate towns, and cities along its line to subscribe to the capital stock of such company does not limit the operation of the general laws of the state authorizing counties to subscribe for stock in the company and to issue bonds therefor. *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668.

283. Interpretation of particular statutes.—(1) *Arkansas.*—The charter of the city of Helena authorized the city council to levy taxes for the payment of stock subscribed by the city on behalf of railroads. On Feb. 6, 1867, an act was passed authorizing the issue of bonds in payment of any stock which the city had or might subscribe to a certain railroad. On April 9, 1869, in pursuance of a new constitution adopted in 1868, the legislature passed a general act for the incorporation, classification, and government of cities and towns, and repealed all acts then in force for the organization or government of municipalities, but especially provided that "such repeal shall not destroy or bar any right of property, action, or prosecution which may be vested or exist at the time this act takes effect," and it contained no provision expressly limiting or denying

to pre existing corporations special powers theretofore conferred by special acts. *Held*, that the power which the city possessed under the act of 1869 was not repealed or taken away. *Babcock v. Helena*, 34 Ark. 499.

(2) *Illinois*.—The act of Feb. 26, 1869, was only intended to legalize certain municipal subscriptions to the stock of the Chicago, Danville & Vincennes railroad made prior to its passage, and has no reference to bonds issued in 1871. *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. Rep. 937.

(3) *Michigan*.—A provision in a statute that a township should issue its bonds "within 60 days after the question of aid is determined" is permissive only, and bonds issued after the 60 days are not thereby rendered invalid. *Chickaming Tp. v. Carpenter*, 106 U. S. 663, 1 Sup. Ct. Rep. 620.

(4) *Mississippi*.—The act of 1854, § 5, incorporating the town of Columbus, constituted the mayor and aldermen a body politic, and, among other enumerated powers, gave them power to levy taxes on property. *Held*, that this did not authorize them to issue bonds in aid of a railroad. *Sykes v. Mayor, etc., of Columbus*, 55 Miss. 115.

And such bonds could not be validated by the act of 1872, which declared that subscriptions to the capital stock of a certain railroad "not made in violation of the constitution" should be "legalized, ratified, and confirmed," as the constitution then in force prohibited such bonds unless authorized by two thirds of the qualified voters. *Sykes v. Mayor, etc., of Columbus*, 55 Miss. 115.

(5) *Missouri*.—Under the act of March 24, 1868, entitled "An act to enable counties, cities, and incorporated towns to fund their respective debts," a county court that had the management of the business of the county passed an order to issue "county funding bonds" for the benefit of certain townships that had voted stock in a railroad, and for the purpose of retiring bonds issued in pursuance thereof. *Held*, that such action made the funding bonds the debt of the county whether the original debt was or not. *Cass County v. Shores*, 95 U. S. 375.

A statute of Missouri authorized county courts to subscribe on behalf of townships to the stock of any railroad building or to be built "into, through, or near such township." *Held*, that a road at its nearest point nine miles from the township, was "near" it, within the meaning of the statute, and

authorized an issue of bonds, which should be held valid in the hands of *bona fide* holders, especially after interest had been paid thereon for three years. *Kirkbridge v. Lafayette County*, 108 U. S. 208, 2 Sup. Ct. Rep. 501.

(6) *New Jersey*.—The authority of Montclair township, Essex county, to issue bonds to be exchanged for bonds of the Montclair railroad company sustained. *Montclair v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. Rep. 391.

—FOLLOWED IN *Jonesboro v. Cairo & St. L. R. Co.*, 110 U. S. 192.

(7) *Pennsylvania*.—Under the act of Feb. 9, 1853, the commissioners of defendant county were authorized to subscribe to the stock of the Northwestern railroad company, and to issue bonds, and to bind the county to pay them. *Curtis v. Butler County*, 24 How. (U. S.) 435; affirming 1 Pittsb. (Pa.) 516.

(8) *Tennessee*.—Under the Code of 1857-58, §§ 1142-61, municipal corporations have no power to issue regular negotiable bonds in payment of subscriptions to the stock of railroads. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101.

The county court of Wilson county had, under the act of Dec. 16, 1867, after certain preliminary proceedings were taken, lawful authority to subscribe, on behalf of the county, for stock in the Tennessee & Pacific R. Co., and to issue bonds of the county in payment therefor. *Wilson County v. Third Nat. Bank*, 3 Am. & Eng. R. Cas. 151, 103 U. S. 770.

The act of March 23, 1872, only conferred on certain cities and towns the power to fund their matured debts by issuing bonds, and had no application to a case where a vote to subscribe to a railroad and to issue bonds in payment of the subscription was taken at the same time. *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. Rep. 1101.

(9) *Wisconsin*.—A provision in the charter of a village forbidding it to incur any debt or liability in any year greater than the amount of the tax allowed by the charter to be raised in such year, and conferring no authority to raise money by taxation to pay bonds issued in aid of a railroad, takes the village out of the purview of ch. 93, P. & L. Laws of 1867, and it had no authority in 1872 to issue its bonds in aid of the railroad therein mentioned. *Perrin v. New London*, 67 Wis. 416, 30 N. W. Rep. 623.

b. Compelling Issuance.

284. Right of company to demand the bonds.—

Where an election has been held in a township authorizing a subscription to the amount of \$18,000, and authorizing the issuing of a like amount of township bonds to the company in payment for such stock, but three days prior to the election it was agreed between a portion of the electors of the township and certain agents of the company that if the election should be in the affirmative the amount of the subscription and of the bonds to be issued should be only \$10,000, and the election resulted in an affirmative vote, authorizing a subscription to be made and bonds to be issued in the amount of \$18,000, but immediately afterwards, in a proceeding instituted by a taxpayer and an elector of the township, the officers and the company were enjoined from receiving a subscription or issuing an amount of bonds exceeding \$10,000, and the subscription was then made for \$10,000, and the company accepted the subscription and relinquished all claim to an amount of bonds above that amount, and afterwards the railroad was built and all the other conditions imposed upon the company by the proposition voted upon were complied with and fulfilled by the company in pursuance of such election and subscription, the company is entitled to the bonds of the township to the amount of \$10,000. *Chicago, K. & W. R. Co. v. Ozark Tp.*, 46 Kan. 415, 26 Pac. Rep. 710.

Such agreement that if the election should result favorably to the subscription and the issuing of the bonds the amount should be only \$10,000 instead of \$18,000 is not in effect or tantamount to a bribe to the voters, and will not necessarily render the election wholly invalid. *Chicago, K. & W. R. Co. v. Ozark Tp.*, 46 Kan. 415, 26 Pac. Rep. 710.

Capitol precinct at an election held Oct. 16, 1875, voted bonds to the A. & N. R. Co. to aid in an extension of its line. The bonds were to be placed in the hands of a trustee until the company had so far completed its road as to be entitled to them. The company immediately made a preliminary survey of its line, and the same was completed prior to Nov. 1, 1875. Held, that the right of the company to the bonds in question had become vested at the time the constitution of 1875 took effect to such

an extent that the company could require the bonds to be issued, as provided in the proposition, and placed in the hands of the trustee to await the final action of the company. *State ex rel. v. Lancaster County Com'rs*, 6 Neb. 214.

285. Jurisdiction of equity to compel issuance and delivery of bonds.

—A court of chancery has no jurisdiction to entertain a bill to compel the authorities of a town to issue and deliver bonds in pursuance of a vote to aid a railroad. The proper remedy is by mandamus. *Chicago D. & V. R. Co. v. St. Anne*, 101 Ill. 151.

286. When mandamus will lie.—

A proposal of a railroad company made in proper form to the county commissioners for the county to take stock in the road will give the court jurisdiction to submit the matter to the voters of the county; and if the vote be favorable, the court is authorized to subscribe and to issue bonds of the county, and if it refuses to do so, it may be compelled to act by mandamus. *Ex parte Selma & G. R. Co.*, 46 Ala. 230. *Ex parte Selma & G. R. Co.*, 45 Ala. 696. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374. *People ex rel. v. Harp Sup'r*, 67 Ill. 62. *Cincinnati, W. & Z. R. Co. v. Clinton County Com'rs*, 1 Ohio St. 77. *Com. ex rel. v. Perkins*, 43 Pa. St. 400.

But if such proposal contains another proposal, as to build a passenger and wagon bridge across a river in the county free of toll, such proposal will not confer jurisdiction on the court to submit it to a vote; and an order of the court, and an election held under it, will be invalid, and will not give the court authority to subscribe or issue bonds; and a mandamus in such case will be refused. *Ex parte Selma & G. R. Co.*, 46 Ala. 230.

It is a rule of construction that where a public body or officer has been empowered to do an act which concerns the public interest the execution of the power may be insisted on as a duty, and the subscription by a county to the stock of a railroad is a matter of public interest. *Napa Valley R. Co. v. Napa County Sup'rs*, 30 Cal. 435.

Where a subscription is voted in favor of a railroad by a town, under a law which leaves no discretion in its officers but to make the subscription without unnecessary delay, a mandamus may be awarded to compel the issue and delivery of the bonds of the town, although no formal subscription

has been made upon the books of the company. *Illinois Milland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

287. When mandamus will be refused.—If the vote of a county is in favor of a subscription to a railway, under a charter authorizing a subscription in like manner and with the like effect as is provided in the Ill. "act to provide for a general system of railroad incorporations," approved Nov. 5, 1849, and acts amendatory thereof, the county authorities will have a discretion either to make or withhold the subscription, and they cannot, by mandamus, be compelled to make the subscription. *People ex rel. v. Cass County*, 77 Ill. 438.—**APPROVING** *People ex rel. v. Dutcher*, 56 Ill. 145. **DISTINGUISHING** *People ex rel. v. Logan County*, 63 Ill. 377.

Where a statute leaves it to the discretion of a court as to the amount that shall be subscribed by a county to the stock of a railroad not to exceed a specified limit, and the naked proposition is submitted to a vote as to whether the taxpayers favor a subscription, without specifying any amount, a favorable vote does not give the company any vested right that will prevent the legislature from repealing the statute after the vote is taken, and before the bonds are issued; and in such case a mandamus to compel the court to issue the bonds is properly refused. *Covington & L. R. Co. v. Kenton County Court*, 12 B. Mon. (Ky.) 144. —**DISTINGUISHED IN** *State v. Central Iowa R. Co.*, 71 Iowa 410, 32 N. W. Rep. 410.

In such cases the legislature has the right to repeal the statute at any time before the privilege of subscribing has been so far exercised as to give vested rights. *Covington & L. R. Co. v. Kenton County Court*, 12 B. Mon. (Ky.) 144.

Where there is danger of a misapplication of funds subscribed by a county in aid of a corporation, a court of equity, and also a court of law, should refuse to enforce the subscription until the corporation properly secures the appropriation of the bonds or their proceeds in accordance with the terms of the subscription. *Cumberland & O. R. Co. v. Washington County Court Judge*, 10 Bush (Ky.) 564.

Where a township issues bonds in aid of a railroad, to be held by a third party until the road is completed, to be determined by a certificate of the engineer, indorsed by the chairman of the county commissioners

and attested by the clerk, and the act under which the bonds were issued is declared unconstitutional, a mandamus will not issue to compel such chairman and clerk to indorse and attest the certificate. *State ex rel. v. Whitesides*, 30 So. Car. 579, 3 L. R. A. 777, 9 S. E. Rep. 661.

288. Time to apply for the writ.—Under Cal. Act of 1860, § 2, any taxpayer has a right to institute proceedings in the district court to review the action of the board of supervisors in refusing to issue bonds in aid of a railroad within ten days from the time of its decision upon the estimate of expenditures presented by the company; and during that time no proceeding can be taken by the company against the board for such refusal. *California Northern R. Co. v. Butte County Sup'rs*, 18 Cal. 671.

Where a mandamus to compel the issue of town bonds to a railroad company in exchange for its stock was not asked for until nearly six years after the relator's right accrued—*held*, that in exercising the discretion of the court in reference to the writ the delay would not be treated as laches, in the absence of any evidence that the town was injured thereby, especially as the contract was mutual, and it had been at all times since the relator's road was built in the power of the town to enforce an exchange of its bonds for stock of the company. *State ex rel. v. Jennings*, 48 Wis. 549, 4 N. W. Rep. 641.

There is no presumption that if the relator had compelled a delivery of the bonds before a certain act was passed incorporating a city which included a part of the territory of the defendant town the legislature would have required such city to pay part of the bonded debt of the town, even if it had power to do so. *State ex rel. v. Jennings*, 48 Wis. 549, 4 N. W. Rep. 641.

A town, on July 24, 1869, voted a subscription of \$30,000 to a railroad, to be paid by the issue of bonds, and the line of the road was permanently located through said town Oct. 15, 1875, and the road constructed through the same on Aug. 1, 1880, and on Apr. 12, 1870, the town did subscribe \$10,000, \$6000 of which was paid by the issue of bonds of the town, and on Nov. 1, 1871, the balance of the bonds voted were deposited with a trustee, but were afterwards withdrawn by the consent of the company in 1875 and destroyed, the supervisor and town clerk giving their obligation that the

town should execute to the company bonds to the amount of \$24,000 upon the completion of its road. Application was made for a mandamus in 1881 to compel the issue of such bonds. *Held*, that the case came within the express provisions of the acts of 1874 and 1877 limiting the time for the enforcement of such liabilities. *People ex rel. v. Granville*, 104 Ill. 285.

Prior to the passage of the act of 1874 bonds of a township voted in aid of a railroad company were deposited in the hands of a trustee, to be delivered to the company at a subsequent time. But in 1875 the bonds were given up to the town by the assent of the company and destroyed, so that at the passage of the amendatory act of 1877, or afterwards, there was no such deposit with a trustee. *Held*, that the case would not fall within the exceptions in a similar proviso in the latter act. And the fact that on the return of the bonds the supervisor and clerk of the town gave their sealed obligation to the company that the town, upon the completion of the road, should execute to the company bonds to the amount of \$24,000, which remained with the trustee, will not bring the case within such exception, as such obligation was but the individual one of the supervisor and clerk. *People ex rel. v. Granville*, 104 Ill. 285.

280. Demand and tender of subscription book or certificates.—Though a county be compelled by law to subscribe to the stock of a railroad, yet the company cannot have a writ of mandamus to compel it to do so until it tenders its books to the officers of the county and demands the subscription. *Oroville & V. R. Co. v. Plumas County Sup'rs*, 37 Cal. 354.

An information for a writ of mandamus to compel a county judge to issue the bonds of his county recited as one of the terms upon which the subscription was made "that said county was to receive for each as issued a certificate for the same amount of stock in said company." *Held*: (1) that an actual tender of the certificate of stock was not a condition precedent to the issue or delivery of the county bonds; (2) that in an information for a writ of mandamus it is only necessary on the part of the relator to allege a readiness and willingness to issue the certificate when the bonds are delivered. *State ex rel. v. Wapello County*, 9 Iowa 288. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

290. Parties.—A county was divided after it had issued its negotiable bonds in aid of a railroad, the statute making provision for an apportionment of the liability. Subsequently a statute was passed authorizing the county to compromise its indebtedness, and to issue new bonds, acting for itself and the territory that had been taken off. *Held*, that in suing on the new bonds it was not necessary to make the parts of the new counties taken off defendants, as the original county was made the representative of all. *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. Rep. 650. *Columbia County Com'rs v. King*, 13 Fla. 451.

291. Petition.—Where a town votes to guarantee \$40,000 of the bonds of a railroad, to be secured by a mortgage on the road, making the guaranty and taking the security are intended as one transaction, and the town authorities cannot be compelled to act upon separate demands by holders of a part of the amount of the bonds. In such a case, where a holder of but a part of the bonds applies for a mandamus to compel the town officers to discharge their duty, it is properly refused where he prays in his petition only for a mandamus to compel the officers to guarantee the particular bonds held by him. *Douglas v. Chatham*, 41 Conn. 211.

292. Right to put in a defense.—In a mandamus proceeding to compel a county to subscribe to the stock of a railroad, after a vote, where the question of the legality of the vote was in issue, the board of supervisors had a right to appoint a committee of their number to employ counsel, prepare evidence, and appoint other agents for the purpose of defending the interests of the county. *Gillett v. Logan County Sup'rs*, 67 Ill. 256.

The county judge has power to bind the county by employing counsel to resist an application of a railroad company for a mandamus to compel him to subscribe for its stock, and to issue the bonds of the county to pay the subscription, and it is the duty of the county levy court to make provision for the payment of a reasonable compensation to such counsel for the services rendered under such employment. *Washington County Court v. Thompson*, 13 Bush (Ky.) 239.

293. Return or answer.—The only proper return to a peremptory writ of mandamus is a certificate of compliance with its

requisitions, without further excuse or delay. *People ex rel. v. Barnett*, 91 Ill. 422.

Where a peremptory writ of mandamus has been granted to compel a town to issue its corporate bonds, it is too late to object to the rate of interest required and the time the bonds are to run. Such questions should have been presented and determined before the writ was issued. *People ex rel. v. Barnett*, 91 Ill. 422.

A willingness expressed to execute and deliver the bonds in pursuance of a writ of mandamus upon receipt of a certificate of stock, and a refusal to give such certificate, *it seems*, will excuse the town from obeying the mandamus until the company is ready to give the certificate; but where no such offer is made, nor any willingness expressed to deliver the bonds, a failure of the company to tender the stock will furnish no excuse for not obeying the writ. *People ex rel. v. Barnett*, 91 Ill. 422.

A return to a mandamus to compel a county to issue bonds to a railroad is good on demurrer that states that the apparent majority vote in favor of the subscription was made up entirely of illegal votes, without stating wherein the votes were illegal. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.

Where a petition for a mandamus to compel township officers to subscribe to the capital stock of a railroad company and issue corporate bonds sets out the conditions upon which the township voted the subscription, and avers performance of them, if the answer of the defendants substantially denies the performance of such conditions, stating wherein they have not been performed, it will be good on general demurrer, although it may contain unnecessary averments and irrelevant matter. *People ex rel. v. Holden*, 91 Ill. 446.

294. Unavailable defenses.—Where a municipality has become legally bound to subscribe to railroad stock and to issue its bonds in payment, and a compromise is effected afterwards whereby it is agreed that it may issue a less amount of bonds, the delivery of the less amount is not a donation; nor is the fact that the road does not touch the municipality, and is not one of local interest, a good defense in an action to compel it to issue the bonds under the compromise. *People ex rel. v. San Francisco Sup'rs*, 27 Cal. 655.

Upon an application for a mandamus to

compel a town clerk to countersign bonds which had been executed by the town supervisor, the clerk cannot set up matters affecting the legality of the steps required by law to be taken before the bonds could properly issue as a reason for refusing to countersign them, his signing being but a ministerial act. *Houston v. People ex rel.*, 55 Ill. 398, 1 Am. Ry. Rep. 104.—DISTINGUISHED IN *People ex rel. v. Cline*, 63 Ill. 394.

The fact that a company has encumbered its road, or given a lease thereon, so as to lessen the value of stock, or issued a large amount of stock to another company, the lessee of the road, affords no defense against an application to compel a county to subscribe a sum authorized by a vote of its citizens at a legal election. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.

It cannot be urged in defense to a petition for a mandamus for the issue of corporate bonds voted that the company suing had purchased another railroad or exchanged stock with such other company, where there is no such defense alleged in the answer, but only a consolidation with such company is averred. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

A decree enjoining county commissioners from issuing certain bonds, made in an action to which the persons claiming a right to them are not parties, is no bar to an action by such parties to compel the issue of those bonds. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 12 Kan. 127.

On mandamus to compel a county to make a subscription to a railroad in pursuance of a vote, the return showed, as cause against the remedy sought, that the directors of the company, in building the road, gave to the contractors too large a sum. *Held*, no defense; that the directors had the power to make contracts binding on the stockholders. *People ex rel. v. Logan County Sup'rs*, 63 Ill. 374.—QUOTED IN *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426.

A municipal township voted bonds to aid a railroad on an agreed line through the township, and made a subscription to the capital stock of the company, and received and retained the certificates of stock issued to it. The proceedings of the board of county commissioners affirmatively showed that all the requirements of the statute authorizing such vote and empowering such subscription had been duly observed, the

railroad having been constructed through the township in all respects in strict compliance with the terms of the subscription, and regularly operated. *Held*, in an action to compel the issue and delivery of the bonds voted, that it is estopped from asserting that the petition presented to the board of county commissioners requesting an election to be called at which to vote the bonds was not signed by two fifths of the resident taxpayers of the township, the board of county commissioners having found and determined at the time of its presentation that it was so signed and was legal in all other respects, and the railroad having been constructed through the township on the faith that all the statutory requirements had been complied with, as shown by the journal of the county board. *Hutchinson & S. R. Co. v. Kingman County Com'rs*, 48 Kan. 70, 28 Pac. Rep. 1078.

295. Burden of proof—Evidence.

—In a suit by a railroad company to enforce the issuing of bonds by a municipality for its use, the burden of proof is upon the railroad company to show affirmatively that the issue of the bonds was authorized by a vote of the people, had pursuant to a law providing therefor, prior to the adoption of the present constitution, and the law under which the election is held must be substantially complied with, or the election will confer no authority. *Chicago & I. R. Co. v. Mallory*, 5 Am. & Eng. R. Cas. 139, 101 Ill. 583.

A town voted to guarantee the bonds of a railroad company to a certain amount, to be secured by a second mortgage on the road. The bonds were issued and known as second mortgage bonds, but the mortgage in fact was a third mortgage, a second mortgage having been executed, which had been released by a vote, but no release executed. *Held*, that it was competent to show by parol evidence that the bonds in question were known as second mortgage bonds, and were the ones intended when the town voted on the guaranty. *Douglas v. Chatham*, 41 Conn. 211.

296. Disobedience and punishment therefor.

—In a proceeding by attachment to compel a town to obey a mandamus requiring it to issue its bonds to a railroad company, it is no concern of the town for whose use the suit may be prosecuted, or to whom the bonds may go when issued; the fact that the road has gone into

the hands of a receiver is no defense, if the receiver makes no objection; nor the fact that the affairs of the company have been fraudulently managed. *People ex rel. v. Barnett Sup'rs*, 91 Ill. 422.

A court of equity will not punish an officer who is being used as a mere instrument by which a court of law is enforcing its judgment. So where a railroad company obtains a mandamus against the judge of a county court to compel him to issue county bonds in payment of a subscription to its stock, and before he has complied certain taxpayers enjoin him from issuing the bonds, but do not enjoin the company from enforcing the writ, the court issuing the mandamus had the right, and could not refuse, to compel obedience to it, and the injunction interposed no legal obstacle to its enforcement. *Cumberland & O. R. Co. v. Washington County Court Judge*, 10 Bush (Ky.) 564.—QUOTING *Ex parte Fleming*, 4 Hill (N. Y.) 582.

297. Canadian cases. — A writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway will not be granted upon motion, but the applicant must bring his action. *In re Canada Atl. R. Co.*, 3 Ont. 291.—FOLLOWING *Grand Junction R. Co. v. Peterborough County*, 6 Ont. App. 339.—*In re London, H. & B. R. Co.*, 36 U. C. Q. B. 93.

The corporation of the county of Ottawa under the authority of a by-law undertook to deliver to the Montreal, O. & W. R. Co., for stock subscribed by it, 2000 debentures of the corporation of \$100 each, and subsequently, without any valid cause or reason, refused to issue said debentures. In an action by the company against the corporation solely for damages for its refusal—*held*, that the corporation, apart from its liability for the amount of the debentures and interest thereon, was liable under arts. 1065, 1073, 1840, and 1841, C. C., for damages for breach of the covenant. *Ottawa County v. Montreal, O. & W. R. Co.*, 14 Can. Sup. Ct. 193; *affirming* 1 Montr. L. R. 46, which *affirms* 26 L. C. Jur. 148.

A township corporation passed a by-law that the reeve should make out debentures not exceeding \$5000, which should be sealed by the corporate seal, and signed by him and the treasurer; and that, provided the grading of defendant's railway should be completed to a certain point by a day

mentioned, the reeve should subscribe for shares in defendant's company to the extent of \$5000 on behalf of the corporation, and deliver said debentures to the company in payment therefor. By 36 Vict. 98, O, the by-law was confirmed. On application for a mandamus to the reeve to make such subscription and delivery—*held*, unnecessary to show an agreement by the municipality to take the stock, or a written subscription, or to make the treasurer or the corporation parties to the application, and a mandamus was granted with costs. *In re Canada C. R. Co.*, 35 U. C. Q. B. 390.

The Grand J. R., being a local work of the province of Ontario, the act of 33 Vict. c. 53, was *ultra vires* of the dominion parliament, and the company was therefore not in existence when the defendants granted the bonus, or when the act 34 Vict. c. 48, validating the by-law, was passed; and as 37 Vict. c. 43, O, which was the first act by a legislature having power to incorporate them, did not legalize the by-law in favor of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures. *Grand Junction R. Co. v. Peterborough County*, 6 Ont. App. 339; *reversing* 45 U. C. Q. B. 302.—*DISTINGUISHING* Toronto & L. H. R. Co. v. Crookshank, 4 U. C. Q. B. 309; *Smith v. Spencer*, 12 U. C. C. P. 277.

c. Restraining Issuance.

298. When an action will lie, generally.—Where a bill was filed for an injunction to restrain county officers from issuing bonds to a railroad, and the proof showed that they had been issued and delivered before the commencement of the suit, the bill was properly dismissed, as the court was powerless to grant the relief sought. *Menard v. Hood*, 68 Ill. 121.

Where an election was held in 1883 for the purpose of obtaining authority to issue bonds in aid of a railroad corporation, which the commissioners declared to have been ratified by a majority of the qualified voters, but it was not attempted to issue the bonds until 1886—*held*, that an action brought to attack the finding of the commissioners when they attempted to issue the bonds was not barred. *McDowell v. Massachusetts & S. Constr. Co.*, 96 N. Car. 514, 2 S. E. Rep. 351.—*DISTINGUISHED IN* Jones v. Person County Com'rs, 107 N. Car. 248.

299. When a citizen or taxpayer may sue.

—It requires express affirmative legislation to authorize an appropriation by a county to aid in the construction of a railroad, and bonds of the county issued for such purpose without such authority are void, and an injunction will lie, at the suit of a citizen and taxpayer of the county, in his own right, to prevent the issuing and selling of such bonds. *Delaware County Com'rs v. McClintock*, 51 Ind. 325. *Chestnutwood v. Hood*, 68 Ill. 132. *Allison v. Louisville, H. C. & W. R. Co.*, 9 Bush (Ky.) 247. *Curtenius v. Hoyt*, 37 Mich. 583.—*DISTINGUISHING* Miller v. Grandy, 13 Mich. 540.—*Ayers v. Lawrence*, 59 N. Y. 192, 1 T. & C. add. 5; *reversing* 63 Barb. 454.—*FOLLOWED IN* Metzger v. Attica & A. R. Co., 79 N. Y. 171.—*Lynch v. Eastern, L. F. & M. R. Co.*, 12 Am. & Eng. R. Cas. 652, 57 Wis. 430, 15 N. W. Rep. 743, 825.

Where he has no adequate remedy at law, a taxpaying property holder has a right, in his own name, to resort to equity to restrain by injunction a municipal corporation and its officers from illegally creating debts which will increase his burden of taxation. *Hodgman v. Chicago & St. P. R. Co.*, 20 Minn. 48 (Gil. 36).

A taxpayer, for sufficient cause, can intervene in apt time and enjoin the issuing of municipal bonds, but this must be done before the bonds are issued and negotiated and pass into circulation as commercial securities. *Belv. Forsythe County Com'rs*, 76 N. Car. 489.

A court of equity has jurisdiction upon a bill filed by fifteen or more citizens and taxpayers of a county or corporation to enjoin the issuance of bonds of the county or corporation in payment of a subscription to railroad stock, if the proceeding has not been properly conducted, notwithstanding the fact that a statute provides a method whereby the voters may contest an election to vote such subscription. *Redd v. Henry County Sup'rs*, 31 Gratt. (Va.) 695.

Where a company has made such a material change in the route of its road as to release subscribers to its stock, taxpayers of a town that has subscribed may maintain an action against the town, its officers, and the company to restrain the issuing of bonds in payment of the subscription. *Nasen v. Port Washington*, 37 Wis. 168.

300. — and when not.—New York statutes under which a county judge acts in

appointing commissioners to bond a town in aid of a railroad constitute him a judicial tribunal to hear and determine the questions presented by the petition, and provide that his determination shall have the same effect as any judgment of a court of record, and errors of the judge in regard to matters which he has the right to determine cannot be corrected in an equitable action by taxpayers against the commissioners and the company to restrain the issuance of the bonds. *Ayres v. Lawrence*, 63 *Barb.* (N. Y.) 454; *reversed in* 59 *N. Y.* 192.

Taxpayers of a town cannot restrain an issue of such bonds on the ground that they, if issued, will probably increase the taxes of the town at some future time, when it is not shown that they have any interest except such as is common to all taxpayers of the town. *Ayres v. Lawrence*, 63 *Barb.* (N. Y.) 454; *reversed in* 59 *N. Y.* 192.

301. When an injunction will be granted.—A statute authorizing a city to subscribe for stock in railroads and to issue bonds to pay for the same does not authorize it to contribute to a railroad by indorsing its bonds, and upon the complaint of a taxpayer or citizen of the corporation a court of equity will enjoin such indorsement. *Blake v. Macon*, 53 *Ga.* 172.

Where a statute provides two modes, one valid and the other invalid, for authorizing the officers of a municipal corporation to issue bonds of the corporation, inasmuch as the bonds when issued need recite only that they were issued under the statute, without specifying in which of the two modes the officers were authorized to issue them, and as there might be *bona fide* holders of bonds so issued, an action for an injunction, at the instance of a proper party, will lie to restrain the issuance of the bonds by the municipal officers under the invalid mode provided by the statute. *Harrington v. Plainview*, 27 *Minn.* 224, 6 *N. W. Rep.* 777.

It is competent for the state at common law, through its officers, to maintain proceedings by injunction to restrain public corporations from doing acts in violation of the constitution and laws of the state. Section 24 of the Mo. statute concerning injunctions (Wagn. St. 1032), which provides that "the remedy by injunction or prohibition shall exist in all cases where injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the

court, an adequate remedy cannot be enforced by an action for damages," also applies to such cases. *So held*, where an injunction was prayed to restrain a county court from issuing bonds to pay a subscription illegally made to the capital stock of a railroad. *State ex rel. v. Saline County Court*, 51 *Mo.* 350, 3 *Am. Ry. Rep.* 149.—REVIEWING *Davis v. Mayor*, etc., of N. Y., 2 *Duer* (N. Y.) 663; *Attorney-General v. Great Northern R. Co.*, 1 *Drew. & Sm.* 154; *Attorney-General v. Mid-Kent R. Co.*, L. R. 3 Ch. 100; *Stockport Dist. Waterworks Co. v. Manchester*, 9 *Jur.* N. S. 266; *Attorney-General v. West Hartlepool Imp. Com'rs*, L. R. 10 Eq. 152; *Attorney-General v. Salem*, 103 *Mass.* 140. REVIEWING AND CRITICISING *People v. Miner*, 2 *Lans.* (N. Y.) 396. REVIEWING AND DISTINGUISHING *State v. Parkville & G. R. R. Co.*, 32 *Mo.* 496.—FOLLOWED IN *State ex rel. v. Sander-son*, 54 *Mo.* 203.

A court should grant an injunction *pendente lite* to restrain officers of a town from issuing bonds in aid of a railroad, where it is alleged that the petition presented by the taxpayers was so defective as not to give the town a right to issue bonds. And in such case the certificate of the county clerk is not conclusive evidence of such authority. *Rochester v. Davis*, 44 *How. Pr.* (N. Y.) 95.

Where a county has made an unauthorized subscription of stock to a railroad company, parties who have an interest to defeat it need not wait for the bonds of the county to be called for by the company, nor for their issuance, or attempt to issue them, nor for the assessment of a tax to pay the subscription, but may file their bill at once, and obtain an injunction. *Winston v. Tennessee & P. R. Co.*, 1 *Baxt.* (Tenn.) 60.

The authority to the three commissioners appointed is joint to them all, and must be jointly executed, not by a majority, as in case of a board of public officers, a majority of whom may act for the whole under the statute. Therefore a second subscription, executed by two only of said commissioners, varying from the first in terms, is of no effect as a subscription for the town, and the first one is the only one remaining in force; and where the selectmen and treasurer of the town intend to deliver the bonds of the town to the railroad company in accordance with the second subscription, and in violation of the conditions of the first, which were important, an injunction is

properly granted restraining said officers from so doing. *Danville v. Montpelier & St. J. R. Co.*, 43 *Vt.* 144.

An injunction is the proper remedy to prevent the execution and delivery, by its officers, of the negotiable bonds of a town or other municipal corporation, where it appears, upon the complaint of a taxpayer likely to suffer pecuniary loss, that the officers threaten such execution and delivery in contravention of the authority given them by law, or in violation of the trust reposed in them by the legislature or by the taxable inhabitants of the municipality. *Lawson v. Schnellen*, 33 *Wis.* 288.—APPROVING *Phillips v. Albany*, 28 *Wis.* 340. FOLLOWING *Judd v. Fox Lake*, 28 *Wis.* 583; *Whiting v. Sheboygan & F. du L. R. Co.*, 25 *Wis.* 167.

In an action for specific performance of a contract of defendant town to issue bonds in payment of its subscription to the stock of the M., M. & G. B. R. Co.—*held*, that the subscription was not binding, because a material change of route invalidates subscription of a non-assenting subscriber, and that defendants are entitled to positive relief by injunction restraining all persons claiming under the company or the plaintiff from asserting any claim against said town by reason of such stock subscription. *Perkins v. Port Washington*, 37 *Wis.* 177.—FOLLOWING *Nessen v. Port Washington*, 37 *Wis.* 168.

302. When the writ will be refused.—The issue of bonds by a county to a railroad company will not be restrained where the requirements of the statute authorizing the issue have been complied with. *Union Pac. R. Co. v. Merrick County*, 3 *Dell.* (U. S.) 359.

Where a complaint by a taxpayer of a town alleges that the railroad company is duly created and organized, he cannot restrain the delivery of town bonds to the officers of the company on the ground that they were not legally elected, where it appears that they are at least *de facto* officers. *Sauerhering v. Iron Ridge & M. R. Co.*, 25 *Wis.* 447.

Where it is understood at the time that a town votes to issue bonds in aid of a railroad that the road might be built by an assignee of the company, a taxpayer of the town cannot enjoin the delivery of the bonds simply because the road was completed by an assignee. In such case the

company is not required to complete the road itself in order to earn the bonds. (*Lyon and Orton, JJs.*, dissenting.) *Lynch v. Eastern, L. F. & M. R. Co.*, 12 *Am. & Eng. R. Cas.* 652, 57 *Wis.* 430, 15 *N. W. Rep.* 743, 825.

Under the Kan. Act of February 26, 1876, a township voted to take stock in a railroad company to the amount of \$27,000, and to issue bonds of the township in payment therefor. The amount thus voted was \$614.45 in excess of the amount of bonds which the township might legally issue. *Held*, that this vote was not a nullity except as to the sum of \$614.45, and that the commissioners could not be restrained from issuing the remainder of such bonds. *Turner v. Woodson County Com'rs*, 12 *Am. & Eng. R. Cas.* 600, 27 *Kan.* 314.

Under the New York statutes it is made the duty of town assessors to make an affidavit that a majority of the taxpayers of the town have consented in writing to an issue of town bonds in aid of a railroad. *Held*, that, if the assessors proceed according to law, and make a regular affidavit, the supreme court cannot restrain the commissioners from issuing the bonds of the town on the ground that the assessors have predicated their affidavit upon facts failing to warrant it. *Corwin v. Campbell*, 45 *How. Pr. (N. Y.)* 9.

303. Parties defendant.—In an action to restrain the issuance of railroad aid bonds the company to which the bonds are to be issued is a necessary party. *Patterson v. Yuba County Sup'rs*, 12 *Cal.* 106. *People ex rel. v. Clark*, 53 *Barb. (N. Y.)* 171.

The company to be aided is not bound by the judgment in the injunction suit by merely being named as a defendant in the summons and pleadings. *People ex rel. v. Clark*, 53 *Barb. (N. Y.)* 171.

In an action by injunction, when the petition alleges that a county court had made an unlawful subscription to a railroad, and had delivered a quantity of bonds issued to pay such subscription into the hands of an agent to be negotiated, and had levied a tax to pay said bonds and the interest thereon, and the petition prays that the subscription be canceled, and that the county court and the justices thereof and said agent be restrained from the commission of said acts—*held*, that the railroad and the agent for the negotiation of the bonds as well as the county court and its justices are proper par-

ties to the action. *State ex rel. v. Callaway County Court*, 51 Mo. 395, 3 Am. Ry. Rep. 172.

304. The bill or petition.—Where a taxpayer of a town seeks to enjoin commissioners from issuing bonds of a town, the complaint must show that they are the officers of the town having authority to issue the bonds. It is not sufficient to allege that they "are or claim to be" such commissioners, or that plaintiff is not informed and is not able to say whether they have been duly appointed or not. If they have no authority to act, bonds issued by them would be a nullity, and an injunction is unnecessary. *Pierce v. Wright*, 6 Lans. (N. Y.) 306, 45 How. Pr. 1.

Where the statute makes affidavits and consents of taxpayers, acknowledged and filed as required, evidence of the facts therein contained, such facts may not be attacked collaterally, the remedy in case of inaccuracy being by proceeding to correct the record or set it aside. *Pierce v. Wright*, 6 Lans. (N. Y.) 306, 45 How. Pr. 1.

A bill to enjoin the supervisor of a town from issuing, and a railroad from receiving, bonds charged, "on information and belief, that said company will soon demand of the supervisor of said town all or a part of said bonds, and that there is danger, unless said supervisor is enjoined from issuing said bonds, and the said company restrained from receiving the same, that said bonds will be issued and registered." *Held*, that this was a specific and positive charge that there was danger that the bonds would be issued and registered unless the supervisor was restrained from issuing, and the company from receiving, the bonds, and clearly entitled complainant to an answer. *Campbell v. Paris & D. R. Co.*, 71 Ill. 611.

2. Execution, Form, and Contents.

305. What officers may execute the bonds.—Where a county in Illinois is organized under the "Township Act," the supervisors are the proper officers to issue county bonds in aid of a railroad. *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 Sup. Ct. Rep. 80.

Where a railroad charter provides that if a majority vote at an election on a proposition that a town subscribe or donate money to the company to aid in the construction of its road, the town, by its proper corporate authorities shall subscribe and issue

its bonds for the amount voted, the bonds will be properly executed by its supervisor and town clerk, though the expression "corporate authorities" does not ordinarily, in its application to townships, signify the supervisor and town clerk. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179. *Wind-sor v. Hallett*, 3 Am. & Eng. R. Cas. 76, 97 Ill. 204. *Douglas v. Niantic Sav. Bank*, 3 Am. & Eng. R. Cas. 54, 97 Ill. 228.

306. Signature.—Bonds of a county issued in aid of a railroad signed by two out of three commissioners are valid and binding upon the county. *Curtis v. Butler County*, 24 How. (U. S.) 435.

After a precinct had regularly voted bonds to a company and the road had been built in strict conformity to the proposition, and before the bonds had been issued, the county commissioners became apprehensive that they might be enjoined, but before any writ had been issued or served, and without knowledge on their part, or of the company, that an injunction had been allowed, they, with the deputy clerk, went to an adjoining county, where the bonds were signed by the chairman and the seal attached. Upon their return to their county, and before the bonds had been delivered, an injunction was served on them. *Held*, that the bonds were earned when the road was completed according to the contract, and the company was entitled to them. *Jones v. Hurlburt*, 13 Neb. 125, 13 N. W. Rep. 5.—REVIEWING AND QUOTING *Weyauwega v. Ayling*, 99 U. S. 112.

A statute which authorized towns to issue bonds in aid of railroads provided that they should be issued by "the proper officers" of the town. The bonds were signed by the chairman of the board of supervisors and the town clerk, the signatures being lithographed, and were delivered by the chairman to the company. The town made defense to a suit on the bonds by a *bona fide* holder for value, after maturity, that the bonds in fact were not issued until after their date, at which time the clerk had ceased to be an officer, and his successor had been elected and qualified. *Held*: (1) that the town was estopped from denying that the bonds were not properly dated; (2) that it must be assumed that the bonds were delivered by the chairman, with the assent of the clerk who was in office at the time, and, therefore, issued by the "proper officers," within the meaning of the statute. *Wey-*

anweya v. Ayling, 99 U. S. 112.—REVIEWED AND QUOTED IN *Jones v. Hurlburt*, 13 Neb. 125.

The municipal authorities of Statesville were authorized by the N. Car. Act of 1861, ch. 176, subject to a vote of the qualified voters of the town, to issue certain coupon bonds, with a provision that they shall be signed by the town magistrate, treasurer, and commissioners thereof. After a vote approving the same the bonds were issued, but signed only by the town magistrate and treasurer. *Held*, that the act was directory, and the omission of the commissioners to sign the bonds was not fatal to a recovery upon them. *Bank of Statesville v. Statesville*, 7 Am. & Eng. R. Cas. 178, 84 N. Car. 169.

A municipal by-law for issuing debentures to a railway which had been submitted to the ratepayers and approved by them contained a clause stating that the debentures were to be signed by the reeve. *Held*, that the council had power to appoint another person to sign the debentures in place of the reeve on his refusal. *Brock Tp. v. Toronto & N. R. Co.*, 17 Grant's Ch. (U. C.) 425.

307. Seal.—Where a statute authorizes a town to subscribe to the capital stock of a railroad and to issue bonds to pay for such subscription, and prescribes that the subscription shall be made by commissioners, who are to execute the bonds under their hand and seal, a failure to affix seals to the bonds does not invalidate them, the requirement as to seals being merely directory and a matter of form, not of substance. *Draper v. Springport*, 5 Am. & Eng. R. Cas. 205, 104 U. S. 501. *San Antonio v. Mehaffy*, 96 U. S. 312.—APPROVING *Thomas v. Richmond*, 12 Wall. (U. S.) 354; *Oneida Bank v. Ontario Bank*, 21 N. Y. 496.

In such a case equity will restrain the town from setting up the want of seals as a defense at law to a suit on the bonds by a purchaser in good faith who bought without noticing the lack of seals. *Bernards Tp. v. Stebbins*, 15 Am. & Eng. R. Cas. 634, 109 U. S. 341, 3 Sup. Ct. Rep. 252.

Where it appears that the commissioners intended properly and effectually to execute the bonds, and the omission of the seal was by misunderstanding, mistake, or inadvertence, a court of equity might afford relief to a person justly entitled to the benefit of the instrument. *Solon v. Williamsburgh*

Sav. Bank, 114 N. Y. 122, 21 N. E. Rep. 122.

Where officers issuing town bonds sign them, but neglect to affix seals, as required by law, the bonds are not rendered invalid because a stranger afterwards affixes wafer seals thereto. *Armfield v. Solon*, 19 N. Y. Supp. 44, 45 N. Y. S. R. 905, 64 Hun 633, mem.; modified in 136 N. Y. 663, 49 N. Y. S. R. 848, 32 N. E. Rep. 1063.

With respect to the mode in which corporations aggregate may execute contracts, a broad distinction is taken and maintained by the authorities between trading and municipal corporations. The former are permitted to incur many liabilities without using their common seal which the latter are not otherwise permitted to incur; and notwithstanding that the rule of the common law on this subject has received many modifications in this country, yet no case has been found in which a municipal corporation has been permitted, otherwise than by its common seal, to issue its negotiable bonds for the liquidation of its subscription to the stock of a company. *San Antonio v. Gould*, 34 Tex. 49.

A statute authorizing a town to issue bonds in aid of the construction of a railroad provided that they should be under the hands and seals of commissioners. They issued coupon bonds which were not sealed, although their wording showed that sealing was intended, and the coupons were not sealed. *Held*, in a suit on the coupons, that the bonds and coupons were void. *Avery v. Springport*, 14 Blatchf. (U. S.) 272.

308. Countersigning by county clerk or treasurer.—The signature of the county clerk is essential to the validity of township bonds issued in aid of railroads, under Kan. Laws of 1870, ch. 90, providing that when such bonds have been authorized the county commissioners shall order the county clerk to issue the same, "to be signed by the chairman of the board, and attested by the clerk, under the seal of the county." *Bissell v. Spring Valley Tp.*, 15 Am. & Eng. R. Cas. 585, 110 U. S. 162, 3 Sup. Ct. Rep. 555.

But the clerk is not in default for not countersigning the bonds until the board of supervisors directs him to countersign the same or affords him an opportunity to do so in its presence, and he refuses. *People ex rel. v. San Francisco Sup'rs*, 27 Cal. 655.

Where bonds of a county are legally au-

thorized, and the law provides that the bonds shall be countersigned by the treasurer of the county, the omission of the treasurer to countersign the bonds is a mere defect in the execution of them which a court of equity will supply, and an injunction restraining the collection of taxes for the payment of such bonds should not be allowed. *Melvin v. Lisenby*, 72 Ill. 63.

309. Naming the parties.—Where a statute authorizes a county to subscribe to railroad stock and to issue its bonds in payment, to be made payable "to the president and directors of the company, and their successors and assigns," bonds issued payable to the company or bearer are not invalid. Such provision as to whom payable is only directory. *Calhoun County Sup'rs v. Galbraith*, 99 U. S. 214.

The issuing of bonds in the name of "the town of Perrysburg," instead of in the name of "the incorporated village of Perrysburg," its proper legal designation, is merely a misnomer, which does not affect the validity or obligation of such bonds. *State ex rel. v. Perrysburg*, 14 Ohio St. 472.

Where a statute authorizes the mayor and council of a city to "execute bonds running to and for the benefit of said company, in such form and denominations as they may direct," bonds executed and delivered to and accepted by the company are not void because made payable to an individual by name, "or bearer," instead of to the company or bearer. *Rogan v. Watertown*, 30 Wis. 259, 8 Am. Ry. Rep. 20.

310. Amount and denominations.—The court of county commissioners may cause bonds to be executed in such denominations as may be agreed upon by it and the railroad company, provided the total amount for which they are issued does not exceed that set forth in the proposal accepted by the vote of the qualified electors of the county. *Green County v. Daniel*, 3 Am. & Eng. R. Cas. 105, 102 U. S. 187.

311. Stating place of payment.—Where the statute designates no place of payment of municipal bonds issued for railroad stock, it is competent for the officers to make them payable in New York. *Calhoun County Sup'rs v. Galbraith*, 99 U. S. 214. *Austin v. Gulf, C. & S. F. R. Co.*, 45 Tex. 234, 13 Am. Ry. Rep. 172.

Counties and cities in Illinois have not the right to make bonds issued in aid of railroads payable in the city of New York.

They should be made payable at the municipal treasury. *People ex rel. v. Tazewell County*, 22 Ill. 147.—**DISTINGUISHING** *Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.—*Prettyman v. Tazewell County Sup'rs*, 19 Ill. 406.—**DISTINGUISHED IN** *People ex rel. v. Tazewell County*, 22 Ill. 147.—*Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803.—**FOLLOWING** *People v. Tazewell County*, 22 Ill. 147; *Johnson v. Stark County*, 24 Ill. 75; *Sherlock v. Winnetka*, 68 Ill. 530.

In the absence of any statutory regulation, municipal bonds issued for railroad stock are not void for being payable at another place than the municipal treasury; and being payable at another place is not sufficient to put a purchaser on inquiry as to their validity, or of a prior judgment declaring them illegal. *Enfield v. Jordan*, 119 U. S. 680, 7 Sup. Ct. Rep. 358.

A bond issued by a county in Virginia which mentions on its face no place of payment either as to principal or interest is payable in the county by which it is issued; and, if made in Virginia, delivered to a company incorporated by Virginia as obligee, and payable in Virginia, it is not affected by a custom of New York, if there be such custom, which treats such a bond, having such a power of attorney for its transfer or a "registered bond" attached, as negotiable. Custom cannot make that which is essentially non-negotiable negotiable beyond the locality in which the custom prevails. *Cronin v. Patrick County*, 4 Hughes (U. S.) 524.

312. Rate of interest, and how payable.—Where a statute authorizes a court to issue county bonds in payment of a subscription to railroad stock, and no rate of interest is fixed, any rate may be fixed that is not illegal. *Beattie v. Andrew County*, 56 Mo. 42.

Where a statute authorizes a city to issue bonds bearing six per cent. interest, bonds issued bearing ten per cent. interest are valid to the extent of the principal and six per cent. interest. *Lewis v. Clarendon*, 5 Dill. (U. S.) 329.

Where a statute authorized bonds in aid of a railroad "drawing interest at the rate of ten per cent. per annum," a vote to issue bonds at a rate "not to exceed ten per cent. interest"—held, to authorize the issue of bonds bearing the statute rate of ten per cent. *People ex rel. v. Ford County Sup'rs*, 63 Ill. 142.

The interest of authorized bonds may be made payable in gold. *Pollard v. Pleasant Hill*, 3 Dill. (U. S.) 195.

313. Certificate of regularity.—A holder of municipal bonds issued in Missouri in aid of a railroad cannot maintain an action thereon unless they are indorsed by the state auditor, and bear his certificate that the conditions of the law have been complied with, as required by the act of March 30, 1872. *Anthony v. Jasper County*, 101 U. S. 693.

Where bonds of a county issue to the stock of a railroad for a sum greater than authorized by law, the county is not estopped from denying the validity of the over-issue by a certificate on the back of the bonds by the county judge to the effect that they were duly authorized. *Davies County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897.

The certificate of township trustees that a railroad has been constructed as contemplated in a notice of election to vote a tax in aid thereof is not invalidated by the fact that it was signed in a place outside the township. *Meador v. Lowry*, 45 Iowa 684.

Bonds issued by a county in Nebraska as a donation to a railroad company are invalid unless they have indorsed thereon a certificate signed by the secretary and auditor of state showing that they were issued pursuant to law. *State ex rel. v. Roggen*, 22 Neb. 118, 34 N. W. Rep. 108.

The Tenn. Act of 1871, providing that the credit of a county shall not be given or loaned to or in aid of any company, except upon the consent of a majority of the justices, and upon an election held by the voters of the county at which three fourths of the voters shall consent, is sufficiently complied with where bonds are issued in aid of a railroad with an indorsement thereon under the hand and seal of the chairman of the county court stating that the credit of the county, under and by virtue of said act, is pledged to the payment of the bonds and coupons attached, in accordance with an order of said court passed on a day named, and approved by the people at an election held on another day named. *Shelby County v. Jarnagin* (Tenn.), 16 S. W. Rep. 1040.

314. Registration.—Where the law requires municipal bonds issued for railroad stock to be registered in the office of the auditor of state, and so certified, the bonds are valid in the hands of *bona fide* holders,

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though there be no actual registration, if the auditor's certificate duly appears on the bonds. *Rock Creek Tp. v. Strong*, 96 U. S. 271.

The provision of the Ill. Act of April 16, 1869, providing for registering municipal railroad bonds in the office of the state auditor, does not require that the auditor shall inquire into their validity, or certify that they were regularly or legally issued; and the mere act of registration will not estop the municipality from denying their validity. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159.

It was objected to the certificate of the president of a town, made to entitle the bonds of the town to be registered, that it was not sufficient, for the reason that it was not positive, but to the best of the officer's knowledge and belief. Held, that, as the certificate was required to be made under oath, it was sufficient. *Decker v. Hughes*, 68 Ill. 33.

The Kan. Act of March 2, 1872, providing for the registration of municipal and county bonds, is not a curative act in the sense that it takes away any valid defense which the city or county would otherwise have to bonds theretofore issued. *January v. Johnson County*, 3 Dill. (U. S.) 392.

County commissioners may provide for paying the interest on county bonds issued to railroad companies, although such bonds have not been registered with the auditor of state, as provided in the Minn. Act of March 6, 1871. *St. Louis County Com'rs v. Nettleton*, 22 Minn. 356.

The Mo. Act of March 30, 1872, entitled "An act to provide for the registration of bonds issued by counties, cities, and incorporated towns, and to limit the issue thereof," applies to bonds issued to railroads under the "Township Aid Law" of 1868. *Anthony v. Jasper County*, 101 U. S. 693.—FOLLOWED IN *Hoff v. Jasper County*, 110 U. S. 53.

A statute authorized a town to subscribe to railroad stock and to issue its bonds upon the assent of a majority of the taxpayers, but provided for an "instrument of assent" signed and acknowledged by each person assenting, and setting forth the conditions on which the subscriptions should be made, and that the commissioners who were to make the subscription should add thereto a certificate stating that such assent had been signed and acknowledged by a majority,

and should cause such instrument and certificate to be filed and recorded in the town clerk's office, and a copy lodged and recorded in the county clerk's office, and that the commissioners should not proceed to make the subscription until such records should be made. *Held*, that the commissioners had no authority to make a subscription in any form without causing such assent and certificate to be both filed and recorded; that filing alone was not sufficient; therefore a mandamus would not lie to compel the town officers to execute and deliver the notes or bonds of the town. *Essex County R. Co. v. Lunenburg*, 49 Vt. 143.—FOLLOWED IN *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257.

3. Validity.

315. In general.*—Where a statute only requires a grand jury to fix the amount of a municipal subscription, and to approve it, it is not necessary, in a suit to recover interest, that the plaintiff show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defense for the county to show that the grand jury failed to do so. *Woods v. Lawrence County*, 1 Black (U. S.) 386.

Under Iowa statutes authorizing counties to aid in public improvements, bonds signed by the proper officers, and under seal, made payable to bearer, and reciting that they are issued pursuant to a vote of the people, are *prima facie* valid, though they fail to state the purpose for which they were issued. *Carpenter v. Buena Vista County*, 5 Dill. (U. S.) 556.

It is the settled policy of Kansas to tolerate the issue by municipalities of bonds in aid of railroads, and bonds so issued, if issued in pursuance of express authority and in accordance with the prescribed forms, are valid. *Leavenworth, L. & G. R. Co. v. Douglas County Com'rs*, 18 Kan. 169, 15 Am. Ry. Rep. 256.

When a county issues its bonds to a railroad, if there is reasonable certainty in the manner of voting and ordering the subscription, and the subscription is made to the road authorized, and the other provisions of the statute are complied with, such bonds are valid. *Ranney v. Baeder*, 50 Mo.

600, 3 Am. Ry. Rep. 141.—FOLLOWED IN *Cass County v. Johnston*, 95 U. S. 360. REVIEWED IN *Carpenter v. Lathrop*, 51 Mo. 483.

A condition unauthorized omitted to be printed upon the bonds does not impair their validity, whether the holder had notice or not. *Howard v. Crawford County*, 1 Pittsb. (Pa.) 531.

316. Validity determined by law in force at time of issue or sale.

Where county bonds issued in aid of a railroad have been sold upon the faith of decisions of the supreme court of the state declaring their validity, the fact that the court afterwards overrules its decision does not invalidate those previously purchased in good faith and before maturity. *United States ex rel. v. Lee County Sup'rs*, 2 Biss. (U. S.) 77. *Marshall v. Elgin*, 3 McCrary (U. S.) 35, 8 Fed. Rep. 783. *Green County v. Conness*, 109 U. S. 104, 3 Sup. Ct. Rep. 69. —APPROVING *State ex rel. v. Garrouette*, 67 Mo. 445; *State ex rel. v. Dallas County Court*, 72 Mo. 329. FOLLOWING *Callaway County v. Foster*, 93 U. S. 567; *Scotland County v. Thomas*, 94 U. S. 682; *Henry County v. Nicolay*, 95 U. S. 619; *Schuyler County v. Thomas*, 98 U. S. 169; *Cass County v. Gillett*, 100 U. S. 585; *Louisiana v. Taylor*, 105 U. S. 454; *Ralls County v. Douglass*, 105 U. S. 728. QUOTING *Douglass v. Pike County*, 101 U. S. 687.—*Columbia County Com'rs v. King*, 13 Fla. 451. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. Rep. 161.—QUOTED IN *Willoughby v. Chicago J. R. & U. S. Co.*, 50 N. J. Eq. 656.—*State ex rel. v. Chester & L. N. G. R. Co.*, 5 Am. & Eng. R. Cas. 220, 13 So. Car. 290.

The repeal of Cal. Act of April 4, 1870, which authorized the issuing of bonds in aid of railroads in certain cases, did not affect the validity of bonds issued under a contract which was made and partially performed prior to the passage of the repealing act. *Nevada Bank v. Steinmiz*, 64 Cal. 301.

Town bonds were executed some time before they were negotiated, and between the time of their execution and the time of their negotiation the statute under which they were issued was changed as to the time that bonds should run. *Held*, that the bonds were not legally issued until they were negotiated, and it was sufficient if they conformed to the law existing at the time

* Validity of municipal bonds in aid of railroads, see notes, 5 AM. & ENG. R. CAS. 241; 18 AM. REP. 259.

of their negotiation as to the time that they should run. *Brownell v. Greenwich*, 8 N. Y. S. R. 737; affirmed in 114 N. Y. 518, 24 N. Y. S. R. 6, 22 N. E. Rep. 24.—DISTINGUISHING *Potter v. Greenwich*, 26 Hun (N. Y.) 326.

The Wis. constitution provides that "no general law shall be in force until published." A statute provides that all laws shall be divided into two classes, and published in separate volumes, the first to include "all laws of a general nature"; the second, all not included in the first. The legislature passed a law authorizing a county to subscribe for stock in a railroad and to issue bonds. The law was classed as a local law, but not published until after a vote had been taken and the bonds issued. Afterwards the supreme court of the state decided that such statutes are general laws. *Held*, that the rights of the holders of such bonds were to be determined by the law as construed at the time they were issued, and that the action of the executive officers of the state in classing the act as a local law must control their validity. *Havemeyer v. Iowa County Com'rs*, 3 Wall. (U. S.) 294.—FOLLOWING *Gelpcke v. Dubuque*, 1 Wall. 175.

317. Change in constitution after valid subscription will not invalidate the bonds.—Where a town has voted to issue bonds in aid of a railway, as was allowable under the then existing constitution of the state, and the bonds are not issued until after the adoption of a new constitution, the new constitution can in no wise affect the bonds. *Balcheller v. Mascoutah*, 2 Fed. Cas. 504, 7 Chicago Leg. News 230. *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. Rep. 799, 29 N. E. Rep. 280. *Purcell v. Bear Creek*, 138 Ill. 524, 28 N. E. Rep. 1085. *Cherry Creek v. Becker*, 123 N. Y. 161, 33 N. Y. S. R. 411, 25 N. E. Rep. 369; affirming 18 N. Y. S. R. 485, 2 N. Y. Supp. 514. *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.—APPROVING *Wadsworth v. Eau Claire County Sup'rs*, 102 U. S. 534; *Buffalo & J. R. Co. v. Falconer*, 103 U. S. 826.

But in such a case the burden rests upon those affirming the validity of the bonds to show that they were lawfully issued pursuant to a vote of the people. *Eddy v. People ex rel.*, 127 Ill. 428, 20 N. E. Rep. 83.

318. Federal courts follow law as

declared by state courts at time bonds were put on the market.—The U. S. supreme court decides the validity of municipal bonds according to the law as construed when the bonds were issued, without reference to subsequent state decisions. *Kenosha v. Lamson*, 9 Wall. (U. S.) 477.—DISAPPROVING *Foster v. Kenosha*, 12 Wis. 616.—*Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175.—FOLLOWING *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 539; *Royal British Bank v. Turquand*, 6 El. & Bl. 327; *Farmers' L. & T. Co. v. Curtis*, 7 N. Y. 466; *Stoney v. American Life Ins. Co.*, 11 Paige (N. Y.) 635; *Morris C. & B. Co. v. Fisher*, 9 N. J. Eq. 667; *Willmarth v. Crawford*, 10 Wend. (N. Y.) 343; *Allegheny City v. McClurkan*, 14 Pa. St. 83.—APPROVED IN *Lee County v. Rogers*, 7 Wall. 181. DISAPPROVED IN *Marshall County Sup'rs v. Cook*, 38 Ill. 44. FOLLOWED IN *Meyer v. Muscatine*, 1 Wall. 384; *Havemeyer v. Iowa County*, 3 Wall. 294; *Rogers v. Keokuk*, 18 Law. Ed. (U. S.) 74; *Mineral Point v. Lee*, 18 Law. Ed. 456; *Kenicott v. Wayne County Sup'rs*, 16 Wall. 452. NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479. QUOTED IN *Columbia County Com'rs v. King*, 13 Fla. 451; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186. REFERRED TO IN *Davidson v. Ramsey County Com'rs*, 18 Minn. 482 (Gil. 432).—*Thompson v. Lee County*, 3 Wall. (U. S.) 327. *Lee County v. Rogers*, 7 Wall. (U. S.) 181.—APPROVING *Gelpcke v. Dubuque*, 1 Wall. 176.—FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.—*Block v. Bourbon County Com'rs*, 99 U. S. 686.—DISAPPROVING *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—*Douglass v. Pike County*, 101 U. S. 677.—FOLLOWED IN *Foote v. Pike County*, 101 U. S. 688, n.; *Darlington v. Jackson County*, 101 U. S. 688, n.; *Green County v. Conness*, 109 U. S. 104.—*Taylor v. Ypsilanti*, 12 Am. & Eng. R. Cas. 549, 105 U. S. 60.—FOLLOWED IN *New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73.—*New Buffalo Tp. v. Cambria Iron Co.*, 105 U. S. 73.—FOLLOWING *Taylor v. Ypsilanti*, 105 U. S. 60.—*Green County v. Conness*, 15 Am. & Eng. R. Cas. 613, 109 U. S. 104, 3 Sup. Ct. Rep. 69.—FOLLOWING *Ralls County v. Douglass*, 105 U. S. 728; *Douglass v. Pike County*, 101 U. S. 687.—*Anderson v. Santa Anna Tp.*, 116 U. S. 356, 6 Sup. Ct. Rep. 413. *Foote v. Johnson County*, 5 Dill. (U. S.) 281.

The decision of the supreme court of Michigan against the validity of such bonds is opposed to an overwhelming weight of decisions in other states with constitutions similar to that of Michigan. Before the constitution of Michigan was adopted in 1850 the validity of bonds of this character had been settled in states with similar constitutions. In adopting its own constitution Michigan must be presumed to have adopted the practical and judicial construction of other like constitutions. *Talcott v. Pine Grove Tp., 1 Flipp. (U. S.) 120.*

A New York statute provided that after certain preliminary steps the county judge should appoint commissioners to issue bonds, whose duty it was to proceed "with all reasonable dispatch." After such commissioners were appointed the action of the county judge was taken on *certiorari* to the supreme court, the commissioners not being made parties, and while the matter was pending in that court the commissioners made the subscription and issued the bonds. The action of the county judge was sustained by the supreme court, but after the bonds were issued was reversed by the court of appeals on the ground that the petition did not contain the required number of legal signatures. *Held*, that the judgment of the county judge and of the supreme court was binding until reversed, and that *bona fide* holders were entitled to recover on the bonds. *Orleans v. Platt, 99 U. S. 676.*—APPROVING *Warren County v. Marcy, 97 U. S. 96.*—APPROVED IN *Lyons v. Munson, 99 U. S. 684.*

319. Must be issued to subserve a public purpose.—What is a public purpose.—An attempted grant of public aid to an individual or a private corporation cannot be sustained unless, upon the face of the law or record, it appears that the grant is to subserve some public purpose. The silence of the law as to the purpose of the grant makes against its validity. *Central Branch U. P. R. Co. v. Smith, 23 Kan. 745.*

Where a bond purports upon its face to be issued under authority of a special act, it will, as a rule, be invalid if that act is unconstitutional; and where it is sought to uphold the bond by virtue of authority given in some other law, it must appear, to sustain the bond even in the hands of a *bona fide* holder, that the terms of said second law have in fact been complied with, and

that the bond is in fact legal and valid, as issued in aid of some public and authorized purpose. *Central Branch U. P. R. Co. v. Smith, 23 Kan. 745.*

Bonds issued under legislative authority in Missouri to aid a railroad company in erecting "machine shops" are, *it seems*, bonds issued for a public purpose. *Jarrott v. Moberly, 5 Dill. (U. S.) 253.*

County bonds issued for the purpose of erecting a public bridge over the Platte river, conformable in all respects to the laws of the state authorizing the issuance of bonds in aid of works of internal improvement, are valid. *Union Pac. R. Co. v. Colfax County Com'rs, 4 Neb. 450.*

Such a bridge is a work of internal improvement, and, from the course of legislation in Nebraska, it is clear that aid may be granted in its erection by the issuance of county bonds, by grant from the state, donations, or by two counties bordering on the river uniting in the enterprise. It was not the legislative intention to restrict the aid authorized to works of internal improvement in which the county has no interest. The question in determining what constitutes a work of internal improvement must be determined by the benefits to be derived by the public, and not by its extent or cost. *Union Pac. R. Co. v. Colfax County Com'rs, 4 Neb. 450.*—FOLLOWED IN *State ex rel. v. Keith County, 16 Neb. 508*; *State ex rel. v. Babcock, 19 Neb. 230*; *State ex rel. v. Babcock, 23 Neb. 179.* QUOTED IN *South Platte Land Co. v. Buffalo County, 7 Neb. 253.*

320. Mere irregularities are not fatal to the bonds.—The substitution of a municipal subscription to railroad stock by consent in the stead of a subscription of private citizens does not invalidate the municipal subscription or its bonds issued thereunder, unless there has been some trick whereby the citizens were deceived, or the matter has been so arranged that the citizens voted or petitioned for the subscription under a misconception of facts, but not if the facts were well known and understood by all the parties. *Davis v. Kendallville, 5 Biss. (U. S.) 280.*

Bonds are not invalid because issued in full of the subscription while the stock is payable in future instalments, nor because the interest is made payable semi-annually. *Bridgeport v. Housatonic R. Co., 15 Conn. 475.*

Where county bonds upon subscription to a railroad have been issued and got into

circulation, all reasonable presumptions will be indulged in favor of their regularity until rebutted, and if irregularities are shown they will not invalidate the bonds unless they go to the power of the court to issue them. *Maxey v. Williamson County*, 72 Ill. 207.—FOLLOWED IN *Oregon v. Jennings*, 119 U. S. 74.—*Clay v. Hawkins County Justices*, 5 Lea (Tenn.) 137. *Louisville & N. R. Co. v. State*, 8 Heisk. (Tenn.) 663, 19 Am. Ky. Rep. 107.

Signing bonds in blank by township officers, and leaving them with others to hold until the conditions of the vote are complied with, and afterwards filling up the blanks, are mere irregularities which do not affect the bonds in the hands of bona fide purchasers for value, without notice. *Niantic Sav. Bank v. Douglas*, 5 Ill. App. 579.

The act authorizing the issue of bonds by the city of Palmyra (Mo. Acts 1857, p. 431) provided that the bonds issued in payment of the subscription to a railroad should be "payable twenty years after date," etc. On the face of the bonds it appeared that the ordinance of the city directing a subscription to the stock was passed after the date of the bonds, showing that the bonds had been antedated. *Held*, to be no substantial objection to the bonds. *Flagg v. Mayor, etc., of Palmyra*, 33 Mo. 440.

321. Jurisdictional defects patent on the record.—Where want of jurisdiction in a proceeding by a town to issue its bonds in aid of a railroad is patent upon the face of the record, bonds issued thereunder are void in the hands of the company. *Angel v. Hume*, 17 Hun (N. Y.) 374.

Under the above rule, where the statute requires the petition in such proceeding to be verified, the verification must extend to every material fact alleged in the petition to give the court jurisdiction; and if it fails to state, among other things, that the company to be aided is a corporation of the state, as required by statute, it is defective, and confers no jurisdiction. *Angel v. Hume*, 17 Hun (N. Y.) 374.

322. Departure from statute as to time bonds are to run.—Where the statute authorizes an issue of municipal bonds in aid of a railroad to run not more than thirty years, the bonds are not invalid because made payable, according to their date, in seventeen days over the thirty years, but where there is no excess over the thirty years from the time the bonds

are actually executed, issued, and delivered. *Marion County Com'rs v. Clark*, 94 U. S. 278.—FOLLOWED IN *Rock Creek Tp. v. Strong*, 96 U. S. 271.—*Rock Creek Tp. v. Strong*, 96 U. S. 271.—FOLLOWING *Marion County Com'rs v. Clark*, 94 U. S. 278.—DISTINGUISHED IN *Woodruff v. Okolona*, 57 Miss. 806. FOLLOWED IN *Dows v. Elmwood*, 34 Fed. Rep. 114.

Where a statute authorizes bonds payable at any time "not exceeding twenty years from date," bonds dated April 27, but reciting that they ran twenty years from July 1 following, are not void, the interval between the two dates being only a reasonable time for putting them on the market. *Dows v. Elmwood*, 34 Fed. Rep. 114; *appeal dismissed in* 136 U. S. 651, 10 S. Ct. Rep. 1074.—FOLLOWING *Rock Creek Tp. v. Strong*, 96 U. S. 271.

Where a statute authorizes an issue of municipal bonds in aid of a railroad not to run more than ten years, bonds having more than ten years to run are void in the hands of purchasers for value before maturity. *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. Rep. 638.—APPROVING *Woodruff v. Okolona*, 57 Miss. 806.

Where the statute requires bonds to be paid in ten years, a vote authorizing them to run twenty years is such a material departure from the statute as to authorize a court to enjoin the issue of the bonds. *Union Pac. R. Co. v. Lincoln County*, 3 Dill. (U. S.) 300. *Woodruff v. Okolona*, 57 Miss. 806.—APPROVING *Knox County Com'rs v. Aspinwall*, 71 How. (U. S.) 539. CRITICISING *Calhoun County Sup'rs v. Galbraith*, 99 U. S. 214. DISTINGUISHING *Marion County Com'rs v. Clark*, 94 U. S. 278; *Rock Creek Tp. v. Strong*, 96 U. S. 271.—APPROVED IN *Barnum v. Okolona*, 148 U. S. 393.

A town bond in aid of a railroad issued under N. Y. Laws of 1869, ch. 907, and made payable in twenty instead of thirty years, is void on its face, and cannot be reformed by the court even at the instance of a purchaser for value. *Potter v. Greenwich*, 92 N. Y. 662; *affirming* 26 Hun 326.—DISTINGUISHED IN *Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. Rep. 24, 24 N. Y. S. R. 6, 4 L. R. A. 685.

Bonds issued by a town in pursuance of Laws 1869, ch. 907, being simply its promise to pay, could not be sold by it; they acquired no vitality as securities capable of a sale until they had obtained a valid incep-

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tion in the hands of the first holder, and the consideration described as paid by him was simply a loan of the sum specified to the town. *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519.

In voting town bonds under Minn. Sp. Laws 1875, ch. 132, in aid of a railroad, it is competent for the town to stipulate, as a condition precedent to issuing the bonds, that the same shall be made payable at a place designated, and on or before the expiration of twenty years, at the option of the town. Such a condition is not repugnant to a clause in the statute providing that the bonds "shall be payable in not less than ten or more than twenty years." *Hoyt v. Braden*, 27 Minn. 490, 8 N. W. Rep. 591.—*FOLLOWING* *Coe v. Caledonia & M. R. Co.*, 27 Minn. 197.

Neither of the Tenn. Acts of Dec. 16, 1871, Feb. 26, 1869, or Feb. 8, 1870, authorized town bonds for stock in railroads payable in ten years. *Norton v. Dyersburg*, 127 U. S. 160, 8 Sup. Ct. Rep. 1111.

A statute authorized a city to issue its bonds in aid of a railroad, and provided that they should be payable in twenty years with interest. The bonds were not issued for more than a month after the passage of the statute, but they bore date from its passage, and were made payable in twenty years therefrom. Several years afterwards, in a suit to recover interest, the objection was interposed that the bonds did not run for twenty years, nor allow one full year for the first year's interest to run. *Held*, that, as this was not a suit for the principal of the bonds nor for the first year's interest, the objection could not be made. *Luling v. Racine*, 1 Biss. (U. S.) 314.

Where a town is authorized by statute to subscribe to the capital stock of a railroad company, and is required to pay the subscription in "not exceeding" six annual instalments, and is further authorized to anticipate the collection of taxes by issuing "short bonds" bearing six per cent. interest—*held*, that the proper construction of the act requires the bonds to mature at a date not longer than the assessments of taxes are due and payable, and that bonds payable in ten years and bearing seven per cent. interest are unauthorized by the act. These requirements are not directory only, but imperative, and must be complied with by the town. The bonds on their face show non-compliance with the statute, and there

can be no *bona fide* holder for value of such bonds. *Green v. Dyersburg*, 2 Flipp. (U. S.) 477.

Commissioners appointed under N. Y. Act of 1869, ch. 907, issued bonds of the town payable in twenty years instead of thirty, as required by the act. *Held*, that the bonds were void as such, but that, as the commissioners had authority to borrow the money which the bonds were meant to secure, they by doing so bound the town to repay it; and, it appearing that the parties, both borrower and lender, acted in good faith and with the intention to comply with the statute, that a promise on the part of the town to repay the loan at the time and in the manner prescribed by the statute would be implied, and an action thereon against the town was maintainable. *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519.

Certain of the bonds by their terms made payable in twenty years were issued after the passage of the act of 1871 (ch. 925, Laws of 1871), which requires (section 6) bonds to be made payable in not to exceed thirty years, and that not more than ten per cent. of the total authorized debt shall be made payable in any one year. *Held*, that said bonds were valid and enforceable. *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. Rep. 842, 44 N. Y. S. R. 519.—*FOLLOWING* *Brownell v. Greenwich*, 114 N. Y. 518.

Where the legislature at the same session passes two acts authorizing municipal subscriptions in aid of a railroad, in the first of which the amount of subscription is limited and the bonds are to mature in thirty years, while in the second there is no limitation as to the amount and the bonds are to mature in twenty years, the latter act, by implication, repeals the prior one, as to the limitation of the amount of subscription, and as to the length of time the bonds may run. *Harding v. Rockford, R. I. & St. L. R. Co.*, 65 Ill. 90.

323. Conditions as to funds from which payable.—It is essential to the validity of bonds issued by a municipal corporation that the ordinance creating the debt represented by them should provide the means for paying the principal and interest of the same. *Knox v. Baton Rouge*, 36 La. Ann. 427.

Nor is this requirement met by the fact that the bonds were issued in lieu of a cash subscription for stock in a railroad, which subscription was to be paid by means of a

special tax. The provision for the payment of the stock is not available for that of the bonds. *Knox v. Baton Rouge*, 36 La. Ann. 427.

Nor does the consent of the qualified voters of the town or city to the issuing of the bonds dispense with this requirement, where the ordinance under which they issued, defective with respect to the requirement, was never submitted to the voters for ratification. *Knox v. Baton Rouge*, 36 La. Ann. 427.

Where a statute provides that a county having or controlling an internal improvement fund granted by the state may subscribe to the capital stock of railroads, counties have no general authority to subscribe, but are limited to the internal improvement fund, and bonds issued must be on the credit of that fund. Bonds issued upon the credit of the county generally, independent of such fund, are unauthorized and void in the hands of subsequent holders for value. *Hancock v. Chicot County*, 32 Ark. 575.

Under the Ill. Constitution of 1848 the legislature could properly confer upon a city the power to incur indebtedness and issue its bonds for a corporate purpose without any vote of the people, but it could not compel a city or incorporated town to incur a debt unless the legislative department of the city or town saw proper to do so. So where an act conferring power upon a city council to incur an indebtedness and issue its bonds therefor is silent in regard to the time when the bonds shall be made payable, and in regard to the terms and conditions upon which they shall be payable, such matters will be left to the city and the person to whom the bonds are to be issued to be settled, and, when agreed to, the city may make the payment of such bonds depend upon conditions mutually assented to. *Chicago, B. & Q. R. Co. v. Aurora*, 5 Am. & Eng. R. Cas. 191, 99 Ill. 205.

The city of Aurora, under an act of the legislature authorizing it to issue its bonds as a donation to a railroad company to secure the location of its machine shops in the city, passed an ordinance for the issue of such bonds, to be conditioned that both the principal and interest should be paid out of moneys to be raised by special tax, to be levied and collected of property in the east division of the city, and that if such a tax could not be legally assessed the obli-

gees should procure the passage of a law authorizing the levy of such a special tax, and that if any of the conditions were not fulfilled the bonds should be void. Under this ordinance the city issued its bonds, conditioned as the ordinance required. It was contended by the holder of the bonds that, the condition being void, for the reason that the city could not, under the constitution, levy and collect a special tax except over its entire territory, therefore the bonds were payable as though there was no condition. *Held*, that the conditions were such as the city had the right to impose, and, it being the intention of the parties that they should not be obligatory if the conditions could not be performed, the bonds were not collectable. *Chicago, B. & Q. R. Co. v. Aurora*, 5 Am. & Eng. R. Cas. 191, 99 Ill. 205.—*DISTINGUISHING Butler v. Wigge*, 1 Saund. 65; *Mauleverer v. Hawxby*, 2 Saund. 78.

A city issued bonds when there was no tax limit imposed upon it, and subsequently issued other bonds when it could only impose a two per cent. tax, and a city ordinance, providing that the interest on the latter bonds should be paid by a general or special tax, was approved by the legislature. Subsequently the city was limited to a one per cent. tax in paying its indebtedness, and was authorized to fund its debt, and could only levy a tax sufficient to pay interest thereon. Judgment was taken against the city on the latter bonds before its former bonds were all paid. *Held*, that the legislation was inoperative so far as it impaired existing contracts; that the holder of the judgment was entitled to have a tax imposed up to the constitutional limit, and after payment of the current expenses of the city was entitled to share *pro rata* in the money raised with other creditors who did not have a specific lien on the taxes. *Sibley v. Mobile*, 3 Woods (U. S.) 535.

But in such case bonds issued when there was no limitation on the power of the city to impose taxation could not be affected by any subsequent law limiting such power. *Sibley v. Mobile*, 3 Woods (U. S.) 535.

324. Effect of provisions as to payment of interest.—It is no objection to the validity of municipal bonds issued in aid of a railroad that the interest is made payable at a commercial city in another state instead of at the treasury of the city issuing the bonds. *Meyer v. Muscatine*, 1

Wall, (U. S.) 384.—FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. (U. S.) 456.

Neither is it any objection to the validity of such bonds that the interest is made payable semi-annually at the rate of ten per cent. per annum, when the vote authorizing such bonds limited the rate of interest to "not higher than ten per cent." Payment of the prescribed rate semi-annually does not create usury. *Meyer v. Muscatine*, 1 *Wall*, (U. S.) 384. *Marion County Com'rs v. Clark*, 94 U. S. 278. *Mobile Sav. Bank v. Oktibbeha County Sup'rs*, 24 *Fed. Rep.* 110.

A statute authorized a town to subscribe for railroad stock, and required it to pay the subscription in not exceeding six annual payments, but authorized it to anticipate the collection of taxes by issuing "short bonds" bearing six per cent. interest. *Held*, that the requirements of the statute were imperative, and bonds issued at seven per cent. to run for ten years were unauthorized and void in the hands of innocent purchasers. *Green v. Dyersburg*, 2 *Flipp.* (U. S.) 477.

325. Effect of irregular or fraudulent incorporation of railway company.—Township bonds are not invalid because the railroad company to which they were voted was not incorporated until the day of the election. *Cass County v. Johnston*, 95 U. S. 360.—DISTINGUISHING *Rubey v. Shain*, 54 Mo. 207.—REAFFIRMED IN *Douglas v. Pike County*, 101 U. S. 677.

Under the N. Y. Town Bonding Act of 1869 (ch. 907, Laws of 1869), the existence of a railroad corporation having power to issue bonds or stock, and to construct the road to be aided, lies at the foundation of the power to issue the municipal bonds, and bonds of a town issued for the stock of a pretended corporation fraudulently organized are invalid save in the hands of *bona fide* holders. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784, 11 N. Y. S. R. 450; reversing 39 *Hun* 22.

326. Effect of transfer of company's franchise after subscription, but before issue.—Where a county has agreed to subscribe to railroad stock, the fact that the company sells and assigns a portion of its route and all the franchises connected therewith after the subscription is made, but before the bonds are issued, does not affect the validity of the bonds. The franchise was not extinguished, but only transferred; but had the company

ceased to exist, it would make no difference. *Henry County v. Nicolay*, 95 U. S. 619.

327. Effect of delivery to company for unauthorized use.—The appropriation of the bonds of a railway company, by its president and general manager, to the payment of the debts of other corporations, from which the railway company derives no practical benefit, is a breach of trust, and illegal and void as to the railway company, and such bonds will be void in the hands of all persons acquiring them with notice of the facts showing the illegality of their delivery for unauthorized purposes. *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. Rep. 899.

328. Effect of sale of bonds below par.—Where a railroad company receives bonds of a city at their par value in payment of stock, their validity is not affected by a sale by the railroad below par. *Meyer v. Muscatine*, 1 *Wall*, (U. S.) 384.

Where an act of assembly authorizes a county to subscribe to the capital stock of a railroad company, and provides that the bonds to be issued in payment thereof shall not be sold under par, the county is bound to provide for the accruing interest on such bonds, notwithstanding that they have been disposed of below par, in violation of the statute, and although there might be a remedy in equity as to a part of the principal. *Com. ex rel. v. Allegheny County Com'rs*, 32 Pa. St. 218. *Adams v. Lawrence County*, 2 *Pittsb.* (Pa.) 60.

329. Bonds issued without authority of law are void.—Municipal bonds issued in aid of a railroad without legislative authority are void in the hands of *bona fide* holders, and no municipal ratification without legislative sanction will validate them. *Lewis v. Shreveport*, 12 Am. & Eng. R. Cas. 683, 108 U. S. 282, 2 *Sup. Ct. Rep.* 634. *Sherard v. Lafayette County*, 3 *Dill.* (U. S.) 236. *Kankakee County v. Aetna Life Ins. Co.*, 106 U. S. 668, 2 *Sup. Ct. Rep.* 80. *Williamson v. Keokuk*, 44 Iowa 88. *Sykes v. Mayor, etc., of Columbus*, 55 *Miss.* 115.

And the collection of taxes levied to pay the interest on the same may be enjoined. *People ex rel. v. Hamill*, 134 Ill. 666, 17 N. E. Rep. 799, 29 N. E. Rep. 280.

Where a town has statutory authority to subscribe for stock in a railroad company, but not to issue negotiable bonds in payment, such bonds are void, and no suit can be maintained on them as non-negotiable in-

struments. *Dodge v. Memphis*, 51 Fed. Rep. 165.

Bonds issued by the city of Shreveport, Louisiana, which appear on their face to have been issued "in aid of the Texas & Pacific R. Co.," but which were in fact used to buy lands to be donated to the railroad company as a site for depots and machine shops, are void. *Lewis v. Shreveport*, 12 Am. & Eng. R. Cas. 683, 108 U. S. 282, 2 Sup. Ct. Rep. 634.

The act incorporating a railroad provided that any county through which it was located could, by a vote of its qualified voters, empower its county commissioners to subscribe to the stock of the road any sum not exceeding \$50,000, and if the county failed to authorize a subscription, then any township therein through which the road was located might subscribe any sum not exceeding \$50,000 and provide for the payment thereof by the issuance of township bonds. The act further provided that the total amount subscribed by any county and the townships therein should not exceed \$100,000. The electors of Delaware county authorized a subscription of \$50,000, and afterwards the electors of Brown township, in the same county, authorized a subscription of \$17,000, and issued bonds for the same. On mandamus, on the motion of a *bona fide* holder of some of the bonds, to compel the township trustees to levy a tax to pay the interest thereon—*held*, that, the county commissioners having been authorized to subscribe stock, the contingency upon which the township might subscribe did not arise, and that the proceedings of the voters of the township and of the township trustees were without authority of law, and the writings purporting to be the bonds of the township were void, and created no obligation in the hands of the company or of the present holder. *Hopple v. Brown Tp.*, 13 Ohio St. 311.—APPROVING *Treadwell v. Hancock County Com'rs*, 11 Ohio St. 191; *Goshen Tp. v. Springfield, Mt. V. & P. R. Co.*, 12 Ohio St. 624. DISTINGUISHING *State ex rel. v. Van Horne*, 7 Ohio St. 332.—DISTINGUISHED IN *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569.

Certain individuals, in order to secure a favorable vote of a township on a proposition to subscribe to railroad stock, agreed to indemnify the township, and executed an indemnity bond with a mortgage to secure it. Subsequently it was decided that the

bonds were unauthorized and void. *Held*: (1) that the company could not be allowed to claim that it dealt with the township as an agent for the mortgagors, as it had full knowledge of the facts; (2) that the township was not estopped from denying the validity of its bonds. *Hopple v. Hipple*, 33 Ohio St. 116.

The necessary steps required by a statute in issuing town bonds were complied with, and the bonds were regularly issued, except that the proceedings were had and the bonds issued before the statute had been published so as to take effect. They recited that they were issued in pursuance of the statute. *Held*: (1) that the bonds were issued without authority of law, and were void in the hands of innocent purchasers without notice, except such as appeared on the face of the bonds; (2) that the supervisors could not ratify the bonds by any subsequent act, such as appointing commissioners to vote the stock; (3) that a failure of the taxpayers to restrain the issuance or negotiation of the bonds did not operate as an estoppel *in pais*. *Rochester v. Alfred Bank*, 13 Wis. 432.

330. Bonds issued in excess of statutory authority.—Town bonds in aid of the construction of a railroad issued beyond the amount assented to by the taxpayers are void. *Thompson v. Mamakating*, 37 Hun (N. Y.) 400. *Davies County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897.—FOLLOWED IN *Kelley v. Milan*, 127 U. S. 139.

Where a county has issued railroad aid bonds in excess of its authority, the holders thereof cannot confer jurisdiction on a court of equity by an offer to surrender such excess, and by asking the court, when such excess is ascertained, to declare the remainder valid and enter a decree for their enforcement. *Hedges v. Dixon County*, 150 U. S. 182, 14 Sup. Ct. Rep. 71.—REVIEWING *Reineman v. Covington, C. & B. H. R. Co.*, 7 Neb. 310.

If bonds be issued without authority of law, the fact that the holders paid full value for them will not remedy a failure to comply with the statute; but where there may be a doubt as to the true construction of the statute, the doubt should be resolved in favor of *bona fide* holders of the bonds; and if the statute be susceptible of two constructions, then that construction should be given which would carry out, in good faith,

the contract between the parties. *Aroma v. State Auditor*, 15 Fed. Rep. 843.

Town bonds issued in aid of a railroad may be regarded as an "investment," so as to bring the vote of the town within the authority conferred by a statute which limits the amount that a town may guarantee to the amount "invested" in the railroad. *Douglas v. Chatham*, 41 Conn. 211.

331. Bonds issued under an unconstitutional law.—Bonds of a municipal corporation issued under an unconstitutional law are absolutely void, no matter in whose hands they may be; but if the legal power or authority to issue them existed, but was defectively or irregularly executed, they are only voidable, and an innocent holder may collect them. Where they are void, no subsequent act or recognition of their validity by the municipal authorities can estop the taxpayers from denying their legality. *Ryan v. Lynch*, 68 Ill. 160.—FOLLOWED IN *South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Kendall County Sup'rs*, 105 U. S. 667.—*Plainview v. Winona & St. P. R. Co.*, 30 Am. & Eng. R. Cas. 259, 36 Minn. 505, 32 N. W. Rep. 745. *Webb v. Lafayette County*, 67 Mo. 353.—REVIEWING *State v. Linn County Court*, 44 Mo. 504.—DISAPPROVED IN *Douglass v. Pike County*, 101 U. S. 677.

Where a law creating county commissioners to issue bonds of the county for stock in railroads is declared unconstitutional, the commissioners are not even *de facto* officers so as to give validity to their acts. *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. Rep. 1121.

Municipal bonds of a town were voted on August 6, 1870, after the new Ill. Const. took effect, and issued in aid of a railroad corporation. *Held*, in a suit on the same, that all previous laws that had authorized municipal corporations to vote aid to railroad or other private corporations, by donation or subscription, had ceased and become inoperative before the vote was taken, and that the bonds so issued were void even in the hands of innocent holders for value, and no recovery could be had. *Wade v. LaMoille*, 112 Ill. 79.

332. Bonds issued without performance of conditions precedent.—Whoever deals in municipal bonds must be presumed to know what powers the corporation has under the enabling laws of the state to issue the securities in which he is

making investments. Such authority, if any exists, is to be found in public laws equally accessible to all, and if bonds are issued without performance of conditions precedent they are void even in the hands of purchasers who have paid full value for them. *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562.

The Ill. Act of April 16, 1869, giving towns the right to prescribe the conditions upon which bonds or subscriptions for railroad stock should be made, and declaring that such bonds or subscriptions "shall not be valid and binding until such conditions have been complied with," is peremptory in declaring that the bonds shall, to a certain extent, be not valid or binding, or, in other words, void, and this illegality will affect them even in the hands of innocent holders without notice. *Eagle v. Kohn*, 84 Ill. 292.

A statute authorized subscriptions by counties and townships to stock of railroads, but prohibited townships from subscribing where the people had voted to authorize a county subscription. *Held*, that bonds issued by a township were void in the hands of *bona fide* purchasers, where a vote of the county had previously authorized a county subscription. *Northern Nat. Bank v. Porter Tp.*, 5 Fed. Rep. 568; *affirmed in* 110 U. S. 608, 4 Sup. Ct. Rep. 254.

Where a petition presented to the county judge provided that the town bonds should be issued on the condition that the road be constructed through the town, a certain portion when the road was located, another portion when it was graded, and the remainder when it was completed, and the whole amount of bonds were issued when the road was completed through the town, but when a small portion thereof outside of the town remained to be constructed—*held*, that there was a substantial compliance with the condition; but, if not fully complied with, that this did not invalidate the bonds in the hands of a *bona fide* holder. *Cherry Creek v. Becker*, 123 N. Y. 161, 33 N. Y. S. R. 411, 25 N. E. Rep. 369; *affirming* 18 N. Y. S. R. 485, 2 N. Y. Supp. 514.—DISTINGUISHING *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491.

333. Bonds issued in lieu of pre-existing bonds.—After a county had subscribed to railroad stock and had issued its bonds a township was cut off and attached

to another county. Subsequently the county was authorized to fund its debt and to issue new bonds, differing as to the amount and rate of interest, but all changes beneficial to the county. *Held*, that the new bonds were chargeable to all the territory originally in the county in like manner as the original bonds. *Marion County Com'rs v. Harvey County Com'rs*, 26 Kan. 181.

In an action by a taxpayer of the town of A. to have certain bonds issued by said town adjudged illegal and void, it appeared that the town, acting in supposed accordance with statutory provisions (ch. 907, N. Y. Laws of 1869, as amended by ch. 925, Laws of 1871), issued its bonds to pay for stock of a railroad corporation, which passed into the hands of innocent holders. The bonds were claimed by the town to have been illegally issued, and so invalid. While suits were pending to enforce them, said town, under the act of 1880 (ch. 146, Laws of 1880) authorizing it "to issue new bonds pursuant to the provisions of chapter 75, Laws of 1878," and its amendments, to the amount and extent of its bonded indebtedness, issued the bonds in question in exchange for and to retire the outstanding bonds, the new bonds drawing a lower rate of interest than the old ones. Said town at the time had no other "bonded indebtedness" than the original bonds issued as above stated. *Held*, that the action was not maintainable; that the town, having elected to compromise rather than to contest the validity of the old bonds, was estopped from thereafter questioning it. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327; reversing 26 Hun 161.—LIMITED IN *Mentz v. Cook*, 108 N. Y. 504, 15 N. E. Rep. 541, 11 Cent. Rep. 319.

The words "bonded indebtedness," as used in said acts of 1878 and 1880, are not limited to bonds in all respects legal and valid, but the acts authorize the refunding of "all municipal bonds, save such as" have been adjudged invalid by the final determination of a competent court, which are excluded from their operation by ch. 317, Laws of 1878. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327; reversing 26 Hun 161.

The act of 1878 first mentioned as thus construed is not violative of the constitutional provision (State Const. art 8, § 11) prohibiting municipal corporations from incurring indebtedness for other than

"county, city, town, or village purposes." The said act does not authorize the incurring of an indebtedness, but the payment of an acknowledged debt, and the constitutional provision does not deprive such corporations of the right to compromise claims which they dispute. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327; reversing 26 Hun 161.

The defect alleged in the proceedings under which the original bonds were issued was that to the averment in the petition that "the signers were a majority of the taxpayers of the town" was not added the words "not including those taxed for dogs or highway tax only." *Held*, that the defect did not render the bonds so absolutely void as matter of law but that there might be reasonable question pending an adjudication; and enough of doubt to justify the legislature in authorizing, and the town in effecting, an amicable settlement. *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327; reversing 26 Hun 161.—DISTINGUISHING *People ex rel. v. Smith*, 55 N. Y. 135; *Metzger v. Attica & A. R. Co.*, 79 N. Y. 171.

334. When void except in the hands of bona fide holders.—A proposition "to issue and give to the L. & N. R. Co., or the B. V. & N. R. Co., one hundred thousand dollars of the coupon bonds of said P. county," etc., was submitted to the voters of the county and adopted by the requisite majority, and the bonds issued, duly certified, and delivered to the L. & N. R. Co., which built the proposed railroad. *Held*, that while the issuing and delivering of bonds voted under an alternative proposition would be enjoined if timely application was made for that purpose, yet, as by the terms of the proposition the commissioners were authorized to issue and deliver the bonds to the one of the companies named which should build the road, and having complied with such apparent authority, their action in the premises was voidable, and not void. In other words, the bonds were liable to be set aside at any time before they were duly certified and had passed into the hands of an innocent purchaser for value. *North v. Platte County*, 29 Neb. 447, 45 N. W. Rep. 692.

The articles of association were filed in 1870; no movement was made to begin the construction of the road within five years thereafter, as required by the N. Y. Act of 1867 (ch. 775, Laws of 1867). *Held*, that,

assuming the corporation had a legal existence as a corporation, and that the bonds were lawfully issued and delivered to it, the default in beginning the construction caused its corporate powers to cease and terminate, and deprived the stock issued to the town of any value, and therefore that, as the consideration for the bonds had failed, they were void except in the hands of *bona fide* holders. *Farnham v. Benedict*, 107 N. Y. 159, 13 N. E. Rep. 784, 11 N. Y. S. R. 450; reversing 39 Hun 22.—FOLLOWING In re Brooklyn, W. & N. R. Co., 72 N. Y. 245; In re Brooklyn, W. & N. R. Co., 75 N. Y. 335.

335. Effect of omission to register the bonds.—Outstanding municipal bonds issued for stock in railroads in Kansas are not valid unless the act of 1872, ch. 68, § 15, has been complied with, which provides that it shall be the duty of the state auditor, upon the registration of such bonds, "within ten days thereafter to notify the officers issuing the same of such registration, which fact shall be entered by such officers in a book wherein the record of such bonds is kept." *Bissell v. Spring Valley Tp.*, 15 Am. & Eng. R. Cas. 585, 110 U. S. 162, 3 Sup. Ct. Rep. 555.

A provision in a Vermont statute that the bonds should be registered in the office of the town clerk was held to be directory merely, and a want of compliance with such provision was held not to affect the validity of the bonds. *First Nat. Bank v. Arlington*, 16 Blatchf. (U. S.) 57.

336. Validity of bonds issued under particular statutes.—Bonds issued by Morgan county, Ill., under the act of 1853, to the stock of the Illinois River railroad are valid, and binding upon the county, and constitute a part of the assets of the company to which its creditors can resort for payment. *Morgan County v. Allen*, 3 Am. & Eng. R. Cas. 92, 103 U. S. 498.—FOLLOWING *Thomas v. Morgan County*, 39 Ill. 498; *Morgan County v. Thomas*, 76 Ill. 141; *Thomas v. Morgan County*, 59 Ill. 480.

The bonds issued by defendant town, under N. Y. Act of 1869, ch. 907, in aid of a certain railroad are valid and binding obligations. *Williamsburgh Sav. Bank v. Solon*, 47 N. Y. S. R. 496, 20 N. Y. Supp. 27; modified in 136 N. Y. 465, 49 N. Y. S. R. 840, 32 N. E. Rep. 1058.—FOLLOWING *Solon v. Williamsburgh Sav. Bank*, 35 Hun (N. Y.) 1.

Under N. Y. Act of Feb. 17, 1881, entitled "An act for the relief of the towns of Newfane, Wilson, and Lewiston, to abolish the office of railroad commissioners of said towns, and to enable each of said towns to adjust its indebtedness and issue bonds therefor," which specially authorized the supervisor and justices of the peace or "any three of such officers" to issue bonds, the supervisor is included; but bonds issued by four of the officers without the supervisor are valid. *Currie v. Lewiston*, 15 Fed. Rep. 377, 21 Blatchf. (U. S.) 236.—FOLLOWING *Phelps v. Lewiston*, 15 Blatchf. 131.

The bonds issued by Marshall county, Tenn., in payment of its subscription to the capital stock of the Duck River Valley Narrow Gauge railroad are valid. *Williams v. Duck River Valley N. G. R. Co.*, 9 Baxt. (Tenn.) 488.

Tenn. Act of 1851-52, ch. 117, authorizing Hawkins and certain other counties to subscribe for railroad stock and to issue bonds, is not repealed by the Code, § 41; and bonds issued thereunder are valid. *Clay v. Hawkins County Justices*, 5 Lea (Tenn.) 137.

Bonds issued by a city under Wis. Act of 1853, ch. 123, in aid of the Watertown & Madison railroad, by previous litigation have been held valid and cannot now be questioned. *Rogan v. Watertown*, 30 Wis. 259, 8 Am. Ry. Rep. 20.—FOLLOWING *Phillips v. Albany*, 28 Wis. 340.

4. Ratification. *Estoppel. Waiver of Defects.*

337. Power of legislature to ratify invalid issue.—Municipal bonds issued without authority of law, and therefore void, may be validated by an act of the legislature passed for that purpose, if the legislature of the state could authorize the issuing of similar bonds. *Deyo v. Otoe County*, 37 Fed. Rep. 246. *Duanesburgh v. Jenkins*, 57 N. Y. 177; reversing 46 Barb. 294.—APPLYING *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. 667; *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. 678.—*Williams v. Duanesburgh*, 66 N. Y. 129.

The legislature may cure defects in the organization of a railroad so as to make available bonds issued for stock where the company had a *de facto* organization at the time the subscription was made, and where the bonds were not void in themselves. *Illinois G. T. R. Co. v. Cook*, 29 Ill. 237.—

FOLLOWED IN *Goodrich v. Reynolds*, 31 Ill. 490.

N. Y. Act of March, 1868, ch. 45, entitled "An act in relation to the Wallkill Valley railroad, and the town bonds issued in aid of its construction," and which embraces provisions validating town bonds previously issued, is not in violation of N. Y. Const. art. 3, § 16, providing that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. *Hardenbergh v. Van Keuren*, 4 Abb. N. Cas. (N. Y.) 43; reversed in 16 Hun 17.

Where the only irregularity in the issue of city bonds is that they were issued before the statute authorizing them had been published so as to take effect, the legislature may subsequently ratify them and declare them valid. *Knapp v. Grant*, 27 Wis. 147. —DISTINGUISHING *Fisk v. Kenosha*, 26 Wis. 23.

338. Effect of validating or curative statutes.—Bonds issued *ultra vires* are not legalized by Iowa Act of 1857, ch. 258, which seeks simply to cure the effect of irregular submission of the question of their issuance to a vote of the people. *Williamson v. Keokuk*, 44 Iowa 88.

The Kan. Act of March 9, 1874, § 7 (Laws 1874, p. 45), was intended to change the mode of levying and collecting taxes to pay municipal bonds, and not to validate and make binding upon municipalities bonds which would otherwise be void. *January v. Johnson County*, 3 Dill. (U. S.) 402.

Where a statute authorizes bonds in aid of a railroad bearing interest payable annually, but the supervisors of the county issue them with interest payable semi-annually, the legislature may subsequently pass an act to cure the defect so as to make the bonds valid in the hands of *bona fide* purchasers. *Cutler v. Madison County Sup'rs*, 56 Miss. 115.—FOLLOWED IN *Madison County Sup'rs v. Brown*, 29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516.

Where commissioners appointed under the New York statute to make a municipal subscription to railroad stock make the subscription, but the corporation becomes merged in a new one before the bonds are issued, and subsequently the legislature provides that all debts due to the old corporation should vest in the new, and after the bonds are issued a special act is passed ratifying them and declaring them binding, the town is liable on the bonds or upon

interest coupons. *Gray v. York*, 15 Blatchf. (U. S.) 335.

A South Carolina statute authorized townships to issue bonds in aid of a railroad, and after they were issued and held by a third person, to be delivered when the road was completed, the supreme court of the state decided that they were void, but subsequently the legislature passed an act recognizing the bonds as a township debt and authorizing a tax to pay them. *Held*, that the company was entitled to the bonds after it had completed its road. *Massachusetts & S. Constr. Co. v. Cherokee Tp.*, 42 Fed. Rep. 750.

The debt represented by the bonds is incurred at the date of such curative act. *Massachusetts & S. Constr. Co. v. Cane Creek Tp.*, 45 Fed. Rep. 336.

So. Car. Act of Dec., 1888 (20 St. at L. 12), declaring all township bonds theretofore issued in aid of a railroad to be a debt of the township, authorizing the levy of a tax to pay it, and providing that the bonds might be used as evidence of the amount and character of such debt, impressed such debt on the township *proprio vigore*, and it is liable therefor, although the act authorizing the bonds was unconstitutional and the bonds void. *Grannis v. Cherokee Tp.*, 47 Fed. Rep. 427.

339. Ratification by municipality.

—Where the supervisors of a county have not the original power to issue bonds of the county for stock in a railroad, they cannot give validity to bonds issued without authority by subsequently ratifying them. *Marsh v. Fulton County*, 10 Wall. (U. S.) 676.—DISTINGUISHED IN *Milner v. Pensacola*, 2 Woods (U. S.) 632.

Bonds issued and signed by the last chairman of the county court, after the adoption of the present constitution abolishing that court, in payment of the county's subscription to the capital stock of a railroad company made by a former chairman according to law, which bonds were countersigned by the clerk of that court, and sealed with the county seal, and accepted by the president of the road in payment of the county subscription, are proper subjects of ratification, and when such bonds are ratified they are valid. *Alexander v. McDowell County Com'rs*, 70 N. Car. 208.

Proof that a city council was proceeding to levy a tax to pay bonds which it had issued, and that it resisted an action by plaintiff

to restrain them from imposing such tax, is sufficient evidence of ratification by the city of the bonds. *Knapp v. Grant*, 27 Wis. 147.

340. Acts of recognition that will estop the municipality.—A township may be estopped by its course of dealing with a railroad company to interpose a defense of irregularity in the exercise of the power of issuing bonds in payment of a subscription made upon a majority vote of the qualified electors of the township. *Kansas City & P. R. Co. v. Rich Tp.*, 45 Kan. 275, 25 Pac. Rep. 595.

Acts of subsequent acquiescence and ratification will estop a township from objecting to the validity of bonds issued by it in aid of a railroad, when they have come into the hands of an assignee for value, who has taken them on the faith of such acquiescence, on account of any irregularities attending their execution and issuing, short of such an absence of power or such an illegality as would render them absolutely void, and notice of such irregularities on the part of the assignee will not defeat the estoppel. *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569. *Eminence v. Grasser*, 81 Ky. 52. *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294.—QUOTING *Bissell v. Jeffersonville*, 24 How. (U. S.) 287.—REVIEWED IN *Steines v. Franklin County*, 48 Mo. 167.—*Bennington v. Park*, 50 Vt. 178.

Where a town has knowledge through its officers that its selectmen and treasurer are issuing bonds in aid of a railroad, but takes no steps to prevent them, it cannot urge the objection that they were prematurely issued, as against a *bona fide* holder of the bonds for value. *First Nat. Bank v. Concord*, 50 Vt. 257.

In determining the validity of bonds issued by a county after a vote of the electors authorized the issue, it is a circumstance of great weight that for a period of more than four years all parties interested in the matter recognized the validity of the bonds, and the authority of the board of supervisors to issue them. *Nevada Bank v. Steinmiltz*, 64 Cal. 301.

Quare, whether citizens who have remained silent at the time a subscription to railroad stock was made by a municipal corporation, and its bonds therefor issued, will not be afterwards estopped from questioning their validity when the bonds have passed into the hands of innocent holders. *Black v. Cohen*, 52 Ga. 621.

Prior to 1865 a county had subscribed to the stock of a railroad. In 1865 a new constitution was adopted providing that such subscriptions should not be authorized unless upon a two-thirds vote. The road never was built, and in 1868, by consent of the company to which the subscription was made, the county court without a vote transferred the subscription to another company, that built the road and received the county's bonds. The statute made it the duty of the county court to take proper steps to protect the interest of the county. *Held*, that if any doubt existed as to the power of the court to make the transfer the taxpayers should not be allowed to set it up against a suit by *bona fide* holders of the bonds, as the action of the court was in good faith to protect their interest. *Ray County v. Vansycle*, 96 U. S. 675.

On January 1, 1876, a county issued to a railroad company its negotiable ten per cent. coupon bonds for \$95,000, that being more than ten per cent. of the assessed valuation of the county. These bonds were duly registered and certified by the county clerk, and by the secretary and auditor of state. Afterwards the county refused to pay interest, and an action was instituted to collect interest due on coupons. The defense of the illegality of the bonds, owing to the excessive issue, was interposed, but the bonds were held valid in the hands of *bona fide* purchasers for value. No proceedings in error or by appeal were then taken. The county board then agreed with the holders of the bonds to execute to them twenty-year six per cent. refunding bonds to be substituted for the bonds of 1876, under the provisions of the act of February 28, 1883. The refunding bonds were executed and registered and certified by the county clerk, but the secretary and auditor of state refused to register them or to certify that they were lawfully issued, alleging that such was not the fact. The county then applied to the supreme court for a peremptory writ of mandamus to compel action by the state officers, and judgment was obtained in favor of the county, awarding the writ and compelling the certification and registry. After they were certified and registered the county exchanged them for the original bonds of 1876 and the interest accrued thereon, and destroyed the original bonds. In an action to enforce payment of the interest accrued on the refunding bonds—*held*, that the county

was estopped to deny their validity in the hands of *bona fide* holders for value. *State ex rel. v. Wilkinson*, 20 Neb. 610, 31 N. W. Rep. 376.—REVIEWING *Rieneman v. Covington*, C. & B. H. R. Co., 7 Neb. 310.

341. Waiver by city of irregularities in the issue.—Frequent acts of recognition on the part of county authorities of bonds issued for railroad stock, such as voting for directors and paying interest, will be taken as waiving any irregularities in the issue of the bonds. *Johnson v. Stark County*, 24 Ill. 75. *Barrett v. Schuyler County Court*, 44 Mo. 197.

342. Effect of payment of interest or levying tax.—After a town has accepted the railroad stock for which it issued coupon bonds, and after it has paid interest on the bonds for a number of years, it is estopped from questioning their validity as against *bona fide* holders. *Whiting v. Potter*, 8 Blatchf. (U. S.) 165, 2 Fed. Rep. 517. *First Nat. Bank v. Wolcott*, 19 Blatchf. (U. S.) 370, 7 Fed. Rep. 892.—FOLLOWING *Irwin v. Ontario*, 18 Blatchf. 259.

It cannot urge any mere irregularities in the proceedings authorizing the bonds. *Mercer County Sup'rs v. Hubbard*, 45 Ill. 139.

—APPROVED IN *Roberts v. Bolles*, 101 U. S. 119.—*Clay County v. Society for Savings*, 5 Am. & Eng. R. Cas. 170, 104 U. S. 579. *Keithsburg v. Frick*, 34 Ill. 405. *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.

Or a lack of authority in the officers who issued them. *Ray County v. Vansycle*, 96 U. S. 675. *Leavenworth, L. & G. R. Co. v. Douglas County Com'rs*, 18 Kan. 169, 15 Am. Ky. Rep. 256. *Brownell v. Greenwich*, 8 N. Y. S. R. 737; affirmed in 114 N. Y. 518, 24 N. Y. S. R. 6, 22 N. E. Rep. 24.

Or that the election to vote the subscription was called by the county court instead of the board of supervisors. *Marshall County Sup'rs v. Schenck*, 5 Wall. (U. S.) 772.

While the payment of interest will not validate a municipal bond issued without authority of law, yet, where the objection is not a want of power to issue, but of compliance with a condition, in respect to which there may be an estoppel by recital or other acts of the city officials, payment of interest on the bonds ought to have great weight. *Moulton v. Evansville*, 25 Fed. Rep. 382.

Where county bonds are issued under

proceedings that are not warranted by law, they are void; but where there has only been an irregularity in the proceedings, the bonds may be rendered valid in the hands of innocent purchasers by acquiescence on the part of the people, and by the county in levying a tax and paying interest thereon. *Clarke v. Hancock County Sup'rs*, 27 Ill. 305.—DISTINGUISHING *Schuyler County Sup'rs v. People ex rel.*, 25 Ill. 163.—DISTINGUISHED IN *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.

Bonds, issued to a railroad, void for irregularity in their issue will not be validated by levying a tax and paying interest thereon. *Marshall County Sup'rs v. Cook*, 38 Ill. 44.

Payment of interest for a time by a county on the whole amount of bonds issued for railroad stock does not amount to a ratification of those issued beyond the amount authorized by law. *Daviess County v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. Rep. 897.

343. Decisions against validity of ratified bonds not followed in federal courts.—A legislature may ratify bonds where it might originally have authorized them, and when so ratified a federal court will sustain their validity, notwithstanding subsequent state decisions to the contrary. *Dows v. Elmwood*, 34 Fed. Rep. 114; appeal dismissed in 136 U. S. 651, 10 Sup. Ct. Rep. 1074.—FOLLOWING *Bolles v. Brimfield*, 120 U. S. 759, 7 Sup. Ct. Rep. 736.

Where a state legislature has affirmed the validity of municipal bonds by strong implication, the U. S. supreme court will not follow subsequent state decisions declaring them invalid. *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.—DISAPPROVING *People ex rel. v. Salem Tp.*, 20 Mich. 452; *Bay City v. State Treasurer*, 23 Mich. 499. FOLLOWING *Chicago, B. & Q. R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. 678.—REVIEWED IN *Louisville & N. R. Co. v. Gaines*, 2 Flipp. (U. S.) 621, 3 Fed. Rep. 266.

Where a county issues its bonds in aid of a railroad payable to bearer, and the supreme court of the state afterwards, but before the bonds are due, declares the law authorizing them to be constitutional, all persons holding the bonds may consider the question settled, and it cannot be reopened so as to affect them. *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574.

5. *Negotiability, and Rights of Purchasers.*a. *Negotiability.**

344. Railway aid bonds are negotiable instruments.—Bonds and the coupons attached issued by municipalities payable to bearer possess all the qualities of commercial paper. *Durant v. Iowa County, Woolw. (U. S.) 69.* *Gelpcke v. Dubuque, 1 Wall. (U. S.) 175.*—REVIEWED IN *Corcoran v. Chesapeake & O. Canal Co., 1 MacArth. (D. C.) 358.*—*Thomson v. Lee County, 3 Wall. (U. S.) 327.* *Lexington v. Butler, 14 Wall. (U. S.) 282.* *Humboldt Tp. v. Long, 92 U. S. 642.*—FOLLOWED IN *Moultrie County v. Fairfield, 105 U. S. 370;* *Dallas County v. McKenzie, 110 U. S. 686.*—*Marion County Com'rs v. Clark, 94 U. S. 278.*—DISTINGUISHED IN *Woodruff v. Okolona, 57 Miss. 806.*—*Roberts Tp. v. Bolles, 101 U. S. 119.*—APPROVING *Johnson v. Stark County, 24 Ill. 75;* *Mercer County Sup'rs v. Hubbard, 45 Ill. 139.*—*Mount Vernon v. Hovey, 52 Ind. 563.* *Barrett v. Schuyler County Court, 44 Mo. 197.*—FOLLOWING *Moran v. Miami County Com'rs, 2 Black (U. S.) 722.*—*Alvord v. Syracuse Sav. Bank, 98 N. Y. 599;* *affirming 34 Hun 143.* *San Antonio v. Lane, 32 Tex. 405.*

While the non-performance of conditions will be a good defense against the railroad company, it would, irrespective of the Ill. Act of April 16, 1869, be unavailing against innocent holders for value. *Eagle v. Kohn, 84 Ill. 292.*

Under Iowa Code of 1851, § 950, which provides that all instruments shall have the incidents of negotiability when such intent of the maker is manifest, but that the words "order" or "bearer" will not alone manifest such intent, a county bond issued to a railroad company "or its assigns," payable at a bank in the city of New York, and specifying that it is issued in part payment of a subscription for stock, sufficiently manifests the intent of negotiability and is negotiable. *Clapp v. Cedar County, 5 Iowa 15.*

Express power is not essential to confer the authority to give municipal bonds a negotiable and commercial form and character. It may be inferred from the intent of the act, indicated by its purpose and scope. Reference may be had, in aid of this construction, to the prevailing usage and cus-

tom in money centers in regard to the form and incidents of bonds necessary to their highest availability for the purpose to be accomplished and the greatest benefit to the city. Authority to issue interest-bearing municipal bonds, having long maturities, to supply means to make costly improvements, or in aid of railroads, justifies the inference that they were intended by the legislature to be sold in the market as commercial and negotiable securities. It may be safely assumed that the legislature intended that the exercise of the power conferred should be made in a mode to promote the best interests of the city—to enhance the market value of bonds by divesting them of equities and making them negotiable. *Mayor, etc., of Vicksburg v. Lombard, 51 Miss. 111.*

345. Such bonds deemed not negotiable.—Bonds, not being promises to pay money absolutely, are not negotiable, and are therefore open, in the hands of any holder, to defenses which would have been available against the payee. *Merriwether v. Saline County, 5 Dill. (U. S.) 265.*

A bond under seal payable to an obligee or "assigns" and containing on its face no words importing negotiability is not negotiable, and can pass only by assignment. *Cronin v. Patrick County, 4 Hughes (U. S.) 524.*

Attaching to such bond, on the same sheet, the form of an irrevocable power of attorney, containing a blank for the name of the attorney who for value received it to sell, assign, and transfer it as a "registered bond" of the corporation issuing it, and signed under seal by the obligee, does not make the bond negotiable, but, on the contrary, fixes its character as a "registered," non-negotiable bond. *Cronin v. Patrick County, 4 Hughes (U. S.) 524.*

The fact that such a bond, with such an annex, is issued by a county to a railroad company does not affect its essential character so as to convert it from a non-negotiable into a negotiable instrument. *Cronin v. Patrick County, 4 Hughes (U. S.) 524.*

County bonds issued in payment of a county subscription for railroad stock have not the quality of commercial paper in Pennsylvania; they are but bonds, and, even in the hands of innocent and remote purchasers, they are subject to the equities existing against them, when in the hands of the first purchasers from the company. The interest coupons are subject to the same equi-

* Negotiability of municipal railway aid coupon bonds, and detached coupons, see note, 1 L. R. A. 299.

ties. *Diamond v. Lawrence County*, 37 Pa. St. 353.—DISAPPROVED IN *Mercer County v. Hackett*, 1 Wall. (U. S.) 83. DISTINGUISHED IN *Carpenter v. Rommel*, 5 Phila. (Pa.) 34. EXPLAINED IN *Brainard v. New York & H. R. Co.*, 25 N. Y. 496.

340. Such bonds not accommodation paper.—An accommodation bill or note is one to which the accommodating party has put his name, without consideration, for the purpose of accommodating some other party who is to use it and is expected to pay it. The definition is analyzed and applied in this case in considering the character of certain bonds issued by the plaintiff counties to the defendant corporation, in part payment for a subscription to the corporation stock, pursuant to contracts supposed at the time to be valid, but afterwards adjudged to be *ultra vires*; and the bonds are held not to be accommodation paper. *Jefferson County v. Burlington & M. R. R. Co.*, 66 Iowa 385, 16 N. W. Rep. 561, 23 N. W. Rep. 899.

Several counties each agreed to subscribe a certain amount to the stock of a railroad, and issued their negotiable bonds for a payment of a part of the bonds, which were adjudged valid in the hands of innocent holders, and the counties paid the same; but subsequently it was adjudged that the subscription was *ultra vires*, and no further bonds were issued; and it was further adjudged that the contracts were entire, and that the counties could not demand certificates of stock on the partial payments. The counties then sued to recover from the company the money paid on the bonds on the ground that they were accommodation paper, which made the company primarily liable. Held, that if the counties had any right of action it accrued immediately on the delivery of the bonds, and not upon their payment; and that the action would be barred in five years from the delivery of the bonds. (Beck, C. J., and Adams, J., dissenting.) *Jefferson County v. Burlington & M. R. R. Co.*, 66 Iowa 385, 16 N. W. Rep. 561, 23 N. W. Rep. 899.

347. Failure to pay interest does not affect negotiability.—Failure to pay interest on bonds issued by a county to aid in the construction of a railroad does not affect their negotiability. *Coler v. Santa Fe County Com'rs*, (N. Mex.) 27 Pac. Rep. 619.

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348. Effect of recitals upon negotiability.—A county bond issued to a railroad company or its assigns in payment of its subscription of stock is negotiable; at least such an instrument is assignable or transferable by indorsement or by delivery. Such a bond, although it may contain recitals of the facts whereby authority for its issue is shown, and also contain a provision that the holder may, at his election, have an equal amount of shares in the capital stock of said railroad in lieu of the money, is not thereby rendered non-negotiable. *Clapp v. Cedar County*, 5 Iowa 15.

A bond of a township which recites that it is to be converted and exchanged for bonds of a county whenever a certain injunction should be dissolved is not negotiable, and no action will lie thereon after the consideration has failed. *Merrivether v. Saline County*, 5 Dill. (U. S.) 265.—REVIEWING *Foster v. Callaway County*, 3 Dill. 200; *State ex rel. v. Linn County Court*, 44 Mo. 504.

Municipal bonds which recite that they are not payable until the road is in running order, and the trains running thereon to a certain place, are not negotiable. *Blackman v. Lehman*, 63 Ala. 547, 35 Am. Rep. 57.—DISTINGUISHED IN *Reid v. Bank of Mobile*, 14 Am. & Eng. R. Cas. 554, 70 Ala. 199.

349. Indorsement and its effect.—Although a bond issued by a city for subscription to railroad stock may not be commercial paper in the sense of the law merchant, yet it is negotiable by indorsement or delivery. Where it bears on its face evidence of genuineness, and there is nothing to excite suspicion, the person who takes it *bona fide*, in the course of business, can enforce payment, though it be not valid as between the original parties. *Maddox v. Graham*, 2 Metc. (Ky.) 56.

Where municipal bonds are made payable to the railroad company or assigns, and the company transfers them by unqualified indorsement, it is bound as indorser, if the municipality fails to pay after maturity, and proper steps have been taken to charge the company as indorser. *Bonner v. New Orleans*, 2 Woods (U. S.) 135.

An indorsement of county bonds issued to the Alabama R. Co. by its president is sufficient to pass the title to the bonds, which were issued for the purpose of negotiation,

notwithstanding the charter of the road requires a different mode of making ordinary contracts. *Com'rs of Roads v. Shorter*, 50 Ga. 489.

350. Transfer by delivery.—Making bonds on their face payable to bearer amounts to a direction that the bonds shall be transferable by delivery, like a bank-note or a bill of exchange. *Com. ex rel. v. Allegheny County Com'rs*, 37 Pa. St. 237.

b. Rights of Holders and Bona Fide Purchasers.*

351. Issue being authorized, purchaser's title is complete.—A county judge in New York has jurisdiction to decide upon an application by taxpayers for an issue of county bonds in payment of railroad stock, and his judgment unreversed is final, and cannot be attacked collaterally in a suit on the bonds by a *bona fide* holder. *Lyons v. Munson*, 99 U. S. 684.—APPROVING *Orleans v. Platt*, 99 U. S. 676.

A city, in payment of valid debts against it, issued bonds in the similitude of bank-bills, in violation of statutes of the state. Afterwards the city called in and canceled these bonds, and issued in their place other bonds, which were unobjectionable in form. *Held*, that the city was liable on the latter bonds to holders thereof who had not participated in the issue of the illegal bonds, although they had notice of all the facts. *Merchants' Nat. Bank v. Little Rock*, 5 Dill. (U. S.) 299.

352. Irregularities in or prior to issue no defense against innocent purchaser.—(1) *General rules.*—Objections which relate only to the regularity in the making and issue of municipal bonds in aid of a railroad company, and not to the power to issue the same, cannot prevail against *bona fide* holders. *Douglas v. Niantic Sav. Bank*, 3 Am. & Eng. R. Cas. 54, 97 Ill. 228. *Rogers v. Keokuk*, 18 Law. Ed. (U. S.) 74. *Rogers v. Burlington*, 3 Wall. (U. S.) 654.—FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. 456.—*Brownell v. Greenwich*, 114 N. Y. 518, 22 N. E. Rep. 24, 24 N. Y. S. R. 6, 4 L. R. A. 685.—DISTINGUISHING *Potter v. Greenwich*, 92 N. Y. 662, 26 Hun 326.—*Clark v. Janesville*, 10 Wis. 136.—FOLLOWED IN *Bushnell v. Beloit*, 10 Wis. 195; *Lawson v. Milwaukee & N. R. Co.*, 30

Wis. 597.—*Goodman v. Simonds*, 20 How. (U. S.) 343.—FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. 456.

Under the settled decisions of the courts of Missouri, county bonds, in payment of stock in a railroad, issued by a *de facto* court, under seal, cannot be impeached in the hands of an innocent holder by showing that the president who signed them was not a *de jure* officer. *Ralls County v. Douglass*, 7 Am. & Eng. R. Cas. 212, 105 U. S. 728.—FOLLOWING *State v. Douglass*, 50 Mo. 593; *Harbaugh v. Winsor*, 38 Mo. 327.

Where bonds of a township were voted to a railroad which subsequently consolidated with another road, and the records of the township show that the bonds were directed to be issued and delivered to the consolidated company, the township is estopped from denying their validity as against a *bona fide* holder for value. *Harter Tp. v. Kernochan*, 3 Am. & Eng. R. Cas. 82, 103 U. S. 562.

Where county bonds were issued to a railroad, and no steps were taken for two and one half years to enjoin them, the time between the election and the time when the company parted with them, and the county having paid interest thereon for ten years, the county is estopped, as against a *bona fide* holder for value, from setting up want of proper notice of the election to authorize them. *Anderson County v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433.—FOLLOWED IN *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72.

Where a statute of the state provides for the registry of municipal bonds and a certificate thereof, such certificate should be held sufficient evidence to a purchaser of the existence of the facts upon which alone the bonds could be registered. *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803.

Where a city has already issued bonds, if it is proceeding to issue other bonds which are unauthorized, and which will interfere with the payment of the first bonds, the holders of the first bonds may restrain the city from issuing them, if they apply in time; but if they remain silent until the second bonds are issued and in the hands of *bona fide* holders, it is too late for them to set up a claim that the bonds are invalid, and that the holders have no rights as against them or the city. *Ranger v. New Orleans*, 2 Woods (U. S.) 128.

* *Bona fide* holders of municipal aid bonds, see note, 30 AM. & ENG. R. CAS. 267.

And the holders of such first bonds have no right to insist that their bonds shall be paid in preference to the second issue out of moneys not specially collected by the city for that purpose, even though their bonds are due and the others are not. *Ranger v. New Orleans*, 2 Woods (U. S.) 128.

Where municipalities are authorized by statute to fund their existing bonded indebtedness, and a funding bond is regularly issued in lieu of one taken up, payment cannot be denied a *bona fide* holder upon the ground of an irregularity in issuing the original bond, such as that it was issued by county supervisors instead of by the county court. *Ballou v. Jasper County*, 3 Fed. Rep. 620.

Where bonds are issued under New York statutes which require a majority of the taxpayers to assent thereto, and the town assessor to make an affidavit that such taxpayers have assented, such affidavit is conclusive in favor of *bona fide* purchasers of the bonds, and they need not show that the taxpayers did, in fact, give their consent; and a federal court is not bound by a decision of the highest state court to the contrary rendered after such purchasers had acquired rights. *McCall v. Hancock*, 10 Fed. Rep. 8, 20 Blatchf. (U. S.) 344.—FOLLOWING *Foot v. Hancock*, 15 Blatchf. 343; *Venice v. Murdock*, 92 U. S. 494. NOT FOLLOWING *Cagwin v. Hancock*, 84 N. Y. 532.

Where a city is authorized to issue its bonds in aid of a railroad if a majority of its citizens vote in favor thereof, individual citizens and taxpayers may enjoin the issue and negotiation of the bonds if a majority fails to vote in favor of the proposition, if they act in proper time; but if the bonds are issued, regular on their face and negotiable in form, after they have passed into the hands of purchasers for value without notice taxpayers cannot enjoin a collection of a tax to pay interest on them. *State ex rel. v. Montgomery*, 74 Ala. 226.

The fact that disqualified persons were allowed to vote at an election upon a proposition to issue bonds in aid of a railroad is not a valid defense to an action on the bonds by *bona fide* holders thereof. *State ex rel. v. Sanderson*, 54 Mo. 203.

(2) *Illustrations.*—A special act was passed authorizing a city to subscribe for stock in a railroad. The city council passed an ordinance to issue the bonds, and they

were issued and regularly sold. It was objected that the bonds were void because the ordinance was not recorded, as required by the city charter. A section of the charter provided that all ordinances authorized by a certain other section should be void if not recorded in thirty days, but that section did not provide for an ordinance to make such a subscription. *Held*, that the provision for recording ordinances did not apply; but even if it did the defect could not be set up against a *bona fide* holder of the bonds. *Amey v. Mayor, etc., of Allegheny City*, 24 How. (U. S.) 364.

A city voted to issue its bonds for \$100,000 for a like amount of railroad stock. Afterwards it was agreed that the city should issue the whole amount of the bonds and sell them for \$5000 in railroad stock and a return of a like amount of the city bonds. This arrangement was carried out, and the bonds were certified to the state auditor for registration as an issue of \$95,000. *Held*, that the bonds, being regularly issued, were not vitiated in the hands of *bona fide* holders by the subsequent agreement to sell them at a great discount. *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. Rep. 803.

A New York statute authorizing towns to subscribe to railroad stock required an affidavit of the town assessor that a majority of the taxpayers had given their consent, and provided that the affidavit should be proof of the fact for the action of the commissioners in making the subscription and issuing bonds. *Held*, that a town, when sued upon the bonds, could not contradict any of the statutory facts contained in the affidavit, where the suit was by *bona fide* holders of the bonds. *Irwin v. Ontario*, 3 Fed. Rep. 49, 18 Blatchf. (U. S.) 259.—DISTINGUISHING *Smith v. Ontario*, 15 Blatchf. 267. FOLLOWING *Phelps v. Lewiston*, 15 Blatchf. 131.

Under authority of law a township voted to subscribe to railroad stock and to issue its bonds in payment; and the various preliminary steps were complied with, the bonds issued and negotiated, and several years' interest paid, when the county treasurer refused to pay over a tax to pay interest to the township treasurer on the ground that the road was not located permanently through the township until after the election and subscription. *Held*, that it was too late to raise such an objection. *State ex rel. v. Van Horne*, 7 Ohio St. 327.

—DISTINGUISHED in *Hopple v. Brown Tp*, 13 Ohio St. 311. FOLLOWED IN *State ex rel. v. Union Tp*, 8 Ohio St. 394.

353. Fraud and misconduct of officers no defense.—County bonds regular on their face and authorized by law are valid in the hands of *bona fide* holders for value. Proof of fraud on the part of the railroad to which they were issued, and that they were negotiated at less than their par value, cannot defeat a recovery. *Mercer County v. Hackett*, 1 Wall. (U. S.) 83.—DISAPPROVING *Mercer County v. Pittsburg & E. R. Co.*, 27 Pa. St. 389. DISTINGUISHING *Diamond v. Lawrence County*, 37 Pa. St. 353.—DISAPPROVED IN *Marshall County Sup'rs v. Cook*, 38 Ill. 44. EXPLAINED IN *State v. Saline County Court*, 48 Mo. 390. FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. (U. S.) 456; *Venice v. Murdock*, 92 U. S. 494; *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 553.

Bona fide purchasers, before maturity, of municipal bonds cannot be prejudiced by want of compliance with the forms of law, or fraud, in the agents intrusted with issuing them. *Grand Chute v. Winegar*, 15 Wall. (U. S.) 355.—FOLLOWED IN *Kenicott v. Wayne County Sup'rs*, 16 Wall. 452. REVIEWED IN *Smith v. Clark County*, 54 Mo. 58.—*Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452, 4 Am. Ry. Rep. 93.—FOLLOWING *Grand Chute v. Winegar*, 15 Wall. 355; *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 539; *Gelpcke v. Dubuque*, 1 Wall. 203; *Moran v. Miami County Com'rs*, 2 Black (U. S.) 722; *Marsh v. Fulton County*, 10 Wall. 676.—*Macon County v. Shores*, 97 U. S. 272. *Maxcy v. Williamson County*, 72 Ill. 207.

The possession of negotiable bonds carries with it the title to the holder, and where the purchaser of such paper pays a full consideration, the facts that the seller was an officer of the railroad which issued them, was not the owner of the bonds, but held them merely for the railroad company, and that the company never received the proceeds of the sale, will not affect the position of a *bona fide* purchaser for value. *Indiana & I. C. R. Co. v. Sprague*, 2 Am. & Eng. R. Cas. 532, 103 U. S. 756.

Where a village obtains legislative authority to issue bonds, professedly for the purpose of making public improvements in the village, but with intent to use them to secure the construction of a railroad through

the village, and such bonds pass into the hands of innocent purchasers for value, equity will not entertain a bill by the common council of the village which seeks to have such bonds declared void, but will leave the parties where it finds them. *Cedar Springs v. Schlich*, 81 Mich. 405, 45 N. W. Rep. 994.

An act authorizing counties to subscribe to the stock of a railroad and issue negotiable bonds in payment thereof provided that all bonds "issued and negotiated" by the commissioners, "and regular on the face thereof," shall, "in the hands of any *bona fide* holders, be deemed and taken in all courts and elsewhere as conclusive evidence of the regularity of everything required by this act preliminary to the issue and negotiation" of the bonds. *Held*, that where bonds regular on their face were issued and delivered to the company, ostensibly in payment of a subscription of stock and for the purpose of being put into circulation, and were afterwards put into circulation and passed into the hands of a *bona fide* holder, they must, as to such holder, be regarded as issued and negotiated within the meaning of the act; and that the payment of bonds, regular on their face, and thus issued and negotiated, and in the hands of a *bona fide* holder, cannot be disputed on the ground of a fraudulent combination between the railroad company and county commissioners to make a formal but not real location of the railroad, and a subscription, ostensibly for the benefit of that company, but really for the benefit of another company, to aid which, by a subscription of its capital stock or by a loan of credit, there was no legal authority. *State ex rel. v. Hancock County Com'rs*, 12 Ohio St. 596.

354. What the purchaser may presume.—When a corporation has power under any circumstances to issue negotiable securities, a *bona fide* holder has a right to presume they were issued under circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper. *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. *Lexington v. Butler*, 14 Wall. (U. S.) 282.

Bona fide holders will be held to a knowledge of the law authorizing the issue of bonds by the town, but they will not be held, in the absence of actual notice, to inquire into the fulfillment of all the formal

prerequisites to the issue. The issuing of the bonds authorizes the receiver or purchaser to suppose all the things required by law to have been done in the time, form, and substance required by law. *Flagg v. Mayor, etc., of Palmyra*, 33 Mo. 440.—QUOTED IN *Smith v. Clark County*, 54 Mo. 58.—*Bylo v. Forsythe County Com'rs*, 76 N. Car. 489.

The record of a proceeding in relation to subscribing stock to a railroad, although awkwardly drafted and ungrammatically composed, which contains the substantial matter of the proposition to subscribe, the issue of bonds, the tax to meet them, the form and manner of vote adopting it, is sufficient to protect an innocent purchaser of such bonds; he has a right to presume proper notice from such record. *Clapp v. Cedar County*, 5 Iowa 15.

It constitutes no objection to a recovery upon a bond issued by a county to a railroad company that the record does not show that the county actually subscribed for the stock; such fact would not be of record, and the purchaser of the bond may presume it from the fact of the issue of such bond. *Clapp v. Cedar County*, 5 Iowa 15.

355. Duty to inquire.—Purchasers of municipal bonds must always take the risk of the genuineness of the official signatures and character of those issuing them. So where bonds of a township issued to a railroad were dated in March, and signed by one as presiding justice of the county who did not come into office until the following October—held, that a purchaser bought at his own risk. *Anthony v. Jasper County*, 101 U. S. 693.

One who buys negotiable municipal securities from litigating parties, with actual notice of a pending suit by the municipality to test their validity, does so at his peril, and must abide the result of the litigation, the same as parties from whom he buys. Under such circumstances it is bad faith or wilful ignorance to fail to make further inquiry. *Lytle v. Lansing*, 147 U. S. 59, 13 Sup. Ct. Rep. 254.

Where city authorities issue bonds in aid of a railroad, payable to bearer, and pay interest thereon for several years, and the city elects commissioners to hold and vote the stock in the railroad company, it thereby affirms their validity, and a bona fide holder need not make further inquiry. *Luling v.*

Racine, 1 Biss. (U. S.) 314.—APPLYING *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 539.

A purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue them, and no recital contained in the bonds can cure such a defect as an utter want of power in the municipality to execute the bonds. *Coffin v. Kearney County Com'rs*, 57 Fed. Rep. 137.—FOLLOWING *Dixon County v. Field*, 111 U. S. 83, 4 Sup. Ct. Rep. 315.

As a general rule, no person can acquire rights under a void instrument, and such is the case with forged paper, and public securities issued without authority. If county bonds are issued in payment of a subscription to a railway company without authority of law, they are void, and an innocent purchaser before their maturity acquires no rights under them to be protected. Such purchaser must look to the authority under which they purport to have been issued. *Gaddis v. Richland County*, 92 Ill. 119.

A purchaser of municipal bonds issued for stock in a railroad is charged not only with notice of the law under which they issued, but also with notice of the construction of the law as made by the highest court of the state prior to the issue of the bonds. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159.

A purchaser of a county bond issued in payment of a subscription of stock to a railroad company is not obliged to look behind the county records, nor is he bound to look to it that such records are true. If the records show sufficient authority for its issue, this will justify him in purchasing, and he may recover thereon. *Clapp v. Cedar County*, 5 Iowa 15.

A purchaser is not bound to look beyond the official action of those to whom the law has confided the authority to ascertain and determine whether the requirements of the law necessary to the loan have been satisfied in the vote taken. *Mayor, etc., of Vicksburg v. Lombard*, 51 Miss. 111.

Persons receiving bonds issued by towns are presumed to know the law, and are bound at their peril to ascertain whether the statute authorizing their creation has been complied with. *Duanesburgh v. Jenkins*, 40 Barb. (N. Y.) 574.

356. What will put purchaser on inquiry.—Where bonds purporting to have been issued by a county contain no recitals

of an election, or of proceedings and orders of the county board, but are naked promises to pay, every purchaser and holder of these securities is chargeable with notice of whatever appears upon the face of the county records. If in such case it appears upon the face of the county records that the commissioners had no authority to issue the bonds, the county may avail itself of that want of authority as a defense to an action even of a *bona fide* holder. *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—QUOTING *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Floyd Acceptances*, 7 Wall. 676; *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Clark v. Des Moines*, 19 Iowa 199; *Gould v. Sterling*, 23 N. Y. 456.

Where a municipal corporation issues its bonds to a corporation the corporate name of which indicates that it is organized for manufacturing purposes, purchasers of such bonds must take notice whether the corporation is organized for such purpose so as to be a private corporation and not authorized to receive such bonds. *Central Branch U. P. R. Co. v. Smith*, 23 Kan. 745.

Where a statute limits the rate of taxation that may be imposed to pay county bonds, one who takes such bonds is chargeable with knowledge of the limitation, and the county court cannot be compelled to appropriate other funds to the payment of such bonds, though the specific fund provided for is inadequate, and the bonds have been reduced to judgment. *State ex rel. v. Macon County Court*, 68 Mo. 29.—REVIEWING *Campbell v. Polk County*, 49 Mo. 214; *Pettis County v. Kingsbury*, 17 Mo. 479; *Kingsberry v. Pettis County*, 48 Mo. 208.

Where municipal bonds are issued in aid of a railroad, under a statute providing that they shall not be sold for less than par, and the bonds on their face refer to the statute, a purchaser thereof is charged with notice, and the rule of commercial law protecting innocent purchasers of negotiable paper does not apply. *Armstrong County v. Brinton*, 47 Pa. St. 367.

Where coupon bonds, issued under the provisions of an act of assembly by a municipal corporation for stock in a railroad company, are in the possession of the president, and the fact that he is the president of the company is shown by the bonds themselves, his possession is *prima facie* evidence that they belong to the company, and constructive notice of their title to one about

to take them as collateral security for a private debt owed by the president. The fact that time for the payment of such debt is given in consideration of the transfer of such bonds as collateral security is immaterial where the creditor has constructive notice of the company's title. The giving of time cannot divest or impair the title of the company. *Pittsburgh & C. R. Co. v. Garrard*, 1 Pittsb. (Pa.) 378.

The mere fact that interest coupons upon municipal bonds are overdue and unpaid is not of itself sufficient to dishonor the bonds, which are, under the commercial law, negotiable paper, or to charge a purchaser with notice of any defenses to the payment of the bonds, and especially where the payment of the coupons had been enjoined, but which had been finally dissolved. *Preble v. Portage County Sup'rs*, 8 Biss. (U. S.) 358.

357. Where issue was unauthorized, purchaser takes subject to equities.—Where municipal bonds issue to a railroad without authority, subsequent purchasers cannot claim protection on the ground that they are innocent purchasers without notice. The protection given to holders of negotiable paper cannot cover a lack of authority to issue the paper. *Marsh v. Fulton County*, 10 Wall. (U. S.) 676.—FOLLOWED IN *Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452; *Thomas v. Lansing*, 14 Fed. Rep. 618, 21 Blatchf. (U. S.) 119. QUOTED IN *State v. Little Rock*, M. R. & T. R. Co., 31 Ark. 701; *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.—*Pana v. Lippincott*, 2 Ill. App. 466.

There can be no estoppel in ascertaining the existence of a law. So one suing on municipal bonds issued for railroad stock cannot insist that he is a *bona fide* holder, and therefore the town issuing the bonds is estopped from showing that the law under which they issued was void for not being entered on the senate journal. *South Ottawa v. Perkins*, 94 U. S. 260.

A *bona fide* holder for value of municipal bonds issued in aid of a railroad is protected against irregularities, or even fraud, or an unfounded assumption of authority on the part of the officers or agents charged with the duty of issuing them, but not against an entire want of authority to issue them. *Dallas County v. MacKenzie*, 94 U. S. 660.

A statute of Missouri (Laws of 1872, p. 56) provided that "before any bond hereafter issued by any county shall obtain valid,

ity or be negotiated" it must be first registered by the state auditor, who shall certify thereon that all conditions precedent required by law, and by the contract under which the bonds were issued, have been complied with. Subsequent to the passage of this statute certain bonds were issued by a county court to a railway company, the company not having fully complied with the conditions upon which the issue of the bonds had been authorized by a vote of the people. In order to evade the statute the bonds were antedated to a date prior to the passage of the act. *Held*, that they were void even in the hands of an innocent holder, and that the county was not estopped to set up this defense. *Anthony v. Jasper County*, 4 Dill. (U. S.) 136.

358. Notice of equities or fraud.—

Where a purchaser of bonds has notice that the bonds had been the subject of litigation, and that his vendor held \$192,000 of them with ten years' unpaid interest at eight per cent. for a debt of \$30,000, he cannot be deemed a *bona fide* holder thereof. *Trask v. Jacksonville, P. & M. R. Co.*, 124 U. S. 515, 8 Sup. Ct. Rep. 574.

A town voted to subscribe to railroad stock and to issue its bonds payable in twenty years, with the option to pay them in ten years. By mistake the bonds were printed without the option clause, and were signed by the town officers without noticing the error, and in that form they were negotiated. *Held*, that purchasers with full knowledge of the facts could not contest a suit by the town to reform the bonds, and a delay of two years, after the ten years had expired, in instituting the suit would not alter the case. (Park, C. J., and Carpenter, J., dissenting.) *Essex v. Day*, 52 Conn. 483.

A purchaser of town bonds issued in New York in aid of a railroad, who has notice that they were exchanged for stock of the company, in violation of the statute under which they issued, which directs that they shall be sold at par for cash, is not a *bona fide* holder, and cannot enforce payment against the town, but the legislature by subsequent act may ratify and legalize the same. *Thompson v. Perrine*, 3 Am. & Eng. R. Cas. 140, 103 U. S. 806.—APPROVING PEOPLE ex rel. *v. Batchellor*, 53 N. Y. 131. DISAPPROVING *Horton v. Thompson*, 71 N. Y. 520. FOLLOWING *Scipio v. Wright*, 101 U. S. 676.

Certain railroad bonds were fraudulently

issued by means of a covinous conspiracy formed between two of the justices of the county court, the prosecuting attorney, and others, and upon a division of the bonds one of the conspirators received \$55,000 thereof, which, two days thereafter, he sold to a banking firm, under circumstances which showed that the firm, as well as G., who afterwards bought them of the firm, had such notice of the fraud perpetrated as should have forbidden purchase. In an action by the county against G., to enjoin sale and cancel the bonds—*held*: (1) that, although the evidence of such knowledge was not of a direct, positive character, it was sufficient if it established the fact of knowledge by reasonable inferences deduced from facts which were proven; (2) that, although primarily the presumption favors the holder of paper acquired before maturity, such presumption must dwindle into insignificance under the circumstances of this case; (3) that, the bonds having been fraudulently issued, the burden of showing that they were acquired in good faith devolved on the defendant; (4) that, the banking firm, as well as G., being chargeable with notice, G. could not successfully invoke the doctrine which permits even a purchaser with notice to purchase from one without notice; (5) that the presumption arising from the fact that G., although conducting the trial and having his own deposition read thereat, failed to explain certain statements tending to prove his lack of good faith derived additional strength in the form of procedure and the nature and organization of the court wherein the *bona fides* of the transaction was questioned; (6) that, as one to whom G., the next day after the injunction was served upon him, had transferred the bonds was not complaining, G. would not be heard vicariously to complain; (7) that the bonds, although invalid, being apparently good, G.'s concealment of them and threat to transfer them constituted a ground for equitable interference, analogous to that for removal of a cloud on title. *Cass County v. Green*, 66 Mo. 498.

359. Non-incorporation of town issuing the bonds.—A town cannot set up as a defense to an action by *bona fide* holders of bonds which it has issued that it was not duly incorporated when they were issued, where it acted as a corporation in issuing the bonds, and has continued so to act. *Aller v. Cameron*, 3 Dill. (U. S.) 198.

360. Incapacity of railway company to contract.—Where a railroad company is a *de facto* corporation at the time the county issues its bonds to it, it is no defense that the company did not organize within the time fixed by its charter. *Macon County v. Shores*, 97 U. S. 272.—FOLLOWED IN *Dallas County v. Huidekoper*, 25 Law. Ed. (U. S.) 974; *Ralls County v. Douglass*, 105 U. S. 728.—*Darlington v. LaCade County*, 4 Dill. (U. S.) 200. *Ralls County v. Douglass*, 7 Am. & Eng. R. Cas. 212, 105 U. S. 728.—FOLLOWING *State Bank v. Merchants' Bank*, 10 Mo. 123; *Kayser v. Bremen*, 16 Mo. 88; *Smith v. Clark County*, 54 Mo. 58; *St. Louis v. Shields*, 62 Mo. 247; *Macon County v. Shores*, 97 U. S. 277.—FOLLOWED IN *Green County v. Conness*, 109 U. S. 104.

Where the people of a county vote in favor of a subscription to railroad stock, and the county court makes the subscription and issues county bonds, and continues to exercise the rights of a stockholder after the road is built, such bonds are not invalid in the hands of *bona fide* holders for value because the company was not created according to law at the time of the election. *Davies County v. Huidekoper*, 98 U. S. 98.

Where a town has authority for issuing its bonds to a railroad as a donation or subscription, and the bonds are executed in proper form and made payable to the proper company, but are delivered to the secretary of a new company, and there is nothing pertaining to them, or which could have been ascertained from the record, indicating their delivery to one not entitled to receive them, the bonds cannot be held invalid by reason of such delivery after they have passed into the hands of innocent holders. *Prairie v. Lloyd*, 3 Am. & Eng. R. Cas. 58, 97 Ill. 179.

361. Subsequent insolvency and dissolution of railway company.—The fact that a railroad company subsequent to the issue of county bonds to it and its negotiation thereof has become insolvent and then dissolved will constitute no defense to an action by an innocent indorsee of such bonds. *Clapp v. Cedar County*, 5 Iowa 15.

362. Violation of conditions precedent to lawful issue.—Where a county has authority to issue bonds in aid of a railroad, and they as issued recite that they were issued in pursuance of law, *bona fide* holders, without notice that certain con-

ditions precedent have not been complied with, are not affected thereby. *Mobile Sav. Bank v. Oktibbeha County Sup'rs*, 24 Fed. Rep. 110.

If a county in its contract for issuing bonds imposes conditions other than those fixed by the legislature which are to be complied with by the railroad company before the bonds are to be delivered, it cannot assert, as against an innocent holder of such bonds, that its officer charged with the duty of passing upon the fulfilment of the conditions and of delivering the bonds issued them without the conditions being complied with. *Nelson v. Haywood County*, 38 Am. & Eng. R. Cas. 620, 87 Tenn. 781, 11 S. W. Rep. 885.

A special act authorized a county to subscribe to the stock of any railroad if a majority of its taxpayers should vote therefor. Subsequently a railroad charter authorized it to receive subscriptions to stock without a vote, and a subscription was made by the county, the bonds reciting that they were issued by authority of the company's charter. Held, that the legislature had the power to except the company from the provisions of the special act, and the bonds were valid in the hands of innocent purchasers without the vote as a condition precedent to the right to issue them, as required by the special act. *Burr v. Chariton County*, 2 McCrary (U. S.) 603, 12 Fed. Rep. 848.

Bonds having passed into the hands of innocent holders, it is enough if the power to issue them existed either under the charter or special act. The question whether the statute has been complied with is for the authorities of the county to determine. *Burr v. Chariton County*, 2 McCrary (U. S.) 603, 12 Fed. Rep. 848.

363. Issue in excess of authority or for unauthorized amount.—The fact that city authorities transcend their delegated powers, in issuing bonds and coupons without having obtained the assent of the required number of voters, does not affect the validity of the bonds in the hands of *bona fide* holders for value, as they have a right to presume that every condition precedent to the issuance of the bonds has been complied with. *San Antonio v. Lane*, 32 Tex. 405.

Judgment bonds of a county cannot be defeated in the hands of innocent holders for value without notice by showing that

the judgments were rendered upon warrants issued in excess of a constitutional limitation, and that the supervisors fraudulently omitted to interpose the defense when the warrants were sued. *Sioux City & St. P. R. Co. v. Osceola County*, 45 Iowa 168.—FOLLOWED IN *Sioux City & St. P. R. Co. v. Osceola County*, 52 Iowa 26.—*Sioux City & St. P. R. Co. v. Osceola County*, 52 Iowa 26, 2 N. W. Rep. 593.—FOLLOWING *Sioux City & St. P. R. Co. v. Osceola County*, 45 Iowa 168.

Town bonds issued in Kansas in aid of a railroad, under the acts of Feb. 25, 1870, and March 2, 1872, are valid in the hands of *bona fide* holders for value without notice of the fact that the amount of the bonds issued bore a greater proportion to the taxable property of the town than was authorized by said acts. *Wilson v. Salamanca Tp.*, 99 U. S. 499.—FOLLOWING *Marcy v. Oswego Tp.*, 92 U. S. 637.—FOLLOWED IN *Dallas County v. McKenzie*, 110 U. S. 686.

Under the law of New Jersey a purchaser of negotiable municipal railroad bonds may rely on the decision of commissioners appointed to issue them that no more were issued than allowed by law, and an over-issue in the hands of purchasers can be collected. *New Providence v. Halsey*, 117 U. S. 336, 6 Sup. Ct. Rep. 764.

The purchasers of bonds issued by municipalities under authority of laws which limit the amount of bonds to be issued to a certain percentage of the assessment rolls, or to a given rate of taxation based on such rolls, are charged with notice of the assessment rolls, and of the amount of bonds which can be validly issued based on such assessment. So where one buys at one purchase more bonds than were authorized by statute, he is chargeable with notice, and the municipality issuing them is not estopped from pleading an overissue. *Francis v. Howard County*, 54 Fed. Rep. 487; *affirming* 50 Fed. Rep. 44.

364. Sale of bonds at less than par.

—The fact that a railroad negotiated municipal bonds issued to it at less than par, contrary to the statute authorizing them, will not defeat a recovery by a subsequent holder. *Richardson v. Lawrence County*, 17 Law. Ed. (U. S.) 558.—FOLLOWING *Woods v. Lawrence County*, 1 Black (U. S.) 386.

But the county may, by proceeding in equity, compel the holder to receive, in satisfaction of the bonds, the sum paid by the

first purchaser, with interest thereon. *Armstrong County v. Brinton*, 47 Pa. St. 367.

365. Pendency of litigation respecting the bonds.—The facts that a suit is pending to restrain a transfer of county bonds in aid of a railway, and a decree therein directing them to be delivered up to be canceled, are not binding upon a *bona fide* holder of bonds for value without notice; but if he has actual knowledge of the litigation when he becomes a purchaser, he is concluded by the decree. *Durant v. Iowa County*, *Woolku*. (U. S.) 69. *Macon County v. Shores*, 97 U. S. 272. *Cass County v. Gillett*, 100 U. S. 585.—FOLLOWING *Warren County v. Marcy*, 97 U. S. 107.—*Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. Rep. 93.—DISTINGUISHING *Scotland County v. Thomas*, 94 U. S. 682. FOLLOWING *Warren County v. Marcy*, 97 U. S. 96.—FOLLOWED IN *Hill v. Scotland County*, 34 Fed. Rep. 208.—*Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131. *Hill v. Scotland County*, 34 Fed. Rep. 208.—FOLLOWING *Scotland County v. Thomas*, 94 U. S. 682; *Scotland County v. Hill*, 112 U. S. 183, 5 Sup. Ct. Rep. 93; *Warren County v. Marcy*, 97 U. S. 96.

The holder of municipal bonds issued in aid of a railroad is not bound by a decree declaring the bonds void where he is not served with process, does not appear, and the only effort at service is a published notice addressed to the "unknown owners and holders" of the bonds. *Empire Tp. v. Darlington*, 101 U. S. 87. *Carroll County v. Smith*, 15 Am. & Eng. R. Cas. 606, 111 U. S. 556, 4 Sup. Ct. Rep. 539.

Where a decree is rendered enjoining the collection of taxes to pay interest accruing on municipal bonds, the bondholders not being made parties, such decree is not conclusive against a bondholder, or *res judicata* as to him; but it does not follow that such party may ignore such decree, and require the collector to collect the tax, in violation of the injunction. If the bondholder can show that the bonds are valid, he may file a bill of review making the parties to the former proceeding defendants, challenging that decree upon the ground that he was not a party thereto, and have the question of the validity of the bonds adjudged *de novo*. *Mail v. Maxwell*, 107 Ill. 554.

The pendency of a suit between a county and a railroad company in regard to bonds issued by the county in payment of its subscription to the stock of the company

is notice to all the world of the facts alleged in the pleadings therein. The purchaser of such a bond from the company *pendente lite* and all subsequent purchasers are affected by the decree of the court in the suit pending at the time of the purchase. *Diamond v. Lawrence County*, 37 Pa. St. 353.

366. Contracts and negotiations between third parties do not affect the purchaser.—A contract between a company and a county that the former should pay the interest on bonds until the road should be completed does not affect the holder of the bonds, nor prevent him from recovering interest from the county. *Com. ex rel. v. Allegheny County Com'rs*, 37 Pa. St. 237. *Com. ex rel. v. Pittsburgh*, 34 Pa. St. 496. *Com. ex rel. v. Perkins*, 43 Pa. St. 400.

Bonds issued by a township in aid of a railroad were, by their terms, payable to the company or its assignees, and a stipulation was added reserving to the township the right to require the company to take the stock subscribed by the township, and to redeem the bonds so issued. *Held*, that this reservation was a contract between the township and company alone, which could not affect the right of a *bona fide* assignee of the bonds for value to require payment of the bonds by the township. *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569.

367. Nor will letters and declarations of third parties affect him.—Letters written by third parties who are charged as forming "a ring" by which a county was defrauded of its bonds, or of the proceeds, none of them being written by the bondholders, but by various persons who had some connection with the bonds or their negotiation, are not binding on *bona fide* bondholders unless some connection is shown between them and the letters. *Kennicott v. Wayne County Sup'rs*, 6 Biss. (U. S.) 138.

What third parties, who represented themselves as agents of the company, said, such as assurances that the road would be built, as an inducement to a county to issue its bonds is not admissible in evidence against a *bona fide* purchaser of the bonds. *Whittaker v. Johnson County*, 10 Iowa 161.

368. Presumption that holder is a bona fide purchaser.—Where municipal bonds are purchased in the market, it is presumed that the purchase was before the bonds were due, and that a valuable consid-

eration was paid, and that the purchaser had no notice of defects or irregularities attending their issue which would render them invalid. *Lexington v. Butler*, 14 Wall. (U. S.) 282.—FOLLOWED IN *Moultrie County v. Fairfield*, 105 U. S. 370. QUOTED IN *Smith v. Clark County*, 54 Mo. 58.

In a suit on municipal bonds issued in aid of a railroad, if the execution of the bonds be not put in issue, the production of the bonds, being regular on their face, establishes plaintiff's case, and raises a presumption that he is a holder for value before maturity, without notice. *Chambers County v. Clews*, 21 Wall. (U. S.) 317. *Kennicott v. Wayne County Sup'rs*, 6 Biss. (U. S.) 138.

It is a presumption of law that a holder of municipal bonds issued for railroad stock is the *bona fide* owner, but where this is made an issue in the pleadings the plaintiff has a right to meet it by direct affirmative proof. *Macon County v. Shores*, 97 U. S. 272.

369. Who is not deemed a bona fide purchaser.—Where a city is authorized to subscribe to railroad stock and to issue its bonds, the proceeds of which shall be expended in the county, and the bonds are issued upon a guaranty that the proceeds shall be so expended, but are not, as between the city and the company or its assignee, the bonds cannot be enforced. And the same rule applies to one who purchases the bonds at a foreclosure sale of the property of the company. *Foote v. Mount Pleasant*, 1 McCrary (U. S.) 101.

Kan. Act of 1872, ch. 68, § 11, requires municipal officers subscribing to a work of internal improvement upon the issuance of the bonds to deliver the same, together with the original or a copy of the subscription, to the state treasurer, to be held by him in escrow until the conditions in the terms of the subscription are complied with. *Held*, that the object of the law is to protect taxpayers against an issue of bonds without a compliance with the conditions required; and it is, therefore, competent for the legislature to make the negotiability of such bonds depend upon their delivery by the state treasurer. *Lewis v. Barbour County Com'rs*, 1 McCrary (U. S.) 458.

And a purchaser of such bonds, which show upon their face that they were issued under such statute, cannot claim to be a *bona fide* purchaser without notice where they were fraudulently issued without ever

being delivered to the state treasurer. *Lewis v. Barbour County Com'rs*, 1 *McCrary* (U. S.) 458.

370. When holder must show a purchase in good faith.—Where such fraud or illegality in the making of municipal bonds issued in aid of a railroad as to render them void between the original holders is shown, an indorser cannot recover unless he shows that he or some intermediate purchaser is a *bona fide* holder. *Stewart v. Lansing*, 7 *Am. & Eng. R. Cas.* 225, 104 U. S. 505.—FOLLOWING *Smith v. Sac County*, 11 *Wall*. (U. S.) 147.—*Lytle v. Lansing*, 147 U. S. 59, 13 *Sup. Ct. Rep.* 254.

The holder of a negotiable municipal railroad security is presumed to have acquired it in good faith and for value; but if, in a suit upon it, the defense be such as to require plaintiff to show that value was paid, it is not always essential to prove that he paid value, for if any intermediate holder between him and the defendant gave value, such intervening consideration will sustain his title. *Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 *Sup. Ct. Rep.* 391.

371. The New York rule.—Bonds issued by commissioners under the provisions of the acts authorizing towns to bond themselves to aid in the construction of railroads must be conformable to the law, or they are invalid, and cannot be collected of the town, and the holder is charged with knowledge of any defects. There is no such thing as a *bona fide* holder of such bonds. *Brownell v. Greenwich*, 44 *Hun* 611, 8 *N. Y. S. R.* 737; *affirmed* in 114 *N. Y.* 518, 24 *N. Y. S. R.* 6, 22 *N. E. Rep.* 24. *Cagwin v. Hancock*, 5 *Am. & Eng. R. Cas.* 150, 84 *N. Y.* 532; *reversing* 22 *Hun* 201.—APPLIED IN *Lyons v. Chamberlain*, 89 *N. Y.* 578.

A county judge acting under the New York statute appointed commissioners to make a town subscription to railroad stock and to execute bonds therefor. Before the bonds were delivered to the company the proceeding was removed on certiorari to the supreme court, where the proceeding was reversed and set aside. At the time the commissioners issued and delivered the bonds to the company both they and the company had full knowledge of the writ of certiorari, and the commissioners took an indemnity bond from the company. Subsequently an action was commenced against a transferee of the bonds to compel their

surrender and cancellation. *Held*, that the burden was on the defendant to show that either he or some one under whom he claimed was a *bona fide* holder for value. *Lansing v. Lytle*, 38 *Fed. Rep.* 204.

372. Purchase of bonds after maturity.—Municipal bonds unpaid at maturity are dishonored like other commercial paper, and a purchaser after maturity holds them subject to all defects which would invalidate them in the hands of the original holder. *Belo v. Forsythe County Com'rs*, 76 *N. Car.* 489.

The purchaser of overdue municipal bonds issued for railroad stock is bound by a decree rendered before the purchase declaring them void. *Louis v. Brown Tp.*, 15 *Am. & Eng. R. Cas.* 630, 109 U. S. 162, 3 *Sup. Ct. Rep.* 92.

373. Taking in payment of an antecedent debt.—The fact that municipal bonds were taken in payment of a pre-existing debt does not render the holder any the less a *bona fide* holder for value. *Mobile Sav. Bank v. Oktibbeha County Sup'rs*, 24 *Fed. Rep.* 110.

The delivery of bonds by commissioners to a contractor for building a railroad in payment for work thereon makes such contractor a purchaser of the bonds for value, though he took them for an antecedent debt, if he took them *bona fide*. *Foote v. Hancock*, 15 *Blatchf.* (U. S.) 343.

374. Rights of purchaser from bona fide purchaser.—It is a well-settled rule of commercial law that title to a negotiable instrument created by a sale or the same to an innocent person for value and before maturity is a title upon which any subsequent holder can recover, notwithstanding he may have notice of infirmities of title, or of equities or defenses that exist between the original parties; and the above rule applies to a purchaser of county bonds from an innocent holder with notice of the pendency of a suit to test their validity. *Hill v. Scotland County*, 34 *Fed. Rep.* 208. *Scotland County v. Hill*, 132 U. S. 107, 10 *Sup. Ct. Rep.* 26; *affirming* 25 *Fed. Rep.* 395.—FOLLOWING *Douglas County Com'rs v. Bolles*, 94 U. S. 104.—*Foote v. Hancock*, 15 *Blatchf.* (U. S.) 343.

375. Rights of purchaser of stolen bonds.—One who takes negotiable paper before due in good faith for a valuable consideration holds it by a valid title as against all the world. And this is true of

negotiable bonds that have been stolen. *Murray v. Lardner*, 2 Wall. (U. S.) 110.— FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. (U. S.) 456.

376. Extent of purchaser's recovery.—A *bona fide* holder of negotiable bonds, without notice, and for value, may recover their full value, and is not restricted to the amount which he paid for the bonds. *Grand Rapids & I. R. Co. v. Sanders*, 17 Hun (N. Y.) 552; reversing 54 Ill. 214.

All purchasers of such bonds are bound to take notice of the law under which they were issued. The court will enforce the payment of the bonds to the extent of the money which they brought to the company, and no further. Remote purchasers have no greater rights than the first purchasers from the company. *Diamond v. Lawrence County*, 37 Pa. St. 353.

c. Effect of Recitals in the Bonds.*

377. Bonds reciting an authorized issue are valid in the hands of bona fide holders.—When a municipal corporation has power, under any circumstances, to issue negotiable securities, a *bona fide* holder of them has a right to presume that they were issued under the circumstances which gave the requisite authority. He is not bound to look further, when they on their face import a compliance with the law under which they were issued. *Miller v. Berlin*, 13 Blatchf. (U. S.) 245. *Moran v. Miami County Com'rs*, 2 Black (U. S.) 722.—APPROVING *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Knox County Com'rs v. Wallace*, 21 How. (U. S.) 546; *Aspinwall v. Daviess County Com'rs*, 22 How. 364.— FOLLOWED IN *Kenicott v. Wayne County Sup'rs*, 16 Wall. (U. S.) 452; *Barrett v. Schuyler County Court*, 44 Mo. 197.—*Lynde v. Winnebago County*, 16 Wall. (U. S.) 6.—APPROVED IN *Wells v. Pontotoc County Sup'rs*, 102 U. S. 625. DISTINGUISHED IN *Deland v. Platte County*, 54 Fed. Rep. 823. FOLLOWED IN *Moultrie County v. Fairfield*, 105 U. S. 370.—*Henry County v. Nicolay*, 95 U. S. 619.— FOLLOWED IN *Ray County v. Vansycle*, 96 U. S. 675; *Cass County v. Gillett*, 100 U. S. 585.—*Pompton v. Cooper*

Union, 101 U. S. 196. *Bonham v. Needles*, 103 U. S. 648. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124.—DISTINGUISHING *People ex rel. v. Dutcher*, 56 Ill. 144. FOLLOWING *American Life Ins. Co. v. Bruce*, 105 U. S. 328.—*Foote v. Hancock*, 15 Blatchf. (U. S.) 343. *Nicolay v. St. Clair County*, 3 Dill. (U. S.) 163. *Jordan v. Cass County*, 3 Dill. (U. S.) 245. *Mobile Sav. Bank v. Ok-tibbeha County Sup'rs*, 24 Fed. Rep. 110. *Smith v. Tallapoosa County*, 2 Woods (U. S.) 574. *Clapp v. Cedar County*, 5 Iowa 15. *Shurtleff v. Wiscasset*, 74 Me. 130. *Aberdeen v. Sykes*, 59 Miss. 236. *Belo v. Forsythe County Com'rs*, 76 N. Car. 489.

The facts which a municipal corporation issuing bonds in aid of a railroad is not permitted, against a *bona fide* holder, to question, in face of a recital in the bonds of their existence, are those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued. *Northern Nat. Bank v. Porter Tp.*, 15 Am. & Eng. R. Cas. 575, 110 U. S. 608, 4 Sup. Ct. Rep. 254; affirming 5 Fed. Rep. 568. *Marcy v. Oswego Tp.*, 92 U. S. 637. *Davis v. Kendallville*, 5 Biss. (U. S.) 280. *Deming v. Houlton*, 64 Me. 254. *Lane v. Embden*, 72 Me. 354.—DISTINGUISHING *Portland & O. R. Co. v. Standish*, 65 Me. 63.

There is no distinction, in this respect, between bonds issued by officers of the municipality having general powers to represent it in its fiscal transactions, and bonds issued by officers acting under a special power in the particular transaction. *Miller v. Berlin*, 13 Blatchf. (U. S.) 245.

Where county bonds in Ill. in aid of a railroad recite that the subscription was made in 1869, when the county had power to subscribe, when sued by a *bona fide* holder, the county cannot set up as a defense that the subscription was not made until after the adoption of a new constitution in 1870 that took away the power. *Moultrie v. Rockingham Ten-Cent Sav. Bank*, 92 U. S. 631.

Municipal bonds in aid of a railroad regularly issued are valid in the hands of *bona fide* holders, though a recital on the bonds refers to a wrong statute as authorizing their issuance. *Johnson County Com'rs v. January*, 94 U. S. 202.

* Effect of recitals in municipal aid bonds, see notes, 15 AM. & ENG. R. CAS. 584; 12 Id. 624.

Doctrine of United States courts regarding recitals in municipal aid bonds, see note, 15 AM. & ENG. R. CAS. 675.

A purchaser is not presumed to have notice of everything that takes place before the issuing of the bonds; and an averment that the proceedings of the city council were spread upon the records of the city is not sufficient to charge him with notice; actual knowledge should be charged. *Davis v. Kendallville*, 5 Biss. (U. S.) 280.

Where bonds recite that they were issued in pursuance of a certain statute and an amendment thereto, and the amendment is invalid, a purchaser of the bonds without notice may presume that the requirements of the original statute were complied with. *Moulton v. Evansville*, 25 Fed. Rep. 382.

A purchaser of coupons has a right to rely upon the truth of a recital in city bonds in respect to the purpose for which they were made, that purpose being authorized by law, and is not bound to inquire whether or not there has been a diversion from that purpose, nor to take notice of what the records of the city council show in that respect. *Portland Sav. Bank v. Evansville*, 25 Fed. Rep. 389.—QUOTING *Portsmouth Sav. Bank v. Springfield*, 4 Fed. Rep. 276.

378. Recital that statutory conditions have been performed concludes and estops the municipality.—A *bona fide* holder of municipal bonds, or coupons therefrom, which have been purchased for a valuable consideration without notice of any defense which could be set up against them is under no obligation to look farther than to see if there is legislative authority for the issuance of the bonds, and that the condition upon which it was allowed to be exercised has been fulfilled. If there was such authority and the precedent conditions have been performed, the bonds and coupons are valid. *Bourbon County Com'rs v. Block*, 99 U. S. 686.

Recitals in municipal bonds of a compliance with conditions precedent to their issuance are conclusive of such facts as between the municipality and *bona fide* holders of the bonds for value, where the bonds are issued by the officers whose duty it is to decide whether such conditions have been complied with; and such holder is not bound to look beyond the recitals, except as to the legislative authority given to issue the bonds. *Douglas County Com'rs v. Bolles*, 94 U. S. 104.—FOLLOWED IN *Scotland County v. Hill*, 132 U. S. 107.—*Warren County v. Marcy*, 97 U. S. 96.—APPROVED IN *Orleans v. Platt*, 99 U. S. 676. FOL-

LOWED IN *Cass County v. Gillett*, 100 U. S. 585.—*Clay County v. Society for Savings*, 5 Am. & Eng. R. Cas. 170, 104 U. S. 579. *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131. *Foote v. Hancock*, 15 Blatchf. (U. S.) 343.—FOLLOWING *Venice v. Murdock*, 92 U. S. 494.—FOLLOWED IN *McCall v. Hancock*, 10 Fed. Rep. 8, 20 Blatchf. 344.—*Hopper v. Covington*, 4 Am. & Eng. R. Cas. 251, 8 Fed. Rep. 777, 10 Biss. (U. S.) 488. *Pollard v. Pleasant Hill*, 3 Dill. (U. S.) 195. *Marshall v. Elgin*, 3 McCrary (U. S.) 35, 8 Fed. Rep. 783. *Lewis v. Barbour County Com'rs*, 12 Am. & Eng. R. Cas. 615, 105 U. S. 739. *Washington Tp. v. Coler*, 51 Fed. Rep. 362, 4 U. S. App. 622, 2 C. C. A. 272. *Madison County Sup'rs v. Brown*, 29 Am. & Eng. Corp. Cas. 157, 67 Miss. 684, 7 So. Rep. 516. *State v. Saline County Court*, 48 Mo. 390.—EXPLAINING *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389; *Mercer County v. Hackett*, 1 Wall. (U. S.) 83. QUOTING AND CRITICISING *Knox County Com'rs v. Aspinwall*, 21 How. (U. S.) 545.—*Phelps v. Yates*, 16 Blatchf. (U. S.) 192.

A recital in a bond, purporting to have been issued by a town under the New York Act of 1869 (Laws of 1869, ch. 907), in aid of a railroad company, to the effect that all the necessary legal steps have been taken to comply with the statute does not estop the town from questioning the validity of the bond even in the hands of a *bona fide* holder. *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405.—DISTINGUISHING *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 380.

A town subscribed for railroad stock and issued its bonds, reciting that they "shall be valid when it is thereon duly certified that the conditions upon which they were voted, issued, and deposited by said town have been performed." The certificate in effect was "that the conditions upon which the bonds were voted, issued, and deposited by said town had been performed." Held, a sufficient compliance with the condition, and that the town was estopped from denying the validity of the bonds in a suit by a *bona fide* purchaser before maturity. *Menasha v. Hazard*, 2 Am. & Eng. R. Cas. 571, 102 U. S. 81.

County bonds recited that they were issued to a certain railway company by virtue of certain statutes, cited by title and date, and that all the provisions and requirements of the statutes, and the condi-

tions precedent to making the subscription, and the lawful issuance of the bonds had "been in all respects fully and completely complied with." *Held*, that the county could not set up the plea of *ultra vires*, based upon the fact that the company was only authorized to build a narrow gauge road, whereas the bonds were issued on condition that it be of standard gauge, as against a *bona fide* purchaser for value on the faith of such recitals. *Kingman County Com'rs v. Cornell University*, 57 *Fed. Rep.* 149.

Minn. St. of 1878, ch. 34, authorized municipal subscriptions to railway stock, and provided two modes for reaching an agreement between the municipality and the company. In 1879 the statute was amended so as to allow but one mode. After the amendment the town issued bonds upon an agreement reached according to the mode provided by the statute which had been repealed, but the bonds issued recited that they were issued under the statute, and that all the conditions required had been complied with. *Held*, that the town was estopped, as against a *bona fide* holder for value, from denying the validity of the bonds. *Kimball v. Lakeland*, 41 *Fed. Rep.* 289. — QUOTING *Fulton v. Riverton*, 42 Minn. 395, 44 N. W. Rep. 257.

379. Effect of such recital to shut off inquiry into regularity of the election.—Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the enactment that the officers of the municipality were invested with power to decide whether that condition has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality. The recital is itself a decision of the fact by the appointed tribunal. *Coloma v. Eaves*, 92 U. S. 484. — FOLLOWED IN *Walnut v. Wade*, 103 U. S. 683. — *Knox County Com'rs v. Aspinwall*, 21 *How.* (U. S.) 539. — APPLIED IN *Luling v. Racine*, 1 Biss. (U. S.) 314. APPROVED IN *Moran v. Miami County Com'rs*, 2 Black (U. S.) 722; *Woodruff v. Okolona*, 57 Miss. 806. FOLLOWED IN *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175;

Kenosha v. Lamson, 19 Law. Ed. (U. S.) 730; *Kenicott v. Wayne County Sup'rs*, 16 Wall. 452; *Knox County Com'rs v. Wallace*, 21 *How.* 546; *Venice v. Murdock*, 92 U. S. 494; *Katzenberger v. Aberdeen*, 16 *Fed. Rep.* 745. QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186; *Beaver County v. Armstrong*, 44 Pa. St. 63. QUOTED AND CRITICISED IN *State v. Saline County Court*, 48 Mo. 390. QUOTED AND DISTINGUISHED IN *Carpenter v. Lathrop*, 51 Mo. 483. REVIEWED IN *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131. — *Rock Creek Tp. v. Strong*, 96 U. S. 271. *San Antonio v. Mehaffy*, 96 U. S. 312. *Northern Nat. Bank v. Porter Tp.* 15 *Am. & Eng. R. Cas.* 575, 110 U. S. 608, 4 *Sup. Ct. Rep.* 254; affirming 5 *Fed. Rep.* 568. — FOLLOWED IN *Carroll County v. Smith*, 111 U. S. 556. — *Huidekoper v. Buchanan County*, 3 *Dill.* (U. S.) 175. — APPROVING *Smith v. Clark County*, 54 Mo. 58. — *Westermann v. Cape Girardeau County*, 5 *Dill.* (U. S.) 112. *Milner v. Pensacola*, 2 Woods (U. S.) 632. — DISTINGUISHING *Marsh v. Fulton County*, 10 Wall. 676. REVIEWING *Knox County Com'rs v. Aspinwall*, 21 *How.* 545. — *State v. Saline County Court*, 48 Mo. 390. — DISTINGUISHING *State ex rel. v. Saline County Court*, 45 Mo. 242.

A statement in county bonds in aid of a railroad that the bonds issued "in pursuance to the vote of the electors" is equivalent to a statement that the vote was one lawful and regular in form, and such as the law required, though followed by a recital of the wrong statute. *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 *Sup. Ct. Rep.* 433.

380. — or of proceedings to obtain the consent of taxpayers.—Where a city subscribes to railroad stock and issues its bonds, which recite that they are in pursuance of an act of the legislature, and an ordinance of the city council passed in pursuance thereof, the city is concluded thereby as to any irregularity in making the subscription or issuing the bonds, and cannot set up that the required number of freeholders did not petition the council to make such subscription. *Moulton v. Evansville*, 25 *Fed. Rep.* 382. *Van Hostrup v. Madison City*, 1 Wall. (U. S.) 291. — FOLLOWED IN *Mineral Point v. Lee*, 18 Law. Ed. (U. S.) 456. — *Venice v. Murdock*, 92 U. S. 494. — APPROVING *Society for Savings v. New London*, 29 Conn. 174; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Knox*

County Com'rs v. Nichols, 14 Ohio St. 260. DISAPPROVING *Starin v. Genoa*, 23 N. Y. 439; *Gould v. Sterling*, 23 N. Y. 456. FOLLOWING *Bissell v. Jeffersonville*, 24 How. (U. S.) 287; *Knox County v. Aspinwall*, 21 How. 539; *Mercer County v. Hackett*, 1 Wall. 83.—FOLLOWED IN *Foot v. Hancock*, 15 Blatchf. (U. S.) 343; *McCall v. Hancock*, 10 Fed. Rep. 8, 20 Blatchf. 344.—*Miller v. Berlin*, 13 Blatchf. (U. S.) 245. *Phelps v. Lewiston*, 15 Blatchf. (U. S.) 131.—QUOTING *Marion County Com'rs v. Clark*, 94 U. S. 278. REVIEWING *Knox County Com'rs v. Aspinwall*, 21 How. 544.—FOLLOWED IN *Irwin v. Ontario*, 3 Fed. Rep. 49, 18 Blatchf. 259; *Currie v. Lewiston*, 15 Fed. Rep. 377.

A town is not estopped from denying that the assent of the taxpayers had been procured by the act of the supervisor and commissioners in executing bonds asserting upon their face that the requisite assent had been obtained and filed. Such a representation is as to the very existence of the power of the agents, and is not binding upon their principal. *Gould v. Sterling*, 23 N. Y. 456.—DISAPPROVED IN *Venice v. Murdock*, 92 U. S. 494. DISTINGUISHED IN *Hoag v. Greenwich*, 133 N. Y. 152. FOLLOWED IN *Horton v. Thompson*, 71 N. Y. 513; *Scipio v. Wright*, 101 U. S. 665. NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. (N. Y.) 446. QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

381. Such recital prevents raising the question of overissue.—Where municipal bonds issued in aid of a railroad show their regularity on their face and the authority under which they were issued, a bona fide holder is not bound to look further and inquire whether the limit in amount had been exceeded. *Moultrie County v. Fairfield*, 7 Am. & Eng. R. Cas. 194, 105 U. S. 370.—FOLLOWING *Lynde v. Winnebago County*, 16 Wall. (U. S.) 6; *Lexington v. Butler*, 14 Wall. 282; *Marcy v. Oswego Tp.*, 92 U. S. 637; *Humboldt Tp. v. Long*, 92 U. S. 642.—*Walnut v. Wade*, 3 Am. & Eng. R. Cas. 36, 103 U. S. 683.—FOLLOWING *Coloma v. Eaves*, 92 U. S. 484; *Marcy v. Oswego Tp.*, 92 U. S. 639.—*Dallas County v. McKenzie*, 15 Am. & Eng. R. Cas. 622, 110 U. S. 686, 4 Sup. Ct. Rep. 184.—FOLLOWING *Marcy v. Oswego Tp.*, 92 U. S. 637; *Humboldt Tp. v. Long*, 92 U. S. 642; *Wilson v. Salamanca Tp.*, 99 U. S. 504.

But where the bonds are issued in excess

of the limit fixed by the state constitution, a recital in the bonds that all the provisions of a certain statute have been fully complied with, and such statute recites the constitutional limitation, the county is not thereby estopped from denying the validity of the bonds. *Sutliff v. Lake County*, 47 Fed. Rep. 106.

382. Effect of omission to recite conditions precedent to issue.—A city which has by a local statute the right to make a subscription on condition in aid of a railroad cannot, when its officers have issued its bonds containing no notice in their recitals of any condition, set up, as against a bona fide holder, that the bonds are void for non-compliance with certain conditions, even though the statute authorizing their issue expressly provides that they shall not be valid till such conditions are complied with. *American Life Ins. Co. v. Bruce*, 12 Am. & Eng. R. Cas. 610, 105 U. S. 328.—DISTINGUISHING *Eagle v. Kohn*, 84 Ill. 292.—FOLLOWED IN *Oregon v. Jennings*, 119 U. S. 74.

Where a town subscribes to railroad stock and issues its bonds, which recite that they are issued by virtue of authority contained in the charter of the company, and after a vote of the electors of the town, such recitals will preclude subsequent inquiry as to whether an election was held and the vote authorized the subscription; but it does not preclude inquiry as to whether a condition was performed after the bonds were issued, such as the building of the road through the town, and to, or near, a certain city, as the Ill. Act of April 16, 1869, § 7, expressly authorizes municipalities to impose conditions in making such subscriptions, and provides that they shall not be binding until such conditions are complied with. *Parker v. Smith*, 3 Ill. App. 356.

A county court in Tennessee subscribed to railroad stock under a statute requiring the bonds to fall due in not less than ten nor more than thirty years, and ordered the issuance of coupon bonds payable in thirty years with semi-annual interest, as the law required, but provided by their order that the whole of the bonds should be paid in six annual instalments; but this last provision was not incorporated in the bonds. *Held*, that the bonds were not thereby rendered void in the hands of innocent holders after the county had recognized them and paid interest thereon for sixteen years. *State*

ex rel. v. Anderson County, 8 Baxt. (Tenn.) 249.

383. Where there is no power to issue, recitals will not protect purchaser.—Even a *bona fide* holder of municipal bonds issued for stock in a railroad cannot recover where the recitals on the face of the bonds show that they were unauthorized. *Bates County v. Winters*, 97 U. S. 83. *Nugent v. Putnam County*, 3 Biss. (U. S.) 105; reversed in 19 Wall. 241. *Dodge v. Platte County*, 2 Am. & Eng. R. Cas. 583, 82 N. Y. 218; reversing 16 Hun 285.

In such case the position of the holder is different from where the power existed, but was irregularly exercised. *Thomas v. Lansing*, 14 Fed. Rep. 618, 21 Blatchf. (U. S.) 119.—**APPLYING** *People ex rel. v. Morgan*, 55 N. Y. 587.

Municipal bonds issued for stock in a railroad under an election not authorized by law are void in the hands of *bona fide* holders, notwithstanding recitals on their face, and subsequent acts *in pais* claimed to operate by way of estoppel. *Hayes v. Mayor, etc., of Holly Springs*, 114 U. S. 120, 5 Sup. Ct. Rep. 785. *Carroll County v. Smith*, 15 Am. & Eng. R. Cas. 606, 111 U. S. 556, 4 Sup. Ct. Rep. 539.—**FOLLOWING** *Northern Nat. Bank v. Porter Tp.*, 110 U. S. 608; *Dixon County v. Field*, 111 U. S. 83; *School Dist. v. Stone*, 106 U. S. 183.

As all persons are bound to know the law, a county is not estopped by a recital on its bonds issued in aid of a railroad that is a mere conclusion of law. So where bonds issued without authority of law, the county is not bound by a recital stating certain facts, and then stating as a conclusion based on these facts that the bonds were lawfully issued, and the county may set up the want of authority as a defense to a suit by an innocent holder of the bonds. *Dixon County v. Field*, 15 Am. & Eng. R. Cas. 595, 111 U. S. 83, 4 Sup. Ct. Rep. 315.—**FOLLOWED** IN *Coffin v. Kearney County Com'rs*, 57 Fed. Rep. 137; *Carroll County v. Smith*, 111 U. S. 556.

Neither the constitution nor statutes of Tennessee in force in 1873 authorize municipalities to issue bonds in aid of a railroad, and a recital in such bonds that they were issued "in pursuance of law" does not estop the municipality from showing that it did not have the regular number of inhabitants to authorize it to issue bonds in payment of "matured liabilities," as authorized

by a statute; neither is it estopped from denying the validity of the bonds by a decree entered in pursuance of a compromise with a railroad company and the bondholders whereby the town should issue its bonds for a certain amount of stock, and the court should decree them valid. *Kelly v. Milan*, 21 Fed. Rep. 842.

384. When recitals put purchaser on inquiry.—The general rule is that municipalities are not estopped by recitals in bonds issued by them unless the recitals relate to matters of fact which it may fairly be presumed that the officers of the municipality were left to determine; and the latter federal decisions hold that recitals cannot be relied upon as an estoppel where the facts recited are matters of public record, and are open to the inspection of every one who is disposed to make inquiry. *Coffin v. Kearney County Com'rs*, 57 Fed. Rep. 137.—**FOLLOWING** *Sutliff v. Lake County Com'rs*, 147 U. S. 230, 13 Sup. Ct. Rep. 318.

Where bonds contain sufficient recitals on their face to put a purchaser on inquiry as to their validity, he cannot recover thereon if they were issued without authority of law. *Harshman v. Bates County*, 92 U. S. 569.

Where county railroad subscription bonds contain on their face a reference to the law under which they were issued and the vote authorizing them, a purchaser thereof is chargeable with notice of a condition of the vote that the bonds should not issue unless the road was commenced and completed within certain fixed dates. *German Sav. Bank v. Franklin County*, 128 U. S. 526, 9 Sup. Ct. Rep. 159.

A recital on the face of bonds issued by a town in aid of a railroad that the bonds are issued "by virtue of" a certain act of the legislature may be a correct statement, although there has been no compliance with the act. *First Nat. Bank v. Wolcott*, 19 Blatchf. (U. S.) 370, 7 Fed. Rep. 892.

A recital in county bonds that they were issued pursuant to an order of the county court puts whoever comes into possession of the bonds, even if purchased for value in the open market, upon inquiry as to the terms of the order. *Post v. Pulaski County*, 49 Fed. Rep. 628, 9 U. S. App. 1, 1 C. C. A. 405; affirming 47 Fed. Rep. 282.

Where a railroad charter requires a majority of the taxable inhabitants to vote for a subscription, the record of a county court

which only recites that "the taxable inhabitants aforesaid voted in favor of such subscription" is not sufficient, where there is no further statement that a majority of such inhabitants voted for the subscription; and such defect is not cured by a recital in the bonds that they were issued "in pursuance of an election by the taxable inhabitants of Camden Point," where it fails to state that a majority voted for the subscription, and where the election petitioned for and held was for part of a township, and Camden Point was only the voting place therein. *Deland v. Platte County*, 54 *Fed. Rep.* 823.

385. Effect of recitals to estop holder.—Although bonds on their face recite that they were issued under Mo. general act of 1855 for the formation of railroads, and that act, as amended by the acts of 1860 and 1861, require a popular vote to authorize the issue of the bonds, such recitals will not estop an innocent holder from showing that, in point of fact, the bonds were issued under the special act of 1857. *Smith v. Clark County*, 54 *Mo.* 58.—APPROVED IN *Nicolay v. St. Clair County*, 3 *Dill.* (U. S.) 163; *Huidekoper v. Buchanan County*, 3 *Dill.* 175.

6. Actions to Enforce or Cancel.

a. To Enforce.

386. In general.—An action may be maintained upon municipal bonds issued in aid of a public improvement, where the obligation to pay is unconditional, notwithstanding they were issued under Colo. Act of Jan. 10, 1868, providing for the payment of such bonds through the territorial or state officers instead of by the municipality. *Toothaker v. Boulder*, 13 *Colo.* 219, 22 *Pac. Rep.* 468.

A town in Vermont issued bonds under seal in aid of a railroad with interest coupons attached not under seal. Each coupon contained an express promise by the town to pay, and was payable to bearer, and was signed by the proper officer. Held, that assumpsit was a proper form of action on the coupons. *First Nat. Bank v. Bennington*, 16 *Blatchf.* (U. S.) 53.

387. Jurisdiction of federal courts.—Under the provision of the Judiciary Act that no district or circuit court shall have cognizance of any suit to recover the con-

tents of any promissory note or chose in action in favor of an assignee unless a suit might have been prosecuted in such court if no assignment had been made, an assignee of a railroad bond under seal, given by a city to a railroad in the same state, cannot sue in the federal courts. *Clarke v. Janesville*, 1 *Biss.* (U. S.) 98.

And the same rule applies to interest coupons from such bonds, though they be payable to bearer. *Clarke v. Janesville*, 1 *Biss.* (U. S.) 98.

A county in Arkansas may be sued in a United States circuit court by a non-resident upon bonds which it has issued in aid of a railroad notwithstanding the act of that state of Feb. 27, 1879, prohibiting actions against counties, and requiring demands against the counties to be presented to the county courts for allowance, and providing for an appeal from the judgment of such courts. *Chicot County v. Sherwood*, 148 *U. S.* 529, 13 *Sup. Ct. Rep.* 695.

388. Demand before suit.—Where a court of county commissioners in Alabama, pursuant to the act of Dec. 31, 1868 (P. L. 1868, p. 514), subscribed for stock in a railroad company, and issued the bonds of the county in payment therefor, the holder of them, or of the coupons thereto attached, is not required to present them when due to that court for allowance before commencing suit to enforce their payment. *Greene County v. Daniel*, 3 *Am. & Eng. R. Cas.* 105, 102 *U. S.* 187.—FOLLOWING *Shinbone v. Randolph County*, 56 *Ala.* 183.

A demand of payment of a municipal aid bond made on the town treasurer is a sufficient demand. *Leach v. Fayetteville Com'rs*, 84 *N. Car.* 829.

389. Who may sue.—If the holder of valid municipal bonds surrenders them to the municipality, and receives in exchange therefor other bonds which the municipality had not the lawful right to issue, he is not thereby divested of his title to the bonds so surrendered, and such owner and holder of the bonds so surrendered may maintain an action thereon after the same mature. *Deyo v. Otoe County*, 37 *Fed. Rep.* 246.—FOLLOWING *Plattsmouth v. Fitzgerald*, 10 *Neb.* 401, 6 *N. W. Rep.* 470.

The plaintiff purchased coupons from municipal bonds issued in aid of a railroad at the suggestion of those who formerly owned them, with a view to collecting them in the U. S. circuit court when it was sup-

posed a recovery could not be obtained upon them in the state courts. The former owners guaranteed the collection of the coupons. The plaintiff was protected from costs if he was defeated, and he was not to pay for the coupons until two years and a half after the time of the purchase. *Held*, that he could maintain a suit against the town on the coupons, being the owner of them, and that his intent in acquiring them was immaterial. *McCall v. Hancock*, 20 Blatchf. (U. S.) 344, 10 Fed. Rep. 8.—**APPROVING** *Osborne v. Brooklyn City R. Co.*, 5 Blatchf. 366.

300. Parties defendant.—Where a municipal corporation is dissolved and a new one created, which succeeds to the public property of the old corporation, and has the same general powers, and includes the same persons and property, only in reduced territorial limits, it will be deemed the legitimate successor of the former, and will be liable, among other things, for bonds issued by the old organization for stock in a railroad. *Mobile v. Watson*, 116 U. S. 289, 6 Sup. Ct. Rep. 398.

On a bill in equity to compel the first purchaser of municipal bonds in aid of a railroad to receive in payment only the sum paid for them, where they had been sold below par, contrary to the statute authorizing their issuance, it is not necessary to make the railroad a party defendant. But otherwise if the suit be against a second or any subsequent purchaser. *Armstrong County v. Brinton*, 47 Pa. St. 367.

A statute authorized a city to issue its bonds for stock in a railroad, and provided that the stock should remain "forever pledged for the redemption of said bonds," and made no further provision for the payment of the bonds, but provided for a special tax to pay the interest annually. *Held*, that the pledge only created a collateral security for the payment of the bonds, and did not release the city from its primary liability; that a bondholder was not bound to look to that security, but might proceed directly against the city. *Wolff v. Mayor, etc., of New Orleans*, 12 Am. & Eng. R. Cas. 625, 103 U. S. 358.

A certain precinct in Nebraska voted bonds in aid of a railway under the act of Feb. 15, 1869, as amended March 3, 1870, to enable counties, cities, and precincts to borrow money for internal improvements, and providing that the bonds of a precinct

shall be issued by the county commissioners. *Held*, that where such bonds are issued and sued on the county is the proper defendant. *Nemaha County v. Frank*, 120 U. S. 41, 7 Sup. Ct. Rep. 395.—**FOLLOWING** *Davenport v. Dodge County*, 105 U. S. 237; *Blair v. Cuming County*, 111 U. S. 363, 4 Sup. Ct. Rep. 449.

301. Declaration or petition.—In an action on municipal bonds in aid of a railroad issued by authority of law, plaintiff need only declare on the bonds. If any requisite necessary to give them validity has been omitted, it is matter of defense. *Lincoln v. Cambria Iron Co.*, 103 U. S. 412. *Burlington & M. R. Co. v. Otoe County*, 1 Dill. (U. S.) 338.

Where the power of a county to subscribe to railroad stock and issue its bonds in payment is derived from a general law, in suing on the bonds such power need not be set out in the declaration. *King v. Johnson County*, 6 Iowa 265.—**FOLLOWED IN** *Gelpcke v. Dubuque*, 1 Wall. (U. S.) 175. **REVIEWED IN** *Stokes v. Scott County*, 10 Iowa 166.

A declaration upon county bonds should show by averment, or by recital in the bonds made part thereof, that the bonds were issued for some authorized purpose or object. *Thayer v. Montgomery County*, 3 Dill. (U. S.) 389.

Where a declaration in an action on town bonds avers all the facts required by the law to make the bonds valid, it is not demurrable because there is filed with it a certificate of the town clerk which is not sufficient to show such facts, as such certificate is only evidence of the facts contained in the declaration, and may be treated as mere surplusage. *Pierce v. St. Anne*, 30 Fed. Rep. 36.

A person who is the legal owner of such bonds is entitled to sue thereon, and a declaration which shows that the plaintiff is the legal owner is not demurrable because it further shows that other parties have an equitable interest in the bonds. *Pierce v. St. Anne*, 30 Fed. Rep. 36.

In a suit on obligations issued under the N. J. "act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take stock in the Passaic Valley and Peapack railroad company," approved April 9, 1868, the declaration must show that the commissioners who issued the bonds were appointed and had given security in the manner required

by the act, and that the consent of such a proportion of the taxpayers of the township had been given and evidenced in the manner required by the act for the issuing of the obligations, and, in general, must show the power of the commissioners to issue the obligations. *Cotton v. New Providence*, 47 N. J. L. 401, 2 Atl. Rep. 253.—FOLLOWING *Morrison v. Bernards Tp.*, 36 N. J. L. 219.—FOLLOWED IN *New Providence v. Halsey*, 117 U. S. 336.

A declaration on the coupons of such obligations requires the same averments of authority as a declaration on the obligations. *Cotton v. New Providence*, 47 N. J. L. 401, 2 Atl. Rep. 253.

An act authorizing a county to issue bonds in aid of a railroad provided that bonds issued and negotiated by the commissioners, and regular on the face thereof, should, in the hands of the company or of any bona fide holder thereof, be deemed and taken in all courts and elsewhere as conclusive evidence of the regularity of everything required by the act to be done preliminary to the issuing and negotiation of such bonds. *Held*, that to make bonds regular on the face thereof such conclusive evidence, and an estoppel to a defense showing a want of power in the commissioners, there must be an averment that they had been "issued and negotiated by the commissioners." *State ex rel. v. Hancock County Com'rs*, 11 Ohio St. 183.

392. Plea or answer.—Where a county pleads the general issue to a suit on its bonds in aid of a railroad, the county cannot object that there was no evidence of its authority to issue the bonds, nor that the seal attached was the seal of the county, when the law of the state provides that the due execution of a written instrument cannot be denied except by a sworn plea. *Chambers County v. Clews*, 21 Wall. (U. S.) 317.

393. Matters of defense.—(1) *Generally.*—A county cannot set up as a defense to a mandamus to compel payment of a judgment against it for interest on its bonds issued in aid of a railroad that it had once raised the money by taxation which had been lost before paid over. *Ralls County Court v. United States*, 105 U. S. 733.

Where a county issues bonds in aid of a railroad, and afterwards files a bill against the company and its trustee to restrain the negotiation of the bonds, and the case is de-

cided against the county, it is estopped from setting up, against subsequent purchasers of such bonds, any ground of illegality which might have been set up in the bill. *Preble v. Portage County Sup'rs*, 8 Biss. (U. S.) 358.

Bonds of a county are ascertained claims. The county board has no power to audit or allow them, or to disallow them. They are to be paid upon presentation to the treasurer. Therefore an order of a county board directing the treasurer not to pay certain bonds issued by the county, and for which money is in his hands, and which it is his duty to pay, is a nullity, and would be no defense to an action against the treasurer for the payment of such money. *State v. McCrillus*, 4 Kan. 250.

A change in the route of the railroad or a failure to build the road gives no exemption from payment of the bonds issued by appellant. *Eminence v. Grasser*, 81 Ky. 52.

Railroad commissioners of a town who have received from the collector of the town moneys raised by tax to pay interest coupons on bonds of the town, issued in payment of a subscription to the capital stock of a railroad, cannot draw in question the validity of the bonds to justify them in refusing to pay over the moneys to the owners of the coupons. *First Nat. Bank v. Wheeler*, 72 N. Y. 201.

The fact that the commissioners resist payment and defend an action against them by the holder of such coupons, pursuant to a resolution of a town meeting, and under a promise of indemnity from the town, does not make the invalidity of the bonds a defense to the action. *First Nat. Bank v. Wheeler*, 72 N. Y. 201.

Where an act of assembly authorized county commissioners to subscribe to the stock of a railroad company, and made it a condition precedent that the grand jury recommend the subscription, it is no valid objection to the bonds issued in payment of the subscription that the officers of the company were admitted to the grand jury room, and permitted to urge the subscription. Nor is it any defense to the bonds in the hands of an innocent purchaser that the recommendation of the subscription was obtained by unfair and corrupt means. *Com. ex rel. v. Allegheny County Com'rs*, 37 Pa. St. 237.—APPROVED IN *State ex rel. v. Goshen Tp.*, 14 Ohio St. 569.

The substitution of smaller bonds for one

bond of the full amount of the subscription is simply changing the evidence of indebtedness, and is no valid objection to the bonds so substituted. *Com. ex rel. v. Allegheny County Com'rs*, 37 Pa. St. 237.

(2) *Ultra vires*.—Where the charter of a city authorizes it to subscribe for railroad stock, and to issue its bonds in payment, it cannot defeat an action on the bonds on the ground that the charter of the company did not authorize it to receive the bonds in payment for stock. Power to the city to issue bonds carries with it power to the company to receive them, and issue stock therefor. *Clark v. Janesville*, 10 Wis. 136.

A county issued its bonds in payment of railroad stock, in compliance with all legal formalities, with a condition that the county build a standard gauge road through the county, which was done. *Held*, that the county could not set up a plea of *ultra vires* as a defense to an action on the bonds, in that the company was only authorized to build a narrow gauge road. *Kingman County Com'rs v. Cornell University*, 57 Fed. Rep. 149.

(3) *Irregular organization of railway company*.—Where a county has issued bonds for railroad stock, and after several years sold the stock by authority of an act of the legislature, it is estopped from setting up an irregularity in the organization of the company in defense to a suit on the bonds. *Leavenworth County Com'rs v. Barnes*, 94 U. S. 70.

A county cannot defend an action against it on its bonds issued for railroad stock on the ground that the charter expired before the company was organized. The question of the existence of the charter can only be questioned by the state, especially where the corporation at the time is in the exercise of all its chartered franchises. *Dallas County v. Huidekoper*, 25 Law. Ed. (U. S.) 974.—FOLLOWING *Smith v. Clark County*, 54 Mo. 59; *Macon County v. Shores*, 97 U. S. 276.—FOLLOWED IN *Dallas County v. Davol*, 25 Law. Ed. (U. S.) 974.

In suit on a bond given by a county court in aid of a subscription for a railroad, the question whether the corporation had a legal existence cannot be raised. The only proper way to test this question would be by *quo warranto* on the part of the state. *Smith v. Clark County*, 54 Mo. 58.—FOLLOWED IN *Dallas County v. Huidekoper*, 25 Law. Ed. (U. S.) 974.

(4) *City unlawfully incorporated*.—Where a city in Missouri is sued on coupons from its bonds issued in aid of a railroad, a defense is not good that avers that the act incorporating the city was unconstitutional because the subject-matter of the act was not expressed in its title, as the constitutional provision does not relate to the incorporation of cities. Neither is the defense that the legislature could not constitutionally amend the charter so as to create a city out of a town, nor that the city did not have the required population. *Judson v. Plattsburg*, 3 Dill. (U. S.) 181.—APPROVING *State ex rel. v. Cape Girardeau & St. L. R. Co.*, 48 Mo. 468.

(5) *Objections to petition of taxpayers*.—In a proceeding under N. Y. Act of 1869, ch. 907, as amended in 1871, ch. 925, to bond a town in aid of a railway, the petition to the county judge must be by a majority of the taxpayers, excluding those taxed only for dogs or highways, and the county judge has no jurisdiction unless such fact appears by the petition, and a defect in this particular may be set up as a defense to an action on the bonds by a *bona fide* purchaser. *Wilson v. Caneadea*, 15 Hun (N. Y.) 218.

(6) *Irregularity or fraud in election*.—Where the people vote in favor of an issue of bonds to a railroad, and they are regularly issued, the city issuing them cannot set up as a defense when sued thereon a lack of good faith in the city officials in issuing the call for the election. *Meyer v. Muscatine*, 1 Wall. (U. S.) 384.

Where city bonds recite that they were authorized by a vote, *bona fide* holders thereof for value without notice cannot be affected by a failure to have a special registration of the voters, even if that is necessary. *Judson v. Plattsburg*, 3 Dill. (U. S.) 181.

A county set up the defense to a suit on its bonds issued to a railroad that the election purporting to authorize their issuance was a sham, "as shown by papers filed with the clerk," and reciting various irregularities "which would appear by reference to certified papers sent in" from the voting precincts, and concluding that there was, in fact, no election held. *Held*, bad on demurrer; the answer presented no issuable questions. *Chicot County v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695.

(7) — or in issuing the bonds.—It is no

good defense to a suit on bonds issued to pay for stock subscribed for by a county in a railroad that the agent authorized to make such subscription, instead of subscribing for the stock himself, purchased the same from a third person. Nor is it a valid defense that the county issued its own bonds to pay such subscription instead of negotiating a loan, as empowered to do by the statute. *Street v. Craven County Com'rs*, 70 N. Car. 644.

The Ill. statute providing that if any fraud or circumvention be used in obtaining the making of any instrument in writing for the payment of money or property, such fraud may be pleaded to any action brought on such writing—held, not to apply where it was set up as a reason for not paying municipal railroad aid bonds, that the company had fraudulently procured the appointment of a town officer to fill a vacancy, who signed the bonds just before an election. *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. Rep. 124.—FOLLOWING *Latham v. Smith*, 45 Ill. 25; *Shipley v. Carroll*, 45 Ill. 285; *Elliott v. Levings*, 54 Ill. 213; *Maxcy v. Williamson County*, 72 Ill. 207.

(8) *Limit of taxation exceeded*.—It is no defense to a suit on bonds issued in aid of a railroad that the payment of the same will require the levy of a tax greater than the state constitution allows, even if the constitutional limit applies to the case at bar, as to which the court expresses no opinion. *Moultrie County v. Fairfield*, 7 Am. & Eng. R. Cas. 194, 105 U. S. 370.—DISTINGUISHING *Citizens' S. & L. Assoc. v. Topeka*, 20 Wall. (U. S.) 655.

(9) *Inability to pay*.—It is no defense to the payment of a judgment on municipal bonds that the city issuing them is deeply in debt and cannot afford to pay all, but is willing to compromise and pay a per cent. of the debt. Neither is it any defense that at the time the bonds were issued it was expected that the railroad to which they issued would pay them, but it became insolvent and could not do so. *Rees v. Watertown*, 19 Wall. (U. S.) 107.

304. Evidence.—Where a bank sues on town bonds issued in aid of a railroad, evidence is not admissible on the part of the defense to show that the president of the bank was a director of the railroad company, and had a controlling interest therein, and said in addressing a public meeting of taxpayers that if they did not

assent he would tear up the track which ran through the town, which induced some to assent. *First Nat. Bank v. Arlington*, 16 Blatchf. (U. S.) 57.

Where the bonds sued on purport to have been assigned to plaintiff by the vice-president and secretary of the company by order of the board of directors, evidence showing that there was no meeting of the board at the time at which it was alleged the bonds were assigned is irrelevant and inadmissible. *Whittaker v. Johnson County*, 10 Iowa 161.

Evidence showing that the consideration paid by the holder of the bonds issued by a county to a railroad company had failed is inadmissible when the title of his assignor is not impeached by the pleadings. *Whittaker v. Johnson County*, 10 Iowa 161.

305. Burden of proof.—If in a suit on county bonds issued for public purposes any proof of fraud or illegality is made, the burden is on the holder to show that he gave value. *Smith v. Sac County*, 11 Wall. (U. S.) 139.—FOLLOWED IN *Stewart v. Lansing*, 7 Am. & Eng. R. Cas. 225, 104 U. S. 505.

Under the Missouri practice, in a suit on county bonds issued for railroad stock, if the due execution of the bonds be not denied on oath, it is not necessary to prove the order of the county court authorizing their execution. *Ralls County v. Douglass*, 7 Am. & Eng. R. Cas. 212, 105 U. S. 728.

The rule that it devolves on the maker of a bond to show the want of power to issue it has no application where the maker is a trustee. In all cases where the bond or other instrument purports to have been issued by delegated power, and where it could not be issued without such delegation of power, it devolves upon the holder to show that such power has been conferred before he can recover. *Carpenter v. Lathrop*, 51 Mo. 483.

In an action upon a town bond issued under N. Y. Act of 1852, ch. 375, it is incumbent upon the plaintiff to show affirmatively that the written assent of the taxpayers, required to be obtained by the act, had, in fact, been obtained. *Starin v. Genoa*, 23 N. Y. 439; reversing 29 Barb. (N. Y.) 442.—DISAPPROVED IN *Venice v. Murdock*, 92 U. S. 494. DISTINGUISHED IN *Hoag v. Greenwich*, 133 N. Y. 152. FOLLOWED IN *Horton v. Thompson*, 71 N. Y. 513; *Scipio v. Wright*, 101 U. S. 665. NOT FOLLOWED IN *People ex rel. v. Hulbert*, 59 Barb. 446.

QUOTED IN *Lewis v. Bourbon County Com'rs*, 12 Kan. 186.

Plaintiff brought assumpsit against M. county upon certain county bonds, part of a series issued to a railroad company on a subscription by the county to the company's stock, authorized by the Pa. Act of April 21, 1846 (P. L. 1850, 812), and its supplementary act of May 4, 1852 (P. L. 605). The defendant pleaded non-assumpsit. *Held*: (1) the plaintiff, having presented in his case in chief precisely the same facts before the court in *Mercer County v. Pittsburgh & E. R. Co.*, 27 Pa. St. 389, wherein said bonds were adjudged illegal and void, he was not entitled to recover, in the absence of evidence that he was an innocent purchaser of the bonds for value and without notice of their illegality. (2) the position of the plaintiff was the same as if he had merely made out a *prima facie* case entitling him to a verdict, and the defendant had then proved the facts upon which this court, in the case cited, held that, under the recommendation of the grand jury, the county commissioners had no authority to issue the bonds. *Frick v. Mercer County*, 138 Pa. St. 523, 21 Atl. Rep. 6.

396. Enforcement of judgment.—The taxes and public revenues of a city cannot be seized on execution by holders of bonds issued by the city in aid of a railroad, although it is in debt and has no means of payment except the taxes which it is authorized to collect. *Peterkin v. New Orleans*, 2 Woods (U. S.) 100.

The place or manner in which the revenues of the city are kept, such as depositing them in bank, does not divest them of their public character or subject them to be diverted, at the suit of creditors, from the purposes for which the law authorized them to be collected. *Peterkin v. New Orleans*, 2 Woods (U. S.) 100.

After judgment on a mandamus against a municipal corporation, to compel payment of railroad aid bonds and the issuing of a peremptory writ commanding the defendant to make provisions for the payment of the relator's claim, the corporate officers have no discretion; their only duty is obedience to the process of the court. *Com. v. Taylor*, 36 Pa. St. 263.

δ. To Cancel.

397. When an action will lie.—Where a subscription by a town to a rail-

road is void for being unauthorized by law, a subsequent act of the legislature cannot validate the same, nor authorize certain officers to make the subscription; and a tax to pay interest on the bonds may be enjoined, and, if the bonds have not been negotiated, the company may be required to surrender them. *Marshall v. Silliman*, 61 Ill. 218.—DISTINGUISHING *Cowgill v. Long*, 15 Ill. 202.—DISAPPROVED IN *Bolles v. Brimfield*, 120 U. S. 759. QUOTED IN *Choisser v. People ex rel.*, 140 Ill. 21.

Where treasurers have in their possession moneys belonging to a county, which, unless restrained, they will pay to the holders of bonds of such county issued without warrant of law, and void in the hands of the holders, equity will interfere at the suit of the county to restrain such payment. *Missouri River, Ft. S. & G. R. Co. v. Miami County Com'rs*, 12 Kan. 230.

Where a county board issues bonds of the county without being properly assembled, as where only two of the three members meet in a special session without notice to the third, the county may maintain an action to have the bonds canceled. *Anderson County Com'rs v. Paola & F. R. Co.*, 20 Kan. 534, 20 Am. Ry. Rep. 315; *adhering to* 16 Kan. 302.

A township issued its bonds in aid of a railroad, and with the consent of the company deposited them in a bank, to be surrendered only upon the joint order of the township trustee and a contractor of the road to whom they were to be paid; and the contractor agreed with the trustee that the bonds were not to be delivered until all debts for labor and supplies had been paid. The contractor failed to pay all such debts, and the bonds were assigned, and the assignee filed a bill to compel their delivery. *Held*, that the assignee obtained no title until the conditions on which they were deposited were complied with, and he could not compel a delivery. *Wilson v. Union Sav. Assoc.*, 42 Fed. Rep. 421.

In such case the bonds exceeded the amount which the township was authorized to issue, and the state treasurer, with whom they were required to be deposited, was induced to surrender them upon a false certificate made by the township trustee to the effect that the conditions imposed had been complied with, the railroad company having knowledge of the fraud, giving a receipt therefor at the time, and consenting that

they should be delivered to the contractor. *Held*, that this did not constitute the contractor an innocent purchaser, and the township was entitled to have the bonds surrendered and canceled. *Wilson v. Union Sav. Assoc.*, 42 *Fed. Rep.* 421.

398. — and when not.—After a county in Kansas had voted its bonds to a railroad for stock in the company it agreed to sell to the company a certain part of the stock if the latter would complete the road in a shorter time than required. *Held*, a valuable consideration for the sale, and in the absence of anything to prevent the county from selling and the company from buying the stock it was a valid transaction, and nothing in it to work a cancellation of an equal amount of the county bonds. *Johnson County Com'rs v. Thayer*, 94 *U. S.* 631.

Defendant was a *bona fide* purchaser for a valuable consideration of the bonds in question. When they came to its hands, seals had been affixed, covering the scrolls on them when issued. This it appeared had been done after they had been transferred by the railroad company, to whom they were delivered by the commissioners, and before they came to the hands of defendant. *Held*, that, conceding the presumption was that the seals were affixed by some party interested, and that the burden of proof would be upon the one seeking to enforce the bonds to explain the alteration, that rule was not applicable in an equitable action to have the security canceled because of the alteration when it appeared defendant was in no sense chargeable with *mala fides*; that the bonds were not necessarily invalidated by the addition of the seals, treating it as a material alteration, and it could not be presumed that the alteration was fraudulently made; and that upon the facts appearing it did not entitle plaintiff to the relief sought. *Solon v. Williamsburgh Sav. Bank*, 114 *N. Y.* 122, 21 *N. E. Rep.* 168.

After the amount of bonds authorized was issued to the president of the railroad company he surrendered a portion of them to the commissioners, and they in place thereof delivered to him a like amount of bonds of larger denominations and made payable in a different place, of which those held by defendant are a part. The returned bonds were destroyed by the commissioners. *Held*, that, assuming the power of the commissioners to issue bonds was exhausted

with the original issue, yet, as they represented the town and were in some sense its agents, and as it appeared that the town had for several years paid the interest coupons upon them, there was no equity to support an action for their cancellation against a *bona fide* holder who had purchased in reliance upon the authority with which the commissioners were lawfully clothed. *Solon v. Williamsburgh Sav. Bank*, 114 *N. Y.* 122, 21 *N. E. Rep.* 168.—DISTINGUISHING *Horton v. Thompson*, 71 *N. Y.* 513.

Where a town has issued bonds in aid of the construction of a railroad, and the action of the town commissioners in reference thereto has been reported to the taxpayers, and no questions raised until interest has been paid upon the bonds by the town, for six years or more, to holders who have purchased them in good faith, and in ignorance of any defect in the proceedings under which they were issued, it may not invoke the aid of a court of equity to procure the cancellation or setting aside of the bonds, but will be left to its remedy by defense to an action at law upon the bonds. *Cherry Creek v. Becker*, 123 *N. Y.* 161, 25 *N. E. Rep.* 952, 33 *N. Y. S. R.* 411; *affirming* 18 *N. Y. S. R.* 485, 2 *N. Y. Supp.* 514.

Where, in proceedings under the *N. Y.* town bonding acts (ch. 907, Laws of 1869; ch. 925, Laws of 1871) to bond a town in aid of a railroad, the county judge acquired jurisdiction to determine the question as to whether the petition presented to him was signed by a majority of the taxpayers of the town—*held*, that his decision thereon, so long as the same has not been reversed for error or set aside for irregularity, is conclusive, and may not be questioned in an action by the town to have its bonds set aside or canceled. *Cherry Creek v. Becker*, 123 *N. Y.* 161, 25 *N. E. Rep.* 952, 33 *N. Y. S. R.* 411; *affirming* 18 *N. Y. S. R.* 485, 2 *N. Y. Supp.* 514.

The jurisdiction of a county judge in such proceedings is not affected by the fact that the judgment rendered by him was based upon two separate and distinct petitions, so long as the aggregate amount of bonds is not to exceed the statutory limit. *Cherry Creek v. Becker*, 123 *N. Y.* 161, 25 *N. E. Rep.* 952, 33 *N. Y. S. R.* 411; *affirming* 18 *N. Y. S. R.* 485, 2 *N. Y. Supp.* 514.

Conceding that a distinct and separate judgment should have been rendered upon each petition, this, at most, is an error or irregularity to be corrected by review or

motion. *Cherry Creek v. Becker*, 123 N. Y. 161, 25 N. E. Rep. 952, 33 N. Y. S. R. 411; affirming 18 N. Y. S. R. 485, 2 N. Y. Supp. 514.

The plaintiffs filed a petition showing that under certain acts of the general assembly, and upon certain conditions prescribed in those acts, the trustees of Goshen township were authorized to subscribe for stock in a railroad company. The petition stated the mode in which a subscription was in form made, and paid for in bonds of the township, but alleged that these acts were not in pursuance of the law, but illegal, and created no obligation on the township. It appeared that the bonds had been delivered, and had been assigned by the railroad company, with a guaranty of their payment, and that the interest accruing upon them for several years had been paid without objection. There was no charge of fraud against the defendants. *Held*, that, under these circumstances, the plaintiffs were not in a position to ask the affirmative relief of a rescission of the contract and the cancellation of the instruments they had issued. *Goshen Tp. v. Springfield, Mt. V. & P. R. Co.*, 12 Ohio St. 624.—APPROVED IN *Hopple v. Brown Tp.*, 13 Ohio St. 311.

399. Jurisdiction.—While it may be that a court of chancery has no jurisdiction to declare municipal bonds void which are held by non-residents who do not appear in the suit, yet the court has jurisdiction as to any such holder who appears and contests the bill on its merits, and also to enjoin the local officers from the collection of taxes to pay such bonds or the interest thereon. *Welch v. Post*, 5 Am. & Eng. R. Cas. 158, 99 Ill. 471.

When, by the laws of Michigan, municipal bonds deposited with the state treasurer in aid of private corporations are void, a suit to have them given up to be canceled will not be affected by proceedings commenced in a court of the United States by a stockholder of such corporation to obtain them for the corporation, when the corporation itself could not lawfully sue the makers or depositary in any but a state court, and would not there be permitted to recover such bonds. Such proceedings are a mere evasion of jurisdiction, and it will not be assumed that any court will sanction them. *People ex rel. v. State Treasurer*, 24 Mich. 468, 4 Am. Ry. Rep. 116.

400. Who may sue.—A taxpayer can maintain a suit in equity to annul illegal acts of a county court when such acts will increase the taxation, and the state is not a necessary party to such suits. *So held*, on a petition filed by certain taxpayers to set aside an order of the county court making a subscription to the capital stock of a railroad. *Newmeyer v. Missouri & M. R. Co.*, 52 Mo. 81, 3 Am. Ry. Rep. 187.—REVIEWING *Sharpless v. Mayor, etc.*, of Phila., 21 Pa. St. 147; *Mayor, etc.*, of Baltimore *v. Gill*, 31 Md. 375.

Where town bonds are issued in aid of a railroad by commissioners appointed in a proceeding instituted under N. Y. Act of 1869, ch. 907, and the judgment appointing the commissioners is void for want of jurisdiction, a taxpayer of the town may maintain an action, under the act of 1872, ch. 161, to restrain the negotiation or payment of the bonds, and to compel them to be surrendered and canceled. *Metzger v. Attica & A. R. Co.*, 79 N. Y. 171.—FOLLOWING *Ayers v. Lawrence*, 59 N. Y. 192.—DISTINGUISHED IN *Hills v. Peekskill Sav. Bank*, 101 N. Y. 490, 5 N. E. Rep. 327. FOLLOWED IN *Rich v. Mentz Tp.*, 134 U. S. 632, 10 Sup. Ct. Rep. 610. REVIEWED IN *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759.

Whether a single taxpayer may maintain an action against a railroad company in his own behalf and that of other taxpayers similarly interested to have a subscription by his town to the stock of a railroad adjudged void, and the bonds issued by the town in payment of such subscription canceled, not decided. *Bound v. Wisconsin C. R. Co.*, 45 Wis. 543.

A county had, under a by-law passed in pursuance of 35 Vict. c. 66, § 15, issued debentures to the amount of \$300,000 to aid in the construction of a railway, but by reason of the neglect of the company to commence the construction of the railway within the time limited, their charter had become forfeited, and the by-law under which the debentures had been issued had therefore become void, whereupon one of the townships which had joined in the petition for the passing of the by-law filed a bill against the railway, the county, and trustees of the debentures, seeking to restrain the trustees from selling or parting with the debentures and to have the same

handed back to the county. *Held*: (1) that the township had not any interest to maintain such a suit; (2) that the corporation of the county was the proper party to institute proceedings. *West Guilimbury v. Hamilton & N. W. R. Co.*, 23 *Grant's Ch. (U. C.)* 383.

401. Parties defendant.—Municipal aid bonds deposited with the state treasurer under a law held unconstitutional are in his official custody until delivered up, and he is responsible for their safe keeping and return to the makers when demanded. *People ex rel. v. State Treasurer*, 24 *Mich.* 468, 4 *Am. Ry. Rep.* 116.

The president of a railroad company who receives county bonds which have been issued in violation of law cannot claim to be an innocent purchaser after he has passed them to a creditor with notice and has taken them back as an individual purchaser; and the board of supervisors may maintain a bill to enjoin him from negotiating them, and to compel him to deliver them to be canceled. *Madison County Sup'rs v. Paxton*, 57 *Miss.* 701.—FOLLOWED IN *Madison County Sup'rs v. Brown*, 29 *Am. & Eng. Corp. Cas.* 157, 67 *Miss.* 684, 7 *So. Rep.* 516.

In a suit by taxpayers of a county to annul proceedings of the county court authorizing the issuance of bonds of the county, and to enjoin the collection of taxes to pay interest on such bonds, the bondholders are necessary parties. *Board v. Texas & P. R. Co.*, 46 *Tex.* 316, 13 *Am. Ry. Rep.* 259.

The allegation that county bonds had been fraudulently issued and delivered to the railroad company, and by it had been passed to parties with full notice of the fraud, will not obviate the necessity of bringing the bondholders before the court as parties. *Board v. Texas & P. R. Co.*, 46 *Tex.* 316, 13 *Am. Ry. Rep.* 259.

To confer power to annul such bonds, the holders should be parties, and the instruments brought under the control of the court so as to await its action upon their validity, etc. Courts do not sit to determine abstract principles, but to decide practical issues and to settle issues in which the litigants have a substantial or immediate interest. *Board v. Texas & P. R. Co.*, 46 *Tex.* 316, 13 *Am. Ry. Rep.* 259.

Nor will the court as against the railroad annul the bonds as against the county, and adjudge that payment therefor be provided by the railroad; such action would impair

the rights of the bondholders. *Board v. Texas & P. R. Co.*, 46 *Tex.* 316, 13 *Am. Ry. Rep.* 259.

It was charged that a railroad company had procured fraudulently a note secured by a mortgage, and had transferred it to a city to secure the latter against an issue of bonds in aid of the road. A bill was filed charging that the bonds were invalid, and asking that the note and mortgage be delivered to the maker to be canceled, but it appeared that the bonds were negotiable, underdue, and in the hands of non-resident purchasers in good faith without notice. *Held*, that, in order to make the proceedings effectual to protect the city, the holders of the bonds must not only be parties in a general sense, but the court must have jurisdiction of their persons, so that any judgment of the court might be enforced. *Burhop v. Roosevelt*, 20 *Wis.* 338.

402. Pleading.—Under Texas Act of April 12, 1871, the county court is made the judicial tribunal to determine the result of an election; and where such court officially declares that a railroad company has complied with the terms of a proposition to issue county bonds thereto, it acts as an agent of the county in doing so, and after collecting a tax for the payment of such bonds an allegation that the company has not complied with such proposition is no ground for canceling the bonds. *Anderson County v. Houston & G. N. R. Co.*, 52 *Tex.* 228.

An action was commenced by a town to compel the surrender and cancellation of certain bonds which the town had issued in aid of a railroad, and the defendants insisted that the want of notice of any defect in the bonds and of good faith in the purchase being set up in the answer, in response to allegations in the complaint, and no proof being given on the subject, it must be taken as true, and the defendants treated as *bona fide* holders without notice. *Held*, that this rule of pleading does not apply in the practice adopted by the New York Code. The allegations of the answer are to be treated either as a denial of the allegations of the complaint or as a matter of affirmative defense. *Venice v. Breed*, 65 *Barb. (N. Y.)* 597, 1 *T. & C.* 130.

In such case, if the allegation in the complaint is not proved, the defendant gets the benefit of the denial by forcing the plaintiff to attempt proof of the fact alleged, and

if it is not made, the defendant has the right to claim that his allegation is established. When the answer sets up matter by way of affirmative defense, he must prove it, or he gets no benefit from it. *Venice v. Breed*, 65 Barb. (N. Y.) 597, 1 T. & C. 130.

403. Burden of proof.—The county commissioners having determined that the conditions precedent to a railroad subscription had been complied with, and having issued to the railroad company county bonds in payment therefor, in an action by taxpayers of the county to compel the cancellation of these bonds upon the ground that the conditions precedent had not been complied with, the burden of proof is upon the plaintiffs. They must show in such action that the county commissioners acted without authority or exceeded it. *Connor v. Green Pond, W. & B. R. Co.*, 23 So. Car. 427.

404. Effect of laches on part of complainant.—The equitable remedy for cancellation of town bonds may be refused by reason of long delay and acquiescence on the part of the town and its taxpayers, accompanied by frequent acts recognizing their validity, although the delay in bringing the action has not continued for the full statutory period of equitable actions. *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759; *affirming* 16 N. Y. S. R. 46, 48 Hun 617, *mem.*—*REVIEWING Metzger v. Attica & A. R. Co.*, 79 N. Y. 171.

Where no attempt is made to enforce the payment of bonds of a railway company wrongfully delivered for other than a corporate purpose, a delay of eleven and a half years in the bringing of a suit by stockholders to cancel and set aside such bonds and the deed of trust given to secure their payment is not a bar to the relief sought. *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. Rep. 899.

A county judge found that a majority of the taxpayers of a town had signed a petition asking that bonds be issued in aid of a railroad, and the bonds were issued to run for thirty years, and passed into the hands of bona fide purchasers. For more than nine years the town collected a tax and paid the interest on the bonds, and also voted a tax to retire a part of the bonds, took steps towards the sale of its stock in the road, but took no steps to deny their validity for more than ten years. The road was never built, though the company spent

more than the amount of the bonds in grading, and it was finally sold at a foreclosure sale. *Held*, that the action of the town was an affirmation of the validity of the bonds, and a bill filed to have such bonds delivered up and canceled was properly dismissed. *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759; *affirming* 16 N. Y. S. R. 46, 48 Hun 617, *mem.*

XIII. TAXATION.

405. Decisions of federal courts.

—(1) *The power to tax.*—A railroad is so far for a public use as to authorize a state to impose taxes for its use, and to allow it to exert the right of eminent domain, though it be owned by a private corporation. *Olcott v. Fond du Lac County Sup'rs*, 16 Wall. (U. S.) 678, 2 Am. Ry. Rep. 115.—*QUOTED IN People v. New York C. & H. R. Co.*, 9 Am. & Eng. R. Cas. 1, 3 Civ. Pro. (N. Y.) 11, 2 McCar. 345.

(2) *Such power implied from power to subscribe and issue bonds.*—When the legislature confers the power on a municipal corporation to subscribe for stock in railroads, and to issue its bonds therefor, the power to levy and collect taxes to pay the bonds is also conferred, unless the law conferring the power, or some general law, clearly shows the contrary. *Ralls County Court v. United States*, 105 U. S. 733.—*DISTINGUISHING United States v. Macon County*, 99 U. S. 591. *FOLLOWING Citizens' S. & L. Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *United States v. New Orleans*, 98 U. S. 381.—*FOLLOWED IN Scotland County Court v. United States ex rel.*, 140 U. S. 41.—*Citizens' S. & L. Assoc. v. Topeka*, 20 Wall. (U. S.) 655.—*DISTINGUISHED IN Moultrie County v. Fairfield*, 105 U. S. 370. *FOLLOWED IN Ralls County Court v. United States*, 105 U. S. 733.—*Black v. Cohen*, 52 Ga. 621. *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. Rep. 687.

A law giving a county the right to subscribe to the stock of a railroad, and issue bonds therefor, "and to take proper steps to protect the interest and credit of the county," implies the authority to levy taxes to pay the bonds and interest, though it exceed the regular tax rate fixed by the general law of the state. *Scotland County Court v. United States ex rel.*, 140 U. S. 41, 11 Sup. Ct. Rep. 697.—*FOLLOWING Ralls County Court v. United States*, 105 U. S. 733.

(3) *Construction of statutes.*—Where a statute authorizes a municipality to levy a special tax each year to pay interest on its bonds, it authorizes a tax to pay interest for any time that the bonds may run after they are due, as well as to pay the annual interest before they are due. *Peterkin v. New Orleans*, 2 Woods (U. S.) 100.

A charter of a railroad company authorized municipalities to subscribe to its stock and to issue bonds in payment, and authorized a levy of a tax of not more than one twentieth of one per cent. per annum on the property of the municipality to pay the same. Subsequently an act was passed which authorized such subscriptions, and provided generally how they might be made, but contained no provision limiting the taxes to be levied. *Held*, that where bonds were issued to the road under the latter act, a levy of a tax necessary for the purpose must be made. *United States ex rel. v. Howard County Court*, 1 McCrary (U. S.) 218, 2 Fed. Rep. 1.

(4) *Railroad property taxable.*—One railroad company may be taxed to assist in paying aid voted to another company, although when the statute was passed authorizing the aid the other company was exempt from taxation for such purpose, where the statute making the exemption has been repealed. *Baltimore & O. R. Co. v. Jefferson County*, 29 Fed. Rep. 305.

(5) *Collection and payment.*—A sheriff who is a tax collector, and whose duty it is to collect a tax which has been imposed by county authorities for the benefit of a railroad company, has no right to decide whether the tax has been properly levied or not, nor to settle disputes between taxpayers, the county, and the company. If he is directed by the proper authorities to pay over the money, it is his duty to do so. *Bell v. Mobile & O. R. Co.*, 4 Wall. (U. S.) 598.

(6) *When resort may be had to the general tax fund.*—A county issued its bonds in payment of stock in a railroad under a law providing for a tax to pay them of one twentieth of one per cent. of the taxable property of each year. *Held*, that the holders of bonds were entitled to have paid from the general funds of the county any balance remaining after exhausting the special tax. *United States ex rel. v. Clark County Court*, 96 U. S. 211.—DISTINGUISHING *Carroll County Sup'rs v. United States*, 18 Wall.

(U. S.) 71; *State ex rel. v. Shortridge*, 56 Mo. 129.—ADHERED TO IN *Knox County Court v. United States ex rel.*, 15 Am. & Eng. R. Cas. 624, 109 U. S. 229, 3 Sup. Ct. Rep. 131. DISAPPROVED IN *State ex rel. v. Macon County Court*, 68 Mo. 29. FOLLOWED IN *Macon County v. Huidekoper*, 134 U. S. 332.—*Macon County v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. Rep. 491.—FOLLOWING *United States v. Clark County*, 96 U. S. 211; *Knox County Court v. United States ex rel.*, 109 U. S. 229.

(7) *Diversion of proceeds of tax.*—Where a city is required to levy an annual tax to pay interest on bonds which it has issued in aid of a railway, and has levied and collected the tax, it has no right to divert the fund to other purposes, and a bondholder may enjoin it from doing so. *Ranger v. New Orleans*, 2 Woods (U. S.) 128.

And when a portion of such tax for certain years is in arrears, an injunction to prevent the corporation from receiving payment in scrip of the city should be refused, where it appears that the taxes cannot be collected at all unless the scrip is taken. *Ranger v. New Orleans*, 2 Woods (U. S.) 128.

406. Alabama.—Although the acts of 1858 and 1859 only authorized city authorities to aid a railroad company in one of two ways, i. e., either by direct taxation or by the issue of city bonds, as might be determined by the vote of the citizens, and not in both ways, yet said city authorities were thereby clothed with the implied power, in the event that the citizens voted in favor of the issue of bonds, to levy a special tax to provide for the payment of the bonds with interest as they fell due, and this, moreover, was expressly enjoined on them as a duty by the 13th section of the act of 1843. *Gibbons v. Mobile & G. N. R. Co.*, 36 Ala. 410.

Where a statute (under which a county issued bonds a series of which fell due annually for a period of ten years) provided that, "as soon as" certain prescribed conditions were complied with, "and annually thereafter for a period of ten years," the court of county commissioners should levy and assess a tax sufficient to pay the series falling due each year, the failure to assess and collect the tax within the time prescribed did not thereafter limit or destroy the power to collect and levy the tax, but that power existed as long as the legal obligation to pay the debt subsisted. *Limestone County Com'rs Court v. Rather*, 48 Ala. 433.

Moneys collected by the county treasurer by way of taxes to pay the interest on railroad bonds issued by the county under the general law approved December 31, 1868, by which counties, cities, and towns were authorized to subscribe to the capital stock of railroad companies (Sess. Acts 1868, p. 514), are moneys belonging to the county, which it is his duty to receive, keep, and disburse, according to law, and the sureties on his official bond are liable for any default in regard to such moneys. *Lewis v. Lee County*, 66 Ala. 480.

The county treasurer is not entitled to commissions on the funds so collected, nor can he claim that the money should pass through his hands. *Barbour County v. Clark*, 50 Ala. 416.

The grant of power to the city council, the election having resulted in favor of aid to the railroad, "to levy such tax as may be necessary upon the real and personal property in said city" is a grant of legislative or governmental power, rather than corporate power; and if it be held to require the imposition of a tax on all the property in the city, both real and personal, without any discretionary power to discriminate between them, a tax levied on real estate alone would not be void: the omission or failure to tax personal property also equally with real property would be a mere error or irregularity, for which a taxpayer, if thereby injured, would have an adequate remedy by mandamus before payment of the taxes assessed against him. *Winter v. Montgomery City Council*, 7 Am. & Eng. R. Cas. 307, 65 Ala. 403. *Winter v. Montgomery City Council*, 79 Ala. 481.

Where a county had subscribed to a railroad under the law of 1868, and judgment has been obtained against it by a holder of its bonds, the collection of taxes for general state and county purposes is to be made as under former laws, while another remedy, less prompt and effective, is provided for the collection of the special railroad tax; and hence sections 404-407 of the Code, in their application to a county which had become liable on its subscription to a railroad prior to their adoption, are unconstitutional, and the tax collector cannot claim the right to give a bond conditioned for the collection of the general taxes only. *Edwards v. Williamson*, 16 Am. & Eng. R. Cas. 668, 70 Ala. 145.

407. Arkansas.—Where municipal

bonds are issued under a statute authorizing the imposition of a tax to pay the same, the law becomes a part of the contract, and it is protected by that provision of the constitution of the United States which prohibits the states from enacting any law which would impair the obligation of contracts. *Brodie v. McCabe*, 33 Ark. 690.

The bondholder is entitled to look to the taxing provision as part of his security, and may demand that it shall be exercised in his favor, and the measure of his right is determined by the constitutional limit upon the power to authorize taxation. *Brodie v. McCabe*, 33 Ark. 690.

408. California.—The charter of the city of Placerville (St. 1859, 77) does not authorize the authorities of the city to levy and collect a tax for making a survey of a railroad route from that city to Folsom. The argument that a railroad extending from or to the city is as much a means of municipal benefit as a street in the city, gas, or waterworks, and that the length or extent of the road is not important in this respect, the municipal character of the work depending on its adaptation to the benefit of the municipality, is conclusively met by the fact that whether this be a municipal work or not, it is not a work authorized by the charter, neither expressly nor by necessary implication. *Douglas v. Mayor, etc., of Placerville*, 18 Cal. 643.

The balance of the railroad interest tax collected under section 6 of the act of April 25, 1863, remaining after payment of the interest on bonds given by the city and county of Sacramento for subscription to the stock of the Central Pacific railroad must be applied to the redemption of such bonds, as required by the act, and such balance could not in any case be transferred to the redemption fund until all such bonds had been redeemed. *Crocker v. Wolson*, 30 Cal. 663.

409. Florida.—When a county issues its bonds under a statute which provides the time and manner of discharging them, as by levying a special tax, the legislature cannot, by repealing the act or changing it, limit the amount of taxes to be levied to a rate insufficient to raise the amount necessary to meet the obligation unless other adequate means are provided. Such a law impairs the obligation of the contract. *Columbia County Com'rs v. King*, 13 Fla. 451.

—QUOTING Gelpcke v. Dubuque, 1 Wall,

(U. S.) 175; *Ohio L. I. & T. Co. v. Debolt*, 16 How. (U. S.) 432. REVIEWING *State ex rel. v. Wapello County*, 13 Iowa 390.

The depreciation of the railroad stock in the possession of Columbia or Bradford county since 1861, for the purchase of which the original bonded indebtedness was created, constitutes no valid reason for the refusal on the part of Baker county to pay its proportion of the indebtedness. *Canova v. State ex rel.*, 18 Fla. 512.

410. Illinois.—(1) *Power to tax, and who may exercise it.*—Taxes levied by township authorities to aid in the construction of a railroad are for a corporate purpose, and in this respect the distinction between a donation in aid of a railroad and a subscription to the capital stock of the corporation is more shadowy than real. The power is granted in consideration of the public benefits, and these are as great in one case as in the other. *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 6 Am. Ry. Rep. 221.—QUOTING *Taylor v. Thompson*, 42 Ill. 9.

Where bonds have been issued by a township to a railroad company, under an election held without authority of law, neither the state nor the local officers have authority to cause a tax to be levied for the payment of the principal or interest of such bonds, and they may be enjoined from doing so. *Rutz v. Cathoun*, 100 Ill. 392.

Railroad bonds of a town due, and interest on the same or on other like bonds, are claims against the town with which a town meeting has nothing to do, and for the payment of which it has no authority to order a tax levied. *St. Louis, R. I. & C. R. Co. v. People ex rel.*, 147 Ill. 9, 35 N. E. Rep. 228.

Town officers, under the township system, making an appropriation to a railroad, in pursuance of law, upon a vote, are "corporate authorities" of a municipal corporation, who are authorized to levy taxes under the constitution of 1848. *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 268, 6 Am. Ry. Rep. 221.—DISTINGUISHED IN *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562.

The state auditor has the rightful authority under both the old and the new constitutions to levy and certify the taxes of municipal corporations to meet the interest on their bonds which are duly registered in his office under the act of April 16, 1869. *Decker v. Hughes*, 68 Ill. 33.

(2) *Construction of statutes.*—The new constitution, art. 9, § 8, which prohibits any

county from levying a tax exceeding seventy-five cents on the one hundred dollars' valuation, does not apply to a tax levied to pay interest on bonds given in aid of a railway voted before the adoption of that instrument, although the subscription and the issue of the bonds occurred after its adoption. *Chiniquy v. People ex rel.*, 78 Ill. 570.

Where, prior to the adoption of the present constitution, a county was authorized by law to issue its bonds in aid of the construction of railways, bearing interest, with power to levy such taxes as were necessary to pay the accruing interest and the principal when due, and did issue such bonds, a subsequent limitation of the taxing power of the county which would operate to deprive it of the means to meet its obligations would, as to such outstanding indebtedness, be void, as impairing the obligation of contracts. *Peoria, D. & E. R. Co. v. People ex rel.*, 116 Ill. 401, 6 N. E. Rep. 497.

(3) *Enforcement, generally.*—Where the bonds of a county are shown to have been delivered in payment of a subscription of the county to the capital stock of a railroad company, or as a donation to such company, to aid in the construction of a railway, in 1872, but nothing is shown as to the disposition of them on application for judgment in 1891 for taxes of 1890 levied to pay interest on such bonds, it will be presumed that such bonds are still in the hands of the railway company, and that there were no rights of innocent purchasers to be protected. *Choisser v. People ex rel.*, 140 Ill. 21, 29 N. E. Rep. 546.

(4) *Rights of taxpayers.*—The payment of taxes levied to meet accruing interest upon bonds issued in the name of a municipality will not estop taxpayers of the municipality from alleging a want of power to create the debt. *Schaeffer v. Bonham*, 95 Ill. 368.

Where a town, without authority of law, voted to issue bonds to a railroad, and subsequently the legislature created a new town, including the old one, and authorized it to issue bonds under the prior vote—*held*, that after such bonds had been registered in the auditor's office, and a tax levied on the property of the town by direction of the state officers to pay same, a taxpayer could enjoin the same. *Flack v. Hughes*, 67 Ill. 384.

Where a bill was filed by certain taxpayers of a town, on behalf of themselves and the

other taxpayers, against a railway company, the town, and the supervisor and town clerk thereof, to enjoin such town and its officers from issuing bonds of the town to the railway company in pursuance of a vote at a special town meeting, and the same was dismissed by the court, on appeal, for want of equity, the court holding that there were no sufficient grounds shown for the relief sought—*held*, that the obligation resting upon the town to issue the bonds was just as binding, by reason of the decision of the court, as though judgment had been rendered in a mandamus proceeding or in a suit on the bonds. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. Rep. 161.

Where, in such suit, the liability of the town to issue its bonds in aid of a railway company is adjudged against the town under a bill denying such liability, other taxpayers and citizens of the town will be concluded by the decree, and they cannot, by another bill to prevent the collection of a tax to pay such bonds when issued, dispute their validity upon any of the grounds which were or could have been litigated in the prior suit. *Harmon v. Auditor of Public Accounts*, 123 Ill. 122, 13 N. E. Rep. 161.

(5) *Diversion of tax fund*.—Taxes levied by town authorities to pay off certain municipal bonds issued in aid of a railway constitute a special trust fund, and cannot lawfully be used for any other purpose even if such bonds are void. *Aurora v. Chicago, B. & Q. R. Co.*, 119 Ill. 246, 10 N. E. Rep. 27; affirming 19 Ill. App. 360.

Where a special tax is levied by a town to pay void bonds issued in aid of a railway, and the supervisor is directed to pay over such taxes to the commissioners of highways to be used as a bridge fund, a taxpayer may enjoin such application of the fund as to the amount of such taxes paid by him. Such taxpayer will have the right to have the taxes paid by him appropriated for the purpose for which they were levied and collected. *Aurora v. Chicago, B. & Q. R. Co.*, 119 Ill. 246, 10 N. E. Rep. 27; affirming 19 Ill. App. 360.

411. Indiana.—(1) *The power to tax*.—After a township had voted to make a subscription to railroad stock, the boundary line of the township was changed so as to take in an additional strip half a mile wide from an adjoining township, and the railroad was located and built upon such strip,

without touching the township as it existed at the time of the vote. *Held*: (1) that the vote did not authorize a tax to aid the road as located and built; (2) that the road must be built in the township as it existed at the time of the vote in order to authorize a tax. *Atvis v. Whitney*, 43 Ind. 83.—*Quoting Lafayette, M. & B. R. Co. v. Geiger*, 34 Ind. 185; *Garrigus v. Parke County Com'rs*, 39 Ind. 66; *Fulton County Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338; *People v. Tazewell County*, 22 Ill. 147; *McMillan v. Boyles*, 3 Iowa 311; *Leavenworth County Com'rs v. Miller*, 7 Kan. 536.

A township voted an appropriation of \$30,000 in aid of a railroad, that sum being less than two per cent. of the taxables for the preceding year, 1879. In 1880 the county board levied a tax of one per cent. on such taxables, but, owing to the shrinkage in the value thereof, this levy produced less than one half of the appropriation. In 1881 the board levied the entire remainder of the appropriation, which required 148½ per cent. *Held*: (1) that under Rev. St. 1881, §§ 4056, 4057, the board had no power to order a levy exceeding two per cent. in any one period of two years, and that the collection of the excess could be enjoined by paying or tendering the part of the tax legally due; (2) that if a levy of two per cent. in two years would not have produced the required amount, by reason of the shrinkage, an additional levy for the deficiency might have been ordered in the succeeding year. *Miles v. Ray*, 100 Ind. 166.

(2) *Construction of statutes*.—That part of the act of May 12, 1869, § 18, which provides that the failure of a company to complete its road within three years from the levy of a special tax for its benefit shall work a forfeiture of the right of the company to the tax, and the provision of the act of Dec. 24, 1872, that the taxpayers shall be released from the payment of levies upon such failure, are both repealed by the act of Jan. 30, 1873, which gives the commissioners the power, in their discretion, to cancel a subscription made by a township to a railroad. *Wilson v. Hamilton County Com'rs*, 68 Ind. 507.

Under Ind. Act of May 12, 1869, only two per cent. of the assessed value of the taxable property of a township as shown by the tax duplicate of the preceding year can be levied at one time upon one petition and in any one period of two years; but other

appropriations may be made at other times and upon different petitions. *Brokaw v. Gibson County Com'rs*, 3 *Am. & Eng. R. Cas.* 573, 73 *Ind.* 543.

Where a township votes aid to a railroad under the above statute, the money need not necessarily be expended within the limits of the township. *Brokaw v. Gibson County Com'rs*, 3 *Am. & Eng. R. Cas.* 573, 73 *Ind.* 543.

The provisions of the laws whereby the auditor and treasurer are required to suspend the collection, and to carry the tax forward until the road has been located and the money expended, etc., have reference to levies which have gone upon the duplicate before the inhibition against placing the tax on the duplicate until the road has been located was enacted. *Peed v. Millikan*, 79 *Ind.* 86.

Ind. Act of May 12, 1869, § 18, and the act of 1872, § 3, concerning the forfeiture of municipal aid to railroads, apply only to donations, and not where a subscription to stock has been made. Nor do they apply where a portion of the tax levied has been collected and paid to the company. *Tipton County Com'rs v. Indianapolis, P. & C. R. Co.*, 12 *Am. & Eng. R. Cas.* 636, 89 *Ind.* 101; *former appeal* 70 *Ind.* 385.

Sections 4060 and 4062, R. S. 1881 (sections 16 and 18, Acts of 1869, p. 92), relating to public aid to railroads, have been repealed by subsequent legislation. *Nixon v. Campbell*, 24 *Am. & Eng. R. Cas.* 605, 106 *Ind.* 47, 4 *N. E. Rep.* 296, 7 *N. E. Rep.* 258. *Caffyn v. State ex rel.*, 91 *Ind.* 324.

(3) *Property taxable*.—For the purpose of a tax in aid of a railroad, an incorporated town within a township is part of the township. *Reynolds v. Faris*, 80 *Ind.* 14.

If, in making the levy for a donation, certain taxable property of the township be omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid. *Goddard v. Stockman*, 5 *Am. & Eng. R. Cas.* 164, 74 *Ind.* 400.

The board of commissioners of a county, at the June session, 1882, ordered that a tax be levied on all the taxable property within a certain township in said county, to aid in the construction of a proposed railroad, an election held in said township having resulted in favor of such appropriation. At the time said tax was ordered to be levied, all of the appellant's property in said county

was situated and assessed for taxes in a township which had voted against an appropriation for said railroad. The board of commissioners, in March, 1883, changed the boundaries of said township, and by such change the property of the appellant in said county was transferred to the township which had voted in favor of the appropriation. *Held*: (1) that the property of the appellant so transferred after the order for the levy was made, but before the tax was in fact levied, was liable for its proportion of the same; (2) that no notice is required of the levying of a tax authorized or directed by law. *Lake Shore & M. S. R. Co. v. Smith*, 131 *Ind.* 512, 31 *N. E. Rep.* 196.

(4) *Enforcement, generally*.—The act entitled "An act to authorize aid to the construction of railroads by counties and townships taking stock in and making donations to railroad companies," § 18 (3 *Ind. St.* 389), requires the company to which an appropriation has been made to commence work upon its road in the county, in good faith, within one year from the time of the levy of the tax therefor, unless additional time has been given. *State ex rel. v. Wheadon*, 39 *Ind.* 520.

Where a company fails to commence work in good faith upon its road within one year from the levy of the tax, taxpayers are discharged from their obligation to pay the tax, and no proceeding will lie to require the auditor to place the tax upon the duplicate, or take any other steps to collect it. *State ex rel. v. Wheadon*, 39 *Ind.* 520.

The time within which the company must commence work in order to avail itself of a county appropriation commences from the time when the order levying the tax is made by the county commissioners, and not from the time when the levy is placed on the tax duplicate. Merely acquiring a right of way or letting construction contracts is not a commencing of work within the meaning of the statute. *State ex rel. v. Wheadon*, 39 *Ind.* 520.

The rule that the payment of a less sum will not discharge a greater only applies where the sum is liquidated, and is due upon contract. It cannot apply to a claim founded upon a statutory proceeding assessing a tax in aid of a railroad corporation. *Huntington County Com'rs v. State ex rel.*, 109 *Ind.* 596, 10 *N. E. Rep.* 625.

(5) *The levy, and proceedings to obtain it*.—Under "an act to authorize aid to the

construction of railroads by counties and townships taking stock in and making donations to railroad companies," 3 Ind. St. 389, the petition to the board of county commissioners, and the notice of election issued by the auditor, must specify the amount to be appropriated, and not a per cent. upon the taxable property; and, where the petition does not specify the amount, but asks a certain per cent. upon the taxable property of the county to be appropriated, the action of the board of commissioners, and the proceedings thereunder to levy a tax, are void, and may be enjoined at the suit of a taxpayer of the county, and an appeal from the action of the board is unnecessary. *Cincinnati, W. & M. R. Co. v. Wells*, 39 Ind. 539, 10 Am. Ry. Rep. 372. —DISTINGUISHED IN *Williams v. Hall*, 65 Ind. 129.

Where the proceedings of the board of commissioners contain no formal order granting the prayer of a petition for a railroad aid tax, an entry of the tax in the tax list of the township petitioning for it is sufficient to show that it was assessed. *Hill v. Probst*, 120 Ind. 528, 22 N. E. Rep. 664.

The recital in the record of the order of the board of commissioners making such an appropriation that "it is hereby ordered that a special tax of one per cent. * * * be and the same is hereby levied * * * for the purpose of raising one half of the amount specified in said petition" is a sufficient granting of the prayer of the petition. *Godard v. Stockman*, 5 Am. & Eng. R. Cas. 164, 74 Ind. 400.

An order by county commissioners directing the county auditor to levy one half of the amount voted by a township to aid a railroad, but not specifying what per cent. of a levy should be made, is valid, as it is a mere matter of calculation to ascertain what per cent. will be required. *Mustard v. Hoppess*, 69 Ind. 324.

The levy of a tax in aid of a railroad company is not void because made in the shape of a percentage instead of a gross sum. *Peed v. Millikan*, 79 Ind. 86.

A taxpayer has the right to compel an additional levy sufficient to pay the amount voted to a railroad company, or he may petition the board of commissioners to order the necessary assessment. *Williams v. Lawrence County Com'rs*, 121 Ind. 239, 23 N. E. Rep. 76.

(6) *Time of levy*.—Though the law re-

quires a levy in favor of a railroad company to be made at the June session next after the vote, the duty to make it is absolute, and consequently the power to make it is not lost by failure to exercise it at the right time. *Peed v. Millikan*, 79 Ind. 86. *Lake Shore & M. S. R. Co. v. Smith*, 131 Ind. 512, 31 N. E. Rep. 196.

Under 1 Ind. Rev. St. 1876, p. 735, the provision that a tax levied in aid of a railroad shall not be placed upon the duplicate tax list until the road has been permanently located is mandatory, and the collection of the tax may be enjoined and the levy ordered stricken from the duplicate for a failure to comply with the statute even where the road has since been located. *Peed v. Millikan*, 79 Ind. 86.

A township having voted aid to a railroad company, the county board ordered one half the necessary tax to be levied and collected at once, and the other half at a time specified. The first half was duly levied, but more than a year elapsed after the time fixed for the levy of the second half without anything being done. At length the county board passed a resolution that the remaining half be levied and collected, the company having been permanently located and put in operation in the township, and having spent more upon its road than the total amount of aid subscribed. *Held*, that the railroad was entitled to have such second half of the necessary tax levied and collected, and that a taxpayer could not by injunction restrain the collection of the same. *Norton v. Milner*, 12 Am. & Eng. R. Cas. 639, 89 Ind. 197.

(7) *Enjoining collection or payment* or. An order made by a board of commissioners at a special session not legally convened, granting the prayer of a petition for an election in a township to vote aid to a railroad, under Indiana statute of May 12, 1869, is illegal and void, and the collection of a tax levied pursuant to such order and election may be enjoined at the suit of a taxpayer. *Columbus, C. & I. C. R. Co. v. Grant County Com'rs*, 65 Ind. 427. *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244.

It is not necessary in such case for the taxpayer to appeal from such void action of the board of commissioners. *Harney v. Indianapolis, C. & D. R. Co.*, 32 Ind. 244.

Where the amount of the appropriation asked by such petition exceeds two per cent. of the assessed value of the taxable

property of the township, the levy and assessment pursuant thereto are illegal and void, and the collection may be enjoined by a taxpayer. *Columbus, C. & I. C. R. Co. v. Grant County Com'rs*, 65 Ind. 427.

The collection of taxes assessed in either of the above cases upon a railroad belonging to one company and leased to another, under an agreement that all taxes legally assessed on the property, and paid by the lessee, shall be chargeable to the lessor, may be enjoined by the lessor company. *Columbus, C. & I. C. R. Co. v. Grant County Com'rs*, 65 Ind. 427.

And after a proceeding has been commenced to enjoin the collection of such illegal tax, it is not competent for the legislature to legalize it, or to declare it valid, as such action is an invasion of the province of the judiciary. *Columbus, C. & I. C. R. Co. v. Grant County Com'rs*, 65 Ind. 427. —QUOTING *Denny v. Mattoon*, 2 Allen (Mass). 361.

Where a railroad company to which an appropriation to build its road had been voted by a county and placed upon the duplicate more than three years prior to the passage of Ind. Act of March 11, 1875, had failed during all that time either to complete its road or to obtain further time, such appropriation became forfeited, and the collection of such tax could be enjoined at the suit of a taxpayer. *Indianapolis, P. & C. R. Co. v. Tipton County Com'rs*, 70 Ind. 385; further appeal 12 Am. & Eng. R. Cas. 636, 89 Ind. 101.

The insolvency of a railroad company, or its inability to complete its road, does not furnish sufficient ground to enjoin the collection of a tax which has been voted it, at the suit of taxpayers. Neither will an injunction lie to prevent the collection of such tax upon the ground that its collection has not been ordered for the purpose of appropriating the same to the object for which it was assessed. *Wilson v. Hamilton County Com'rs*, 68 Ind. 507.

An injunction will not lie to restrain the collection of a township tax in favor of a railroad because it is slightly in excess of the amount voted, where the excess on each taxpayer is so infinitesimal as to come within the maxim *de minimis non curat lex*; nor because the claim to the tax has been assigned by the company. *Faris v. Reynolds*, 70 Ind. 359.

That the property and franchises of a railroad D. R. D.—46

road company are owned by a foreign corporation, that there was a prior existing levy on the township to aid the same road, or that proper notices of election concerning the levy of the tax were not given, are matters which must have been decided by the board of commissioners before granting the prayer of the petition, and that decision can only be reviewed upon a direct appeal, and cannot be questioned by a suit to enjoin the collection of the tax. *Reynolds v. Faris*, 80 Ind. 14.

That the railroad company had not done work in the township equal to the amount of the tax is a matter necessary to be decided by the board of commissioners before ordering the collection of the tax, and, that order having been granted, the question is settled as against a collateral attack. *Reynolds v. Faris*, 80 Ind. 14.

The order of the board of county commissioners directing the levy of a tax to aid in the construction of a railroad cannot be attacked collaterally, in a suit to enjoin the collection of a tax, for any cause which was available when the order was made, not even for want of the notice required by law, unless the record shows affirmatively that there was no notice whatever. *Hilton v. Mason*, 92 Ind. 157.

Unless there is an adjudication by the board of commissioners, in the manner prescribed by existing statutes, declaring a forfeiture because of a failure to make the expenditure required, or to complete the road within the time prescribed, the collection of the special tax cannot be enjoined. *Nixon v. Campbell*, 24 Am. & Eng. R. Cas. 605, 106 Ind. 47, 4 N. E. Rep. 296, 7 N. E. Rep. 258.

The appearance of a railroad aid tax upon the tax duplicate creates the presumption that it was levied by the board of commissioners. The validity of the election authorizing it is necessarily reviewed in making the levy, and cannot be attacked in an injunction proceeding. *Hill v. Probst*, 120 Ind. 528, 22 N. E. Rep. 664.

Where the collection of a tax levied in a township in aid of the construction of a railroad had been enjoined, some of the persons taxed having voluntarily paid to the railroad company the amount assessed against them, and taken from the company stipulations that they should be released from an equal amount that might thereafter be levied against them—held, that a

tax thereafter levied upon new proceedings was not thereby vitiated as against persons who did not so pay to the company; and that the company had no legal right to the money thus paid, as the stock had not been subscribed for nor the donation made. *Petty v. Myers*, 49 Ind. 1.

To secure votes in favor of a township subscription a company circulated among the voters notice of an agreement which it had entered into with another company about to build a road through the township that if both roads were built each one should have one half of the amount voted, and if but one was built that one half of the amount should be returned to the township. *Held*, no ground for an injunction at the suit of taxpayers. If such agreement was legal and valid, then the voters could not be imposed upon thereby; and if it was illegal, they must be presumed to have known it. *Bish v. Stout*, 77 Ind. 255.

(8) *Parties to suits to enjoin*.—Where a suit is brought by taxpayers to enjoin the collection of a tax in aid of a railroad, it is error to admit the directors of the company as defendants, as the company has no interest in the tax until it is collected, and where such directors have been improperly made parties, an appeal taken by them will be dismissed. *Jager v. Doherty*, 61 Ind. 528.

In an action by a taxpayer against a county treasurer to enjoin the collection of a tax levied as an appropriation voted by a township to aid a railroad, the township is a necessary party defendant, but the company and the board of county commissioners are not; neither are the petitioners for the appropriation, where their interests are not affirmatively shown by the complaint to be adverse to the plaintiff's. *Bittinger v. Bell*, 65 Ind. 445.—DISTINGUISHING *Indiana N. & S. R. Co. v. Attica*, 56 Ind. 476.

But where a taxpayer of the township alleges himself in favor of the appropriation, and that the defendant is not a taxpayer of the township, he should on proper application be allowed to appear, answer, and defend the action. *Bittinger v. Bell*, 65 Ind. 445.

(9) *Evidence in suits to enjoin*.—On the trial of an action by a taxpayer to enjoin the collection of a tax, it appearing that the sum specified was exactly two per cent. of the assessed taxable property of the township, it was harmless to allow evidence by the defendant of unassessed property sub-

ject to taxation in that township. *Williams v. Hall*, 65 Ind. 129.—DISTINGUISHING *Cincinnati, W. & M. R. Co. v. Wells*, 39 Ind. 539; *Detroit, E. R. & I. R. Co. v. Bearss*, 39 Ind. 598.

In a proceeding to enjoin the collection of a tax levied for the construction of a railroad, it is not competent to inquire into questions pertaining to the organization of the railroad company, they having been determined by the board of commissioners as jurisdictional matters. *Brocaw v. Gibson County Com'rs*, 3 Am. & Eng. R. Cas. 573, 73 Ind. 543.

(10) *Right to fund after forfeiture by railway company*.—The fund in the hands of a county treasurer arising from a tax voted by a township to aid a railroad, where the company has forfeited all right to the same, under section 18 of the Railroad Act of May 12, 1869 (1 Rev. St. 1876, p. 736), and sections 1 and 2 of the Supplemental Act of December 24, 1872 (Acts 1872, p. 56), it not having been diverted into the township funds, belongs to the township unless it has been demanded by the taxpayers of the township within two years after the passage of the act of 1872, or within two years after the forfeiture thereof by the railroad company, and such demand, being matter of defense, need not be negated in the complaint in an action by a township against a county to recover a tax voted by the township. *Centre Tp. v. Marion County Com'rs*, 70 Ind. 562.

412. Iowa.—(1) *The statutes*.—The county treasurer cannot refuse to pay over a tax in his hands petitioned, voted for, and collected under the act of 1868 enabling townships and cities to aid in the construction of railroads, on the ground that such tax was levied and collected under an unconstitutional law. Said act is constitutional. *McGregor & S. C. R. Co. v. Birdsell*, 30 Iowa 255.—FOLLOWING *Stewart v. Polk County Sup'rs*, 30 Iowa 9.

Bonds issued by counties under the provisions of chapter 87, Laws of 1872, are payable in all respects as is provided in chapter 1, title iv., of the Code. It is the duty of the board of supervisors to levy the bond tax as there provided for their payment, and such tax is not limited by section 840 of the Code to three mills. *Sioux City & St. P. R. Co. v. Osceola County*, 52 Iowa 26, 2 N. W. Rep. 593.

The aggregate amount of tax that can be

voted and levied by any city, town, or township in aid of railroads, under the Act of the Sixteenth General Assembly, ch. 123, is five per cent. of the assessed value of the property therein, and when that amount has been levied and collected the power conferred by the statute is exhausted. *Dumphy v. Humboldt County Sup'rs*, 58 Iowa 273, 12 N. W. Rep. 306. — EXPLAINED IN *Williams v. Poor*, 65 Iowa 410.

But in estimating such aggregate the fact that a similar tax has been imposed under the Act of the Thirteenth General Assembly, ch. 102, is not to be considered, though it contains a like limitation. Such limitation in the earlier statute does not affect the power of the legislature to enact the later statute, which must be construed with reference to its own terms. *Scott v. Union County*, 63 Iowa 583, 19 N. W. Rep. 667.

Where in 1877 a certain township voted a five per cent. tax in aid of a certain railroad, which was duly levied by the supervisors, and entered on the tax books, and in December, 1878, the electors of the township voted another five per cent. tax in aid of another railroad, and in May, 1879, the directors of the first railroad company rescinded and abandoned the tax voted in its favor, and in June following the supervisors canceled said tax, and in September following levied the tax in aid of the second railroad — *held*, that the second tax was not void as being in violation of the provision of the statute (ch. 123, § 3, Laws of 1876) to the effect that the aggregate of such tax "to be voted or levied" should not exceed five per cent. of the assessed value of the property of the township, because, construing the statute with reference to its purpose, the word "or" in the quoted clause should be construed as *and*, and before the second tax was voted *and* levied the first levy had been set aside. (Adams, J., dissenting.) *Williams v. Poor*, 65 Iowa 410, 21 N. W. Rep. 753. — EXPLAINING *Dumphy v. Humboldt County Sup'rs*, 58 Iowa 273.

(2) *What property taxable.* — Farming lands situated within the limits of a city are liable for a tax voted to aid in the construction of a railroad. Such a tax is not a municipal tax within the meaning of that phrase as used in *Morford v. Unger*, 8 Iowa 82, and cases following it. *Sears v. Iowa Midland R. Co.*, 39 Iowa 417.

The municipal taxes from which farm property is exempt are limited to those

which are required for purposes strictly municipal and from which such property derives no benefit. *Sears v. Iowa Midland R. Co.*, 39 Iowa 417.

(3) *Assessment, how made and returned.* — Under Laws of 1872, ch. 2, § 50, it is the duty of township trustees, after a tax has been voted to aid a railroad, and the engineer's estimates, together with an order of the president of the company, has been presented, showing that the statute has been complied with, and that the company has expended more than the amount of the tax in the township, to certify the fact to the county treasurer. *Harwood v. Quinby*, 44 Iowa 385.

That the certificate of compliance by a company with the conditions of a tax voted in aid of its construction was not executed in accordance with any order of the trustees made at a meeting thereof will not invalidate the tax, the certificate having been duly signed. *Merrill v. Welscher*, 50 Iowa 61.

It is not necessary that the clerk of the board of supervisors should attach to the list furnished the treasurer a warrant requiring him to collect the taxes therein levied. *Harwood v. Brownell*, 48 Iowa 657. — DISTINGUISHING *Chicago, D. & M. R. Co. v. Olmstead*, 46 Iowa 316.

Where the township clerk files with the county auditor all the record proceedings relating to a tax voted, and a certificate that the election was held on the proper day, and that a majority of the votes cast were in favor of the tax, this is a substantial compliance with the requirement that the clerk shall certify the rate per cent. of the tax voted. *Shontz v. Evans*, 40 Iowa 139.

In a proceeding respecting the validity of a tax voted to aid a railroad, it appeared that the election was held on March 30, 1869; that on the next day the trustees made an order levying a tax upon the taxable property of the township, and ordered the clerk of the township to certify to the board of supervisors a tax list of said tax according to the valuation of the property for that year; that the township assessor returned the assessment book to the township clerk on April 12, and it was delivered to the county auditor on May 18, the tax list certified to the clerk of the board of supervisors in September and October of that year, and then placed in the hands of the treasurer for collection. *Held*, that the tax was not invalid on the ground that it

was levied upon an assessment not made and returned at the time the tax was voted. *Parsons v. Childs*, 36 Iowa 108.

(4) *Sufficiency and validity of the levy.*—County commissioners have no power to levy a tax in aid of railroads at any other time than at one of their regular meetings appointed by the statute, or a special meeting called as the statute directs. So where the board adjourns without a day fixed, and the second day afterwards meets again at the suggestion of the auditor and levies such tax, it is void. *Scott v. Union County*, 63 Iowa 583, 19 N. W. Rep. 667.

The levy of a tax described as "railroad tax five mills" is sufficiently explicit, when the purpose and object of the tax and the beneficiary corporation can be ascertained *alunde*. *Shontz v. Evans*, 40 Iowa 139.

A levy for "all loans for city purposes, district tax, railroad tax that has been certified according to law," is sufficient. *Casady v. Lowry*, 49 Iowa 523.

Where the railroad to be aided by a tax voted is completed before the tax is levied, the omission to state in the levy the time when the road is to be completed is not a vital defect which will defeat the tax. *Burges v. Mabin*, 70 Iowa 633, 27 N. W. Rep. 464.

The Act of the Thirteenth General Assembly, ch. 159, requires that the clerk of an election shall certify to the county auditor the result of the election, the rate per cent. of the tax voted, and "the time, terms, and conditions upon which the same, when collected, is to be paid to the railroad company." *Held*, that a failure of the board of supervisors in levying a tax to pay such appropriation to state in their order the conditions upon which the tax was to be paid to the company would not invalidate the levy. *Bartemeyer v. Rohlf's*, 71 Iowa 582, 32 N. W. Rep. 673.—DISTINGUISHING *Minnesota & I. S. R. Co. v. Hiams*, 53 Iowa 501.

(5) *Company when entitled to the tax.*—The certificate of the trustees reciting that the company has so complied with the act as to be entitled to the tax should recite a compliance in all respects with the statutes. *Casady v. Lowry*, 49 Iowa 523.

The certificate of the township trustees that a company is entitled to receive the tax is not authority for its collection, the only object of such certificate being to authorize the treasurer to pay to the company the amount collected and in his hands.

Lamb v. Anderson, 54 Iowa 190, 3 N. W. Rep. 416, 6 N. W. Rep. 268.—REVIEWED IN *Southern Kan. & P. R. Co. v. Towner*, 41 Kan. 72, 21 Pac. Rep. 221.

The fact that a corporation is authorized to construct and operate both railroad and telegraph lines will not invalidate taxes voted to aid in the construction of its road. *Snell v. Leonard*, 55 Iowa 553, 8 N. W. Rep. 425.

Where a tax has been voted to aid a railroad, and the company, relying upon the tax, has expended large sums in constructing its road, a subsequent repeal of the statute authorizing the aid does not deprive the company of its right to the tax, although it may not be levied until after the repeal. (See *vers* and *Reed*, JJ., dissenting.) *Burges v. Mabin*, 70 Iowa 633, 27 N. W. Rep. 464.—DISTINGUISHED IN *Barthel v. Meader*, 72 Iowa 125, 33 N. W. Rep. 446.—*Cantillon v. Dubuque & N. W. R. Co.*, 78 Iowa 48, 42 N. W. Rep. 613.

A tax in aid of a railroad was voted on condition that the road be completed "from the south line of the county of Hancock, via Garner, to a connection with the M. & St. L. railroad." *Held*, that this specified with sufficient explicitness the route of the railroad and the points to which it should be completed before the tax was payable. *Burges v. Mabin*, 70 Iowa 633, 27 N. W. Rep. 464.—DISTINGUISHED IN *Kleise v. Galusha*, 78 Iowa 310, 43 N. W. Rep. 217.

A tax voted to aid a railroad is collectible if the road constructed be of narrow gauge, unless it be shown unable to do the business of the country through which it passes. *Casady v. Lowry*, 49 Iowa 523.

The articles of incorporation of a railroad company stated its object to be to acquire, maintain, and operate a railroad through certain designated points, of which the town of N. was one. *Held*, that the construction of the road to N. was essential to entitle the company to the tax voted in its aid in that township. *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. Rep. 416, 6 N. W. Rep. 268.

The building of the road to a point without the township, and the purchase of another road from such point to the town, will not authorize the collection of the tax, the construction of a road being the only object for which such tax can be legally voted or expended under the statute. *Lamb v. Anderson*, 54 Iowa 190, 3 N. W. Rep.

416, 6 *N. W. Rep.* 268.—DISTINGUISHING *Stockton & V. R. Co. v. Stockton*, 51 *Cal.* 328.

Where by the conditions of a tax voted it is not to be payable until the road is constructed between specified points, the construction of a portion of the line and the purchase of the remaining portion will not render the tax payable, although the constructed portion extends through the township in which the tax is voted. *Iowa, M. & N. P. R. Co. v. Schenck*, 7 *Am. & Eng. R. Cas.* 324, 56 *Iowa* 628, 10 *N. W. Rep.* 215.

(6) *Estoppel to deny validity of tax.*—Where tax to aid a railroad is voted in January, 1872, and the railroad completed upon the faith of the tax within the year, and the taxpayers remain silent until all the benefits to accrue therefrom are secured, they will be estopped from denying the validity of the tax. *Lamb v. Burlington, C. R. & M. R. Co.*, 39 *Iowa* 333.—FOLLOWING *Burlington, C. R. & M. R. Co. v. Stewart*, 39 *Iowa* 267.

When a railroad company expends large sums in the construction of a railroad, taxpayers, having before the completion of the road made no objection to a tax voted in its aid, are estopped from denying its validity. *Johnson v. Kessler*, 76 *Iowa* 411, 41 *N. W. Rep.* 57.

Where it does not appear that a person resisting a railroad tax upon the faith of which the road was constructed knew that expenditures were made, he is not estopped to deny the validity of such tax. *Truesdell v. Green*, 7 *Am. & Eng. R. Cas.* 369, 57 *Iowa* 215, 10 *N. W. Rep.* 630.

(7) *Enforcing payment to company.*—While a tax voted to aid a railroad cannot be collected in instalments, yet, if the company has not expended enough in the city or township to entitle it to the whole, it may be entitled to the part earned in lieu of the whole. *Cusady v. Lowry*, 49 *Iowa* 523.

Where a county treasurer fails during his term of office to pay over on demand to a railroad company the taxes voted to the company, and he does not turn over the money to his successor, and it is never passed to the credit of the county, neither his successor nor the county is liable therefor. His failure is a breach of his official bond for which he and his sureties are liable; and the company is the proper party

to bring an action on his bond. *Cedar Rapids, I. F. & N. W. R. Co. v. Cowan*, 77 *Iowa* 535, 42 *N. W. Rep.* 436.

In an action to compel the treasurer of a county to levy and collect a tax voted to aid a railroad, an allegation that the plaintiff has made the required proof of compliance with all the conditions upon which the tax is to be paid is good on demurrer. *Burlington, C. R. & M. R. Co. v. Stewart*, 39 *Iowa* 267, 20 *Am. Ry. Rep.* 89.

(8) *Forfeiture by failure to comply with conditions.*—A taxpayer cannot defeat a tax voted in aid of a railroad under chapter 159, Laws of 1884, on the ground that the company has failed to comply with the conditions of the notice of the election, and to complete the road in the time therein prescribed. Taxpayers are in such case to be regarded as in the same situation as subscribers to the stock of the company. *Johnson v. Kessler*, 76 *Iowa* 411, 41 *N. W. Rep.* 57.

A tax to aid in the construction of a railroad was voted in the township of K., to be expended in that and two other townships specified. Double the amount of the tax was expended by the company in constructing the road through K., but nothing was expended in either of the other townships. *Held*, that the three townships should be regarded as a unit, and that the tax was not forfeited by the failure to expend any part of it in either of the other townships specified. *Merrill v. Welscher*, 50 *Iowa* 61.

The survey of a line of a railroad before voting a tax to aid in its construction does not constitute a representation respecting the location of the line of the road which is binding upon the company, or upon which the taxpayer is authorized to rely. *Merrill v. Welscher*, 50 *Iowa* 61.

A suspension of work upon a road for nearly four years—*held*, not to work a forfeiture of a tax voted in aid of the road. *Merrill v. Welscher*, 50 *Iowa* 61.

And the company is not estopped to collect the tax because it advised, when the work temporarily ceased, that the collection of the tax should be suspended. *Merrill v. Welscher*, 50 *Iowa* 61.

Under section 7 of page 110 of the Laws of 1876, providing that taxes voted in aid of any railroad which remain in the treasury for more than two years after the same have been collected shall be considered forfeited—*held*, that where a portion of a levy

for such purpose had been paid to the county treasurer and held by him for four years without the knowledge of the railroad company in whose favor the tax had been voted, and it was believed further by the company that a decision of the courts that the company was not entitled to a second instalment of the tax voted but not yet levied affected the whole tax, the right to the taxes held by the treasurer was forfeited. *Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer*, 84 Iowa 510, 51 N. W. Rep. 27.

The above statute is not repealed by chapter 192 of the Laws of 1880, providing for a forfeiture of such taxes when work upon the railroad to which aid has been voted shall not have been commenced within the township within two years, or such railroad company shall have neglected for six months to comply with the terms of the notice and petition under which such taxes have been voted. *Cedar Rapids, I. F. & N. W. R. Co. v. Elseffer*, 84 Iowa 510, 51 N. W. Rep. 27.

A company was chartered to build a road from a point in the state through an adjoining state, and to a point in a third state; and a town voted aid to it, but did not make it conditioned upon the road being constructed according to the charter. Held, that the fact that the road was never built to its charter limits would not invalidate the subscription. *Cantillon v. Dubuque & N. W. R. Co.*, 78 Iowa 48, 42 N. W. Rep. 613.

(9) — *by alienation of road.*—When a railroad company to which a tax has been voted has, upon the faith thereof, constructed its road and put it in operation, the company becomes thereby entitled to the tax, and this right is not forfeited or lost by the subsequent alienation of the railroad to another company. *Parsons v. Childs*, 36 Iowa 108.

A tax voted in aid of a railroad is not forfeited by a perpetual lease of the road made in good faith to another company. *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.—QUOTING *Manning v. Mathews*, 66 Iowa 675.

Under Code, § 1302, where a railroad is sold, and consolidated with that of another company, whose stock is equal to or of greater value than that of the company to which a tax is voted, and the purchasing company is ready to give to the taxpayer the same amount of stock in the consolidated company as he would have been en-

titled to in the other company, it has a right to such taxes, and their collection cannot be restrained by reason of the sale or consolidation. *Cantillon v. Dubuque & N. W. R. Co.*, 78 Iowa 48, 42 N. W. Rep. 613.

A tax voted by a township in aid of a railroad, under ch. 123, Laws of 1876, is forfeited by the alienation of the road before its completion; and in such case the township trustees may be enjoined, at the instance of a taxpayer, from certifying to the county treasurer that the conditions of the vote have been complied with, and the treasurer may be enjoined from collecting and paying over the tax. *Manning v. Mathews*, 66 Iowa 675, 24 N. W. Rep. 271.—DISTINGUISHING *Muscatine Western R. Co. v. Horton*, 38 Iowa 33.—FOLLOWED IN *Drennan v. Graham*, 67 Iowa 161; *Mathews v. Winchell*, 67 Iowa 149; *Blunt v. Carpenter*, 68 Iowa 265. QUOTED IN *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728.

(10) *Void taxes—Enjoining collection.*—Where the voters of a township are induced by fraudulent representations to vote a tax in aid of a railroad, the collection of the tax cannot be enforced. *Sinnett v. Moles*, 38 Iowa 25.—ADOPTED IN *Curry v. Decatur County Sup'rs*, 13 Am. & Eng. R. Cas. 80, 61 Iowa 71.

A railroad tax that is procured to be voted upon representations that it will not be enforced except as against non-resident property holders will not be upheld. *Truedell v. Green*, 7 Am. & Eng. R. Cas. 369, 57 Iowa 215, 10 N. W. Rep. 630.

Where the citizens of a town appoint a committee to work up the voting of a railroad aid tax in another township of the county, and the railroad company afterwards employs one of the same committee to do the same thing on its behalf, and he induces men to vote for the tax by offering to pay them fifty cents on the dollar for the certificates of taxes paid by them, the tax so voted is void on account of the undue influence so brought to bear upon the voters. *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.

A court of equity has jurisdiction to restrain by injunction the collection of a tax which has been certified by mistake by the clerk to have been voted in aid of a railroad, when in fact the proposition for the levy of the tax was defeated. *Cattell v. Lowry*, 45 Iowa 478.

Where one of the conditions of a tax voted in aid of a railroad is that it should not be collectible unless the company should construct, and maintain, and have in operation by a time named, a first-class railroad to a good and sufficient depot to be erected at a specified place, the condition is not sufficiently complied with by the construction of a road and depot in such an incomplete and imperfect manner that the ordinary business of a railroad cannot be transacted at the place in question. *Cox v. Forest City & S. R. Co.*, 66 Iowa 289, 23 N. W. Rep. 672.

Taxes voted to a corporation, under ch. 123, Laws of 1876, to aid in the construction of a railroad, after the corporation has transferred its road in pursuance of a purpose entertained from the beginning, of which public notice was given to the voters before the election, cannot be collected, and their collection may be enjoined, notwithstanding the taxpayers remained silent while they saw the road built by the company to which it was so transferred, knowing that such company was building it in reliance upon the payment of the taxes. To allow the taxes to be collected under such circumstances would be to disregard the terms of the statute, and would work gross injustice to the minority who voted against the tax. *Blunt v. Carpenter*, 58 Iowa 265, 26 N. W. Rep. 438.—FOLLOWING *Manning v. Matthews*, 66 Iowa 675.

Where a tax was voted in aid of a proposed railroad, but the statute under which it was voted was repealed before the levy was made, and the company in whose favor the tax was voted had not, prior to the repeal, expended any money in reliance upon the tax in constructing the road, and never did construct it, but transferred it by a perpetual lease to another company, which did construct it, but there was no assignment or transfer of the tax to such other company, and it does not appear that such company constructed the road relying upon the tax—*held*, that the collection of the tax was properly enjoined. *Barthel v. Meader*, 72 Iowa 125, 33 N. W. Rep. 446.—DISTINGUISHING *Burges v. Mabin*, 70 Iowa 633.

(11) *When an injunction will be refused.*—The collection of a tax will not be enjoined on the ground of irregularity in the levy when the purpose to levy the tax and have it collected is plainly manifest, and substan-

tially in the manner provided by law. *West v. Whitaker*, 37 Iowa 598.

The collection of a railroad tax cannot be defeated by a change in the location of the road after the tax is voted, when it violates no condition of the vote. *Shonts v. Evans*, 40 Iowa 139.

Where a tax has been voted to aid a railroad, the fact that a narrow gauge road is constructed is not sufficient ground for restraining the collection of the tax. *Meador v. Lowry*, 45 Iowa 684.

Where a township has voted aid to a railroad, and the certificate made by the township clerk to the county auditor does not show all the conditions upon which the tax was voted, as required by the statute, except by reference to a copy of the notice of the election which was attached to the certificate, after the road is built according to the terms of the vote the collection of a tax will not be enjoined because the certificate is not sufficient in itself to show such fact. *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa 728, 25 N. W. Rep. 901.—DISTINGUISHING *Minnesota & I. S. R. Co. v. Hiams*, 53 Iowa 501.

(12) *Recovery of money paid under illegal tax.*—While the provisions of ch. 171, Laws 1868, requiring a registration of voters, are mandatory and imperative, and a tax voted at an election where the voters have not registered is illegal, yet an action will not lie to compel the county treasurer to refund the amount of the tax after it has been collected and paid over to the railroad company. *Butler v. Fayette County Sup'rs*, 46 Iowa 326.—DISTINGUISHING *Lauman v. Des Moines County*, 29 Iowa 310; *Tallant v. Burlington*, 39 Iowa 543; *Isbell v. Crawford County*, 40 Iowa 102; *Dubuque & S. C. R. Co. v. Webster County Sup'rs*, 40 Iowa 16.

Where taxes to aid a railway are voted in two or more townships in a county, in one of which, after a part of the taxes have been collected, the tax is declared illegal, the treasurer is not authorized to refund the taxes illegally collected out of the taxes lawfully collected from the other townships, and a mandamus will lie to compel him to pay the latter over to the company. *Des Moines & M. R. Co. v. Lowry*, 51 Iowa 486, 1 N. W. Rep. 782.

One who has paid to the county treasurer a tax in aid of a railroad, which is after-

wards declared illegal and non-collectible, is not entitled, in an action against the county, to a judgment in the nature of an order requiring the county to direct the treasurer to repay the tax out of the fund remaining in his hands, or to direct the supervisors to issue an order to the treasurer to that effect; but his remedy is by mandamus against the treasurer or supervisor, or both, to compel them to do their duty and return the tax illegally collected. *Eyerly v. Jasper County*, 72 Iowa 149, 33 N. W. Rep. 609.

Where money is paid into the county treasury under the provisions of the law for voting taxes in aid of the construction of railroads, such money in the hands of the treasurer is a trust fund, and the taxpayer and the railroad company are both beneficiaries. *Eyerly v. Jasper County Sup'rs*, 77 Iowa 470, 42 N. W. Rep. 374.

Where taxes voted in aid of the construction of a railroad were paid, and soon thereafter a suit was begun by the payers and others against the railroad company to test the validity of the tax, and it was subsequently decreed to be invalid—held, that while such action was pending the statute of limitations did not run against the action of mandamus to compel the supervisors of the county to order a refunding of the tax so paid. *Eyerly v. Jasper County Sup'rs*, 77 Iowa 470, 42 N. W. Rep. 374.

(13) — or upon forfeiture by company.— A county acquires no beneficial interest in taxes voted in aid of a railroad and paid to the county treasurer, and cannot be held responsible for their repayment when forfeited by the railroad company. *Barnes v. Marshall County*, 56 Iowa 20.

A county is in no way interested in the voting of taxes in its various townships in aid of railroads, and cannot be required to pay any part of the expense thereby incurred. *McBride v. Hardin County*, 7 Am. & Eng. R. Cas. 221, 58 Iowa 219, 12 N. W. Rep. 247.

In an action against a county to recover a portion of railroad aid taxes collected by the treasurer, which was retained by him and passed into the general county fund, the county cannot set up the fact that the companies for which the taxes were levied had sold and conveyed all their property and franchises before the taxes were due and collectible, although such defense might have been a good one for the taxpayers in

resisting the payment of the tax. *Merrill v. Marshall County*, 74 Iowa 24, 36 N. W. Rep. 778.

Nor can the county defeat a recovery in such case on the ground that the taxes have been forfeited by being permitted to remain in the treasury more than two years (Laws of 1876, ch. 123, § 7), where it appears that the roads for which the taxes were voted were built, and the taxes, except the per cent. in controversy, were paid in instalments to the persons entitled thereto, and that there was a continuing demand by them for the portion withheld. *Merrill v. Marshall County*, 74 Iowa 24, 36 N. W. Rep. 778.

Where a railroad aid tax in dispute has been placed in the general county fund, and has been expended in paying the county's ordinary indebtedness, a judgment therefor is properly rendered against the county. *Merrill v. Marshall County*, 74 Iowa 24, 36 N. W. Rep. 778.—DISTINGUISHING *Barnes v. Marshall County*, 56 Iowa 20.

(14) *Penalties for delinquency*.—Though the statute restricts taxation in aid of railroads to five per cent. of the taxable property of a county, still delinquents may be compelled to pay a penalty for a delay in making payment in addition to the five per cent. tax and interest thereon. *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed. Rep. 541. *Tobin v. Hartshorn*, 69 Iowa 648, 29 N. W. Rep. 764.

And a statute repealing a former one which authorizes townships to vote aid to railroads does not repeal the penalties against such delinquent taxpayers which have accrued at the time of the repealing act. *Chicago, M. & St. P. R. Co. v. Hartshorn*, 30 Fed. Rep. 541.

For the failure to pay a tax voted in aid of a railroad under ch. 123, Laws of 1876, the penalties provided by section 866 of the Code were incurred; but, as the statute first named was repealed by ch. 159, Laws of 1884, which took effect April 9, 1884, the penalties then ceased to accrue, although those which had accrued were not affected by the repeal of the statute (Code, § 45, par. 1). And, as the penalty for the month of April, 1884, had accrued when the statute was repealed, and was payable May 1st following, the amount for which the taxpayer was thereafter liable was the sum of the taxes and accrued penalties with interest thereon at six per cent. per annum from

May 1, 1884. *Tobin v. Hartshorn*, 69 Iowa 648, 29 N. W. Rep. 764.

The penalty provided to enforce the payment of a tax in aid of a railroad under ch. 123, Laws of Iowa 1876, was but a remedy, in which the corporation had no vested right except so far as the penalty had already accrued, and it was in the power of the legislature to cut off its further operation as to a tax already voted by repealing the statute. *Tobin v. Hartshorn*, 69 Iowa 648, 29 N. W. Rep. 764.

(15) *Sale of lands for non-payment.*—Plaintiff's land was sold for delinquent state and county taxes at a time when certain taxes voted in aid of a railroad were also delinquent and a lien upon the land. Afterwards the land was again sold for the railroad tax, and after this plaintiff redeemed from the first sale, and brought an action to set aside the second sale as void on account of the first sale, relying upon section 871 of the Code, which provides that a sale for delinquent taxes "shall be made for, and in payment of, the total amount of taxes, interest, and costs due and unpaid on such property." *Held*, that the word "taxes" in said section must be construed to mean state and county taxes only, and not railroad taxes, and that the second sale for the railroad taxes must be sustained. *Crowell v. Merrill*, 60 Iowa 53, 14 N. W. Rep. 81.—REVIEWING *Dennison v. Keokuk*, 45 Iowa 266.

413. Kansas.—The localities along the line of a railroad may be taxed to aid its construction and operation if they choose to take stock therein and issue bonds thereon; and a fair rule of apportionment, of which the taxpayers cannot complain, is to allow the localities to be taxed the privilege of saying how much the benefit of the improvements is worth to them and for what amount they are willing to be taxed. *Leavenworth County Com'rs v. Miller*, 7 Kan. 479, 1 Am. Ry. Rep. 259.—QUOTED IN *Alvis v. Whitney*, 43 Ind. 83; *Chicago, K. & W. R. Co. v. Ozark Tp.*, 46 Kan. 415.

The proviso of Comp. Laws of 1885, § 1, is a limitation of the amount to be subscribed by a township in aid of railroads, whether it extends to one or to several roads. Up to this limit it may be voted to one company or it may be divided among several, but the sum of \$15,000, and five per cent. additional of the assessed value of the property of the township, is all that can be legally voted under any circumstances.

Chicago, K. & W. R. Co. v. Osage County Com'rs, 38 Kan. 597, 16 Pac. Rep. 828.

An invalid attempted incorporation of a city and separation of it from a township will not release its taxable inhabitants from liability on railroad aid bonds which they assisted in voting upon the township, nor from liability on funding bonds issued by the township to cancel and satisfy the bonds originally issued, although the people of the city took no part in the funding operations. *Oswego Tp. v. Anderson*, 44 Kan. 214, 24 Pac. Rep. 486.—FOLLOWING *Brown v. Milliken*, 42 Kan. 769.

A contract between the city officers and the township officers, to which the holders of the bonds were not parties, adjusting the bonded debt between the city and the township, and stipulating that upon payment of a certain sum of money by the city to the township the city will be released from the lien of such bonds, and from taxation to pay the same, is unauthorized and void, and will not prevent a levy of taxes upon the property of the entire territory subject to taxation for the payment of such bonds in accordance with law. *Oswego Tp. v. Anderson*, 44 Kan. 214, 24 Pac. Rep. 486.

The city of Atchison, under section 30 of its charter, had power to subscribe for railroad stock, to issue bonds thereon, and to pay the principal and interest thereon by a tax upon real and personal property within the limits of the city (though the road was without), the object of the power being legitimate—to build up the material interests of the city. The provision for submitting the tax to a vote does not invalidate the law, but the general tax for purposes including that cannot exceed the charter limits of one per cent. of the assessed value of the real and personal property. *Burnes v. Mayer, etc., of Atchison*, 2 Kan. 454.—DISTINGUISHING *Barto v. Himrod*, 8 N. Y. 483. REVIEWING *Bank of Rome v. Rome*, 18 N. Y. 38.

The legislature detached from Sedgwick county a portion of its territory and attached it to the new county of Harvey. It declared that this detached territory should continue liable for a certain proportion of the railroad bonded indebtedness of Sedgwick county, and that the county clerk of Harvey county should annually apportion on the property of this territory the amount of taxes necessary to pay such proportion of the indebtedness. Upon the failure of the

clerk of Harvey county to make this apportionment the board of county commissioners of Sedgwick county are proper parties plaintiff in a proceeding by mandamus against him to compel him to perform such duty. *Sedgwick County Com'rs v. Bailey*, 11 Kan. 631.

414. Kentucky.—(1) *The statutes.*—

If the taxing power exist and a tax be rightfully levied, it is not rendered invalid by a provision in the law for its repayment or partial repayment to the taxpayer by a proportional share of the stock subscribed by the city, by which he, perhaps, may be, in the end at least, partially remunerated for the payment of his tax, or because the benefit might not be equal in its operation. *Talbot v. Dent*, 9 B. Mon. (Ky.) 526.

Under the act of Feb. 24, 1868, amending the charter of the Elizabethtown & Paducah railroad, a county judge alone, without the justices of the county, may levy a tax to pay a judgment on coupons of bonds issued for stock in said road. *Meriwether v. Muhlenburg County Court*, 120 U. S. 354, 7 Sup. Ct. Rep. 563.

The Shelby railroad, chartered in 1852, was partially graded, but, by the exhaustion of funds subscribed by the stockholders entitled to conditional interest on their stock, the work was hopelessly suspended until an amended charter was granted in 1869 at the instance of citizens of that portion of the county in which the road is located. This amendment authorized a subscription of as much as \$300,000 additional stock by the citizens within a defined boundary of the section of the county through which the road runs, and also provided that the original stockholders should not have the conditional interest on their stock, as provided in the original charter. A majority within that boundary voted for a subscription of \$300,000. The county judge, in that event, was directed by the amended charter to subscribe the amount voted for, to be collected by a tax on the taxpayers within the prescribed boundary, to be levied as their revenue taxation is levied. The county judge refused to make the subscription, and appealed from the judgment of the circuit court requiring him to do so on mandamus. *Held*, that so much of the amendment as required the former stockholders to waive interest was constitutional, and that the tax on only a section of the county was constitutional, as the legisla-

ture may create a district for the purpose of taxation or assessment without reference to existing civil or political districts. *Shelby County Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225.

Under Ky. Act of March 15, 1851, incorporating the Shelby railroad company, authorizing a certain county to subscribe for stock therein, and to levy taxes to pay the same, and the subsequent amendments thereto of Feb. 3, 1869, and March 11, 1870, which authorize a part of the county to subscribe, individual taxpayers are entitled to a certificate of stock for the taxes paid, which they may vote as stockholders; but taxes paid merely to discharge interest on the bonds do not entitle the taxpayers to such certificates of stock, though the county, or a part of the county, voting the bonds is entitled itself to vote the amount of the stock represented by the bonds still outstanding. *Hancock v. Louisville & N. R. Co.*, 145 U. S. 409, 12 Sup. Ct. Rep. 969.

(2) *What property is taxable, generally.*—Farming lands in the city of Henderson exempted from taxation by the city council for city purposes are also exempted from taxation for the payment of subscriptions of stock to the Evansville, Henderson & Nashville R. Co. But such exempted farming lands are subject to taxation for school purposes under the provisions of the act of March 15, 1869. The act of Feb. 11, 1867, extending the corporate limits of the city of Henderson, but expressly exempting one hundred and two acres of farming land belonging to L. from city taxation, and the act of March 9, 1867, authorizing taxation for the payment of subscriptions of stock in the Evansville, Henderson & Nashville R. Co., were passed at the same session of the legislature, and in so far as they directly relate to the same subject—i.e., of taxation in the city of Henderson—they must be construed as one entire act; and to make a later provision repeal a former there must be an express declaration of that intention, or an absolute inconsistency between them. *Henderson v. Lambert*, 8 Bush (Ky.) 607.

The Deposit Bank of Eminence, having its place of business in the town of Eminence, which had subscribed stock in the Cumberland & Ohio R. Co. and had issued bonds to pay for it under the charter of said railroad company, authorizing said town to levy and collect a tax upon such taxable property in the town as is listed and taxed

under the revenue laws of the state, is not liable under such charter to be taxed on the amount of its capital stock. *Eminence v. Deposit Bank*, 12 Bush (Ky.) 538.

The bank must be regarded as residing in the town in which it has its place of business, and whatever it owns, such as its banking house and other tangible property in the town, is subject to taxation under the railroad charter, but the capital stock of the bank is a liability for which the bank is a debtor to its stockholders. *Eminence v. Deposit Bank*, 12 Bush (Ky.) 538.

Legislative judgment and discretion control in establishing tax districts and in determining the objects to be taxed to aid in the construction of railroads through such districts. Whether the lands of particular individuals located in the district defined by the legislature receive any direct benefits from the railroad is not a question to be inquired into by the courts. *McFerran v. Alloway*, 14 Bush (Ky.) 580.—REVIEWED IN *Henderson Bridge Co. v. Henderson*, 90 Ky. 498.

Six-mile Island, in the Ohio river, lying within and composing part of Harrod's Creek precinct, in Jefferson county, is subject to be taxed for the payment of the bonds of said precinct issued to aid in the construction of a narrow gauge railroad through said precinct, although the owner of said island may not derive any direct benefit from said railroad. *McFerran v. Alloway*, 14 Bush (Ky.) 580.

(3) *Railroad property, when taxable*.—A railroad cannot to any extent be liable to be taxed by a county to pay the subscription of such county for the purpose of completing the construction of the road. The object of such a county tax would be inconsistent with the obligation of the county to pay a specific sum for stock in the railroad to aid other stockholders to make and equip the road. *Applegate v. Ernst*, 3 Bush (Ky.) 648.—DISTINGUISHED IN *Lincoln County Court v. Louisville & N. R. Co.*, (Ky.) 7 Am. & Eng. R. Cas. 320.—*Louisville & N. R. Co. v. Com.*, 41 Am. & Eng. R. Cas. 595, 89 Ky. 531, 12 S. W. Rep. 1064.

This rule does not fully apply when the road has been purchased by and become the property of a new company to which the county does not sustain the relation of stockholder or joint owner. In such a case whenever the new company has made an

addition or accession to the property purchased, whether consisting in completing an unfinished road or increasing the capacity for business and advantages, and consequently the value of the road already completed, what is thus added or annexed is not exempt, because the county neither contributes to nor has any interest in it. *Louisville & N. R. Co. v. Hopkins County*, 37 Am. & Eng. R. Cas. 400, 87 Ky. 605, 9 S. W. Rep. 497.—CRITICISING *Ray v. Bank of Ky.*, 3 B. Mon. (Ky.) 510. DISTINGUISHING *Applegate v. Ernst*, 3 Bush (Ky.) 648. QUOTING *Clark County Court v. Elizabethtown, L. & B. S. R. Co.*, M. S. opinion; *Underwood v. Brockman*, 4 Dana (Ky.) 309.

After a county had issued bonds in aid of a railroad it procured a special enactment authorizing it to compromise with bondholders, the act further providing for a regular *ad valorem* tax levied annually "according to the assessment lists reported by the assessor." Under the existing law at the time, railroad property was assessed by a board, and not by a local assessor. *Held*, that the act contemplated that the property of the railroad as well as all other property in the county should be assessed and bear its just proportion of the tax. *Elizabethtown, L. & B. S. R. Co. v. Carter County*, (Ky.) 18 S. W. Rep. 370.—FOLLOWING *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605, 9 S. W. Rep. 497.

A company's right to be exempted from a tax to pay a county subscription is not affected by the fact that the road before its completion was leased to another company, which under its contract completed the road. If the lessee had purchased the road and completed it, a different case would be presented. *Louisville & N. R. Co. v. Com.*, 41 Am. & Eng. R. Cas. 595, 89 Ky. 531, 12 S. W. Rep. 1064.

Where the legislature has by consent of all the stockholders merely divided a railroad company into two distinct companies, and the county has, by virtue of the charter of the original company and the subsequent legislation, become a stockholder of one of such companies under a subscription in aid, the equity which the old company had to exemption from taxation to pay the subscription, to it passes to the new company. *Louisville & N. R. Co. v. Com.*, 41 Am. & Eng. R. Cas. 595, 89 Ky. 531, 12 S. W. Rep. 1064.

(4) *Powers of collector, and liability of*

his sureties.—A special tax collector appointed by law to collect a tax to pay county subscriptions to the stock of a road, which appointment empowers him to collect the taxes in the same manner as sheriffs in the collection of ordinary state taxes, has by implication the power to appoint deputies to assist him in such collection. *Prater v. Strother*, (Ky.) 13 S. W. Rep. 252.

A bond was executed by the sheriff of Bourbon county on Jan. 1, 1855 (at the time he qualified as sheriff), for the collection and payment of "the county levy and public dues" of the county for that year. *Held*, that it embraced taxes levied by the county court in October, 1854, to be collected in 1855, to pay the interest on bonds previously issued by the county to the Maysville & Lexington and Covington & Lexington railroad companies. The sheriff, by virtue of his office, had complete legal authority to collect said railroad tax, and his sureties in the bond were liable for his failure to pay over the same. *Taylor v. Nunn*, 2 Metc. (Ky.) 199.

The fact that the county court by a subsequent order made in June, 1855, before any of the railroad tax was collected, appointed the sheriff collector thereof for that year (who thereupon executed bond with security) did not supersede him as collector in the capacity of sheriff, nor annul or revoke the official authority with which he was already invested by law, and which could have been revoked only by the appointment of some other person as collector of the special tax. *Taylor v. Nunn*, 2 Metc. (Ky.) 199.

(5) *Enjoining collection.*—The county court acts ministerially, and not judicially, in making a subscription of stock on behalf of the county; and the circuit court has power to declare such a subscription void when made without authority of law, and to enjoin the collection of a tax to pay it. *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. Rep. 687.—*DISTINGUISHING* *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.

415. Louisiana.—Where a parish tax is levied to pay subscriptions of stock in corporations, the expenses of collecting such tax must be borne by the parish, and not by the corporation. *Boutle v. Bryant*, 10 La. Ann. 659.

An injunction will not issue at the instance of the taxpayers of a municipal cor-

poration to prevent the officers of that corporation from holding an election, under the authority of a legislative act, to enable the citizens of the corporation to vote to levy or not levy a certain tax on themselves. The action is premature; no right of the plaintiffs is as yet invaded, and the danger they seek to shun is too remote and contingent to warrant the issuance of an injunction. *Roudanez v. Mayor, etc., of New Orleans*, 29 La. Ann. 271.—*QUOTING* *Miller v. Grandy*, 13 Mich. 548.

Notwithstanding a private corporation is organized for the double purpose of building a railway and erecting a cotton compress, the former a public improvement and the latter a private enterprise, a special tax voted in its behalf in aid of the construction of the former alone is valid. *MacKenzie v. Woolley*, 39 La. Ann. 944, 3 So. Rep. 128.

A tax of five mills, voted a number of years since, to aid in the construction of a railroad, which afterward allowed the time to lapse within which to commence the work, and has never taken any steps toward complying with the condition of the contemplated contract, will not be considered in determining whether defendants exceeded their power; having a special five-mill tax levied and collected. *Reynolds & H. Constr. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. Rep. 236.

An agreement relieving a corporation from the payment of the five-mill special tax for a consideration is not in contravention of art. 203 of the constitution so long as no injury arises therefrom. The police jury is without authority to question the validity of the special tax on the ground that a corporation has been released by it from its payment. *Reynolds & H. Constr. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. Rep. 236.

416. Michigan.—There is no mode in which aid to a railroad running through many municipalities can be given by the taxation of all, consistently with any recognized theory of taxation, without an apportionment of the burden, by some rule or upon some basis, among them all; and this would be impossible under a system by which one township might tax itself ten per cent. of its valuation, another equally benefited by the same object refuse to pay but one, and the third decline altogether to bear any share of the common burden. *People ex rel. v. State Treasurer*, 23 Mich. 499, 1

Am. Ry. Rep. 96.—DISAPPROVED IN Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666.

417. Mississippi.—The act of March 15, 1872, empowers the auditor to levy the tax when the authorities of the county neglect or refuse so to do, and such neglect or refusal is not on account of any sufficient cause or in consequence of pending and undecided litigation. It does not contemplate a legal controversy with the auditor to determine the validity of the indebtedness of the county, as no provision is made for giving notice to the county, the real party in interest; nor is any mode devised for investigating disputed issues. It implies that litigation must be with the boards of supervisors, for it makes a pending litigation one of the good reasons for the board declining to act. If the liability of the county has been determined by a court of competent jurisdiction, or if the board of supervisors has no valid objection to the debt, but declines to tax merely to shield the county from its burden, then the auditor may be required to make the assessment. *Mugrove v. Vicksburg & N. R. Co.*, 50 Miss. 677.

The act of April 6, 1874, which repealed the above act of March 15, 1872, put an end to proceedings against the auditor to compel the levy of a tax, but did not destroy or impair any vested right to which the company may have been substituted. *Mugrove v. Vicksburg & N. R. Co.*, 50 Miss. 677.

418. Missouri.—(1) *The statutes.*—The extraordinary indebtedness incurred by a county in issuing bonds to pay a railroad subscription is not one of the "expenses of the county" within the meaning of Wagn. St. § 165, p. 1193, and cannot be paid out of the fund raised by taxation under that section. *State ex rel. v. Macon County Court*, 68 Mo. 29.

The fifth section of the act of 1868 to facilitate the construction of railroads (Laws 1868, p. 93) being unconstitutional and void, can furnish no valid authority to a township which has subscribed to a railroad to retain the taxes collected from such railroad, and they are properly paid into the state treasury, and, being so paid, the general assembly cannot refund them to the township. *State ex rel. v. Walker*, 85 Mo. 41.—**APPROVING** Webb v. Lafayette County, 67 Mo. 353.

A county court cannot levy taxes to pay interest on railroad bonds except in conformity to the provisions of Rev. St. § 6799.

State ex rel. v. Missouri Pac. R. Co., 92 Mo. 137, 6 S. W. Rep. 862.

Revised Statutes 1879, § 6790 *et seq.*, requiring an order of the circuit court or judge to authorize the county court to make a tax levy to pay township railroad aid bonds, being unconstitutional as applied to a levy to pay bonds antedating the enactment of said statute, such an order is unnecessary in case of a levy by the county court to pay such prior bonds. *State ex rel. v. Hannibal & St. J. R. Co.*, 113 Mo. 297, 21 S. W. Rep. 14.—**QUOTING** *State ex rel. v. Wabash, St. L. & P. R. Co.*, 97 Mo. 297.

Where in an action to collect such taxes there is nothing in the evidence to show the date of the bonds, the court may presume they were issued prior to the enactment of said section 6790 *et seq.* *State ex rel. v. Hannibal & St. J. R. Co.*, 113 Mo. 297, 21 S. W. Rep. 14.

The charter of a railroad company authorized any city, town, or county to subscribe to the stock of a railroad, and to levy a tax to pay the same, not to exceed one twentieth of one per cent. upon the taxable value thereof in any one year. Subsequently the Mo. Gen. St. of 1866, ch. 63, § 17, was enacted, authorizing such subscriptions upon a two-thirds vote, but contained no limitation as to the amount of taxes that might be imposed. After the passage of this statute, in pursuance of a vote, a county made a subscription. *Held*, that the subscription would be deemed as made under the general statute, and therefore the powers of the county as to the rate of taxation were not limited. *Knox County v. Ninth Nat. Bank*, 147 U. S. 91, 13 Sup. Ct. Rep. 267.

(2) *Validity.*—A tax levied to pay the bonds of a county given in payment of a subscription to railroad stock is a county tax, although the bonds can only be paid out of a tax levied for the special purpose. *State ex rel. v. Hannibal & St. J. R. Co.*, (Mo.) 39 Am. & Eng. R. Cas. 547, 11 S. W. Rep. 746.

The state courts having held the Missouri "Township Aid Act" to be unconstitutional, while the federal circuit court has sustained the constitutionality of the act, bonds issued pursuant to such act are proper subjects of compromise under the act of April 12, 1877, and a tax levied for the payment of bonds issued in terms of a compromise is valid. *State ex rel. v. Hannibal & St. J.*

R. Co., (Mo.) 39 Am. & Eng. R. Cas. 547, 11 S. W. Rep. 746.

When statutes direct proceedings to be done in a certain way or at a certain time, and a strict compliance with these provisions of time and form does not appear to the judicial mind as essential, the proceedings will be held valid, though the command of the statute is disregarded or disobeyed. This rule applied to support a levy of taxes to pay railroad aid bonds made subsequent to the time mentioned in the statute. *State ex rel. v. Hannibal & St. J. R. Co., 113 Mo. 297, 21 S. W. Rep. 14.*—APPROVING *Perry County v. Selma, M. & M. R. Co., 65 Ala. 394.*

Sections 7653 and 7654, of Rev. St. of 1889, requiring levies for special taxes to pay railroad aid bonds to be made only on the order of the circuit court or of the judge in vacation, do not apply to levies to pay bonds issued prior to their enactment. *State ex rel. v. Ewing, 116 Mo. 129, 22 S. W. Rep. 476.*

(3) *Estoppel to deny validity.*—Payment of town taxes for a period of five years by the owners of land not legally liable to such taxation, submission for a like period to the exercise of jurisdiction by the town authorities in other matters, and participation in an election at which a subscription to a railroad company was voted by the town, in payment of which bonds were subsequently issued, are not sufficient in themselves to estop such persons from disputing the legality of such taxation. *Cameron v. Stephenson, 69 Mo. 372.*

(4) *Assessment of railroad property.*—The provision in the act to facilitate the construction of railroads (Sess. Acts 1868, p. 92, § 2) requiring that the taxes for the payment of bonds issued for that purpose shall be based exclusively on real estate is more in the nature of an assessment for benefits than general taxation. The lands are adjudged to be benefited by the improvements and are taxed in proportion to the amount of such benefit, and the whole tax and expense is levied upon them. And the principle applies in its fullest extent to railroads. Section 16, art. 11, of the constitution, against exempting property from taxation, has reference only to ordinary and general taxation for the purposes of revenue, and assessments of taxes under section 2 of the above act are not such taxation as is contemplated by the general terms of the

constitution. *State ex rel. v. Linn County Court, 44 Mo. 504.*—REVIEWED in *Merriweather v. Saline County, 5 Dill. (U. S.) 265; Webb v. Lafayette County, 67 Mo. 353.*

Compromise or funding bonds issued under Rev. St. 1879, p. 849, for bonds originally issued under the Township Aid Act of March 23, 1868, are valid. *State ex rel. v. Hannibal & St. J. R. Co., 41 Am. & Eng. R. Cas. 581, 101 Mo. 136, 13 S. W. Rep. 505.*—FOLLOWING *State v. Holladay, 72 Mo. 499; Dallas County v. Merrill, 77 Mo. 573.*

Taxes levied to pay said township funding bonds are not "county taxes" within the meaning of the charter provisions exempting the Hannibal & St. Joseph railroad from the payment of county taxes. *State ex rel. v. Hannibal & St. J. R. Co., 41 Am. & Eng. R. Cas. 581, 101 Mo. 136, 13 S. W. Rep. 505.* *State ex rel. v. Hannibal & St. J. R. Co., 113 Mo. 297, 21 S. W. Rep. 14.*—FOLLOWING *State ex rel. v. Hannibal & St. J. R. Co., 101 Mo. 149.*

(5) *Payment to company.*—A county court levied a tax for the amount of its subscription to a railroad company, and appointed an agent to receive the money collected, and to pay it over "when ordered by the court." Held, that the railroad company had no specific or other lien on money collected and in the hands of the agent, but not ordered to be paid over. The money could be recalled from the agent at any time before payment to the company. And for refusal to restore the money on call the agent became liable to his principal. *Henry County v. Allen, 50 Mo. 231, 3 Am. Ry. Rep. 146.*

(6) *Enjoining collection.*—In a suit to enjoin the collector from collecting taxes levied to pay the interest on bonds (alleged to be illegal) issued to a railroad, the county court, which issued the bonds and levied the taxes, and the railroad, should be made parties. The state through its proper officers can bring such suits. *State ex rel. v. Sanderson, 54 Mo. 203.*—FOLLOWING *State ex rel. v. Saline County Court, 51 Mo. 350.*

When a county court, acting in obedience to a mandate from a federal court, and in conformity with the laws of the state authorizing the levy of taxes to pay county indebtedness, has levied a tax for the purpose of paying a judgment of the federal court against the county, the courts of the state will not interfere to prevent its collection on the ground that the judgment was

rendered on bonds which are void. The judgment of the federal court will be held conclusive of their validity. *State ex rel. v. Rainey*, 7 Am. & Eng. R. Cas. 183, 74 Mo. 229.

(7) *Recovery of money paid under illegal tax.*—A county subscription to railroad stock made before the company's articles of association are filed with the secretary of state is illegal and void; but where the county court orders the levy of a tax to pay the subscription, and the tax collector is proceeding to collect it, the remedy of a taxpayer is a proceeding to arrest the execution of the subscription, and not an action to recover back the taxes after they are collected. *Ruby v. Shain*, 54 Mo. 207.—FOLLOWED IN *Ranney v. Bader*, 67 Mo. 476.

(8) *Liability of county commissioners.*—A county commissioner who is charged with the ministerial duty under the statutes of levying a tax to pay interest on municipal bonds issued in aid of a railroad is liable to be sued in another state by a holder of such bonds who has been injured by reason of the commissioner's failing to levy such tax. *St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 2 S. W. Rep. 431.—APPROVING *Dennick v. Central R. Co.*, 103 U. S. 18. DISTINGUISHING *Vawter v. Missouri Pac. R. Co.*, 84 Mo. 679.

The fact that the holder of such bonds has obtained a judgment in the U. S. court for the amount of interest due thereon and a mandamus to compel the levy of a tax to pay the same, but which the commissioner has failed to obey, will not bar an action against the commissioner in another state for damages for the failure to perform his duties. *St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 2 S. W. Rep. 431.

419. Nebraska.—County commissioners, after the exhaustion of the levy in the years 1876 and 1877, allowed claims against the county to the amount of \$22,000, and issued certificates of indebtedness therefor, and levied a sinking fund tax of five mills on the dollar valuation for their payment. *Held*, that the tax was illegal and void, under Gen. St. ch. 13, § 24, providing that "it shall not be lawful for any warrants to be issued for any amount exceeding * * * the amount levied * * * for the current year." *Union Pac. R. Co. v. Buffalo County Com'rs*, 9 Neb. 449, 4 N. W. Rep. 53.—FOLLOWED IN *Union Pac. R. Co. v. York County*, 10 Neb. 612; *Burlington & M. R. R.*

Co. v. Clay County, 13 Neb. 367.—*Burlington & M. R. R. Co. v. Clay County*, 13 Neb. 367, 13 N. W. Rep. 628.—DISTINGUISHED IN *State ex rel. v. Lincoln County Com'rs*, 18 Neb. 283.

In an action to enjoin certain taxes levied to pay interest on bonds issued to a railroad company and to raise a sinking fund under the act of 1875, an injunction was denied as to the interest, but granted until the further order of the court as to the sinking fund, as the court desired to hear further argument on the question of a limitation of the taxing power under the state constitution. *Burlington & M. R. R. Co. v. Saunders County*, 16 Neb. 123, 19 N. W. Rep. 698.

Where bonds are issued by a county in favor of works of internal improvement, they become a charge against the county, the principal and interest to be paid by a levy upon the property therein whether such property was in the county when the bonds were voted or was afterwards brought in. And where additional territory has been added to a county after the voting of such bonds, the taxable property in such additional territory is liable, like other property in the county, to taxation for the payment of said obligations. *Chicago, St. P., M. & O. R. Co. v. Cuming County*, 31 Neb. 374, 47 N. W. Rep. 1121.

420. Nevada.—Under the act authorizing the issuance of the bonds of Ormsby county in aid of the Virginia & Truckee railroad company (St. 1869, 43), the county commissioners of that county before the issuance of the bonds levied a tax for the purpose of meeting interest. *Held*, that the levy was not premature, any more than a levy would be for any other anticipated liability. *Gibson v. Mason*, 5 Nev. 283.

421. New York.—(1) *Validity and operation of the statutes, generally.*—The provisions of N. Y. Act of 1869, ch. 907, providing generally for bonding towns in aid of railroads, and providing specially in section 4 for the application of taxes assessed in any town, city, or village toward the redemption of the bonds issued, are applicable to any municipality having outstanding bonds, and are not limited to railroads constructed under the statute. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923.

The provisions of section 4 are not in conflict with any provision of the state consti-

tution. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923. *In re Tax-Payers of Kingston*, 40 How. Pr. (N. Y.) 444.—DISTINGUISHING *Whiting v. Sheboygan & F. du L. R. Co.*, 25 Wis. 167; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 316.

N. Y. Act of 1859, ch. 907, as amended in 1870 and 1871, specially providing that all railroad taxes collected in the municipality shall be paid to the county treasurer to be applied in payment of bonds issued, is not repealed by the act of 1880, ch. 286, as amended in 1881, chs. 13, 197, authorizing towns to issue bonds to take up outstanding obligations which might be in dispute, and providing for a tax necessary to pay the same. Both statutes are in force, the former merely requiring an application of the railroad tax to the discharge of such bonds, and the latter requiring an application of taxes levied only to such bonds as fall due during the ensuing year. *Ackerson v. Niagara County Sup'rs*, 18 N. Y. Supp. 219; *affirmed in 72 Hun* 616, 55 N. Y. S. R. 277, 25 N. Y. Supp. 196.

Under the provision of the Railroad Act, as amended in 1871 (section 1, ch. 283, Laws of 1871), which provides that taxes "collected for the next thirty years," on the assessed valuation of any railroad in any town, village, or city which "has issued or shall issue bonds to aid in the construction of said railroad" shall be paid over to the county treasurer to be applied to purchase said bonds for cancellation or to be invested as a sinking fund for the redemption and payment of the bonds, a municipality which has issued such bonds is not entitled to any portion of taxes paid by the railroad company after the bonds have matured and been paid in full by the municipality, although within the thirty years. *People ex rel. v. Cayuga County Sup'rs*, 136 N. Y. 281, 32 N. E. Rep. 854, 49 N. Y. S. R. 340; *reversing 45 N. Y. S. R. 89, 18 N. Y. Supp. 808*.

The meaning of the provision is that the taxes shall be paid as directed during the period of the running of the bonds to maturity, and the purpose was to aid municipalities only during a period not exceeding thirty years when the bonds were outstanding and by the terms of the act not payable. The same purpose is to be attributed to the act when applying its provisions to bonds issued under special acts and payable with-

in thirty years. *People ex rel. v. Cayuga County Sup'rs*, 136 N. Y. 281, 32 N. E. Rep. 854, 49 N. Y. S. R. 340; *reversing 45 N. Y. S. R. 89, 18 N. Y. Supp. 808*.

The fact that a municipality neglected to enforce the right given to it by the act for more than six years after the last taxes were collected to the application of which it was entitled, furnishes no ground for the application of the principle of subrogation. *People ex rel. v. Cayuga County Sup'rs*, 136 N. Y. 281, 32 N. E. Rep. 854, 49 N. Y. S. R. 340; *reversing 45 N. Y. S. R. 89, 18 N. Y. Supp. 808*.

Under the provisions of the act of 1874 (ch. 296, Laws of 1874), subjecting the property of the N. Y. & O. M. R. Co. to taxation, which provide that county taxes collected upon property of said company used or held by it in any of the towns or municipalities which have issued bonds in aid of the construction of the company's road, shall be appropriated to and paid over to them respectively, to be applied in payment of said bonds, "a village which has issued such bonds is entitled to the county taxes assessed and collected upon the property of the company within the municipality, although no tax for county purposes is levied upon the village as distinct from the town of which it is a part, and it has no separate relation to the county treasurer in the payment of county taxes." *Oneida v. Madison County Sup'rs*, 136 N. Y. 269, 32 N. E. Rep. 852, 49 N. Y. S. R. 344.

The purpose of the act is to give any municipality that has issued such bonds the benefit of the taxes arising upon property of the company within it. *Oneida v. Madison County Sup'rs*, 136 N. Y. 269, 32 N. E. Rep. 852, 49 N. Y. S. R. 344.

Where county taxes collected upon property of a railroad company in a village have been paid over to the county treasurer and by him paid out for general county purposes, an action is properly brought by the village against the board of supervisors of the county to recover the sums so paid. In such action the county is not entitled to question the validity of the village bonds. *Oneida v. Madison County Sup'rs*, 136 N. Y. 269, 32 N. E. Rep. 852, 49 N. Y. S. R. 344. See also *Woods v. Madison County Sup'rs*, 136 N. Y. 403, 32 N. E. Rep. 1011, 49 N. Y. S. R. 685.

(2) *Powers and duties of the collector*.—The act of 1866, ch. 398, relating to the con-

struction of the New York & Oswego Midland railroad, § 4, which provides for the payment of any taxes collected from railroads to railroad commissioners of any town which has issued bonds in aid of the railroad, is an amendment or qualification of 1 Rev. St. 396, § 37, which prescribes a form for tax collector's warrants, and the warrant should direct the collector to pay the money directly to the railroad commissioners instead of to the town supervisor. *People ex rel. v. Brown*, 55 N. Y. 180.

A tax collector cannot question the validity of the proceedings by which the town issued its bonds to the railroad, nor dispute the right of the railroad commissioners to such taxes. *People ex rel. v. Brown*, 55 N. Y. 180.

(3) *Investment of tax moneys—Sinking fund.*—Under the act of 1869, ch. 907, § 4, as amended in 1871, providing that all railroad taxes shall constitute a sinking fund for the payment of any bonds which a town may have issued in aid of a railroad, the taxes must be applied to the sinking fund although the name of the company has been changed. *Van Tassell v. Derrenbacher*, 56 Hun 477, 31 N. Y. S. R. 312, 10 N. Y. Supp. 145; affirmed in 123 N. Y. 661, mem., 26 N. E. Rep. 750, mem.

And the provisions of the above statute relating to the sinking fund, and to the security that shall be given, have not been superseded by the amendment of 1870, ch. 762. *Van Tassell v. Derrenbacher*, 56 Hun 477, 31 N. Y. S. R. 312, 10 N. Y. Supp. 145; affirmed in 123 N. Y. 661, mem., 26 N. E. Rep. 750, mem.

And the sinking fund provided for in the above statute includes the payment of bonds issued by a town in renewal of other bonds formerly issued. *Van Tassell v. Derrenbacher*, 56 Hun 477, 31 N. Y. S. R. 312, 10 N. Y. Supp. 145; affirmed in 123 N. Y. 661, mem., 26 N. E. Rep. 750, mem. *Barnum v. Sullivan County Sup'rs*, 137 N. Y. 179, 33 N. E. Rep. 162, 50 N. Y. S. R. 381; affirming 62 Hun 190, 41 N. Y. S. R. 845, 16 N. Y. Supp. 513.—FOLLOWING *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170.

Where a taxpayer makes application to compel a county treasurer to execute the provisions of the statute relating to paying over the railroad tax, and it appears that the taxes imposed upon railroads in the town for the year, after deducting school and road taxes, are much more than the sum specified

in the petition as the amount of such taxes paid to the county treasurer, it is no defense that the petitioner has not prayed for a sufficient amount. The treasurer cannot complain of this, or of an order requiring him to set aside a less sum than the statute requires. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923.

Nor is it any answer on the part of the county treasurer in such proceeding, that if he sets aside the taxes as required by the statute there will be a deficiency in other funds. The law having appropriated such taxes for a specific purpose, it is his duty so to apply them. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923.

And it makes no difference as to the duty of the county treasurer that such taxes were not expressly collected and paid over to him for the purpose of liquidating such bonds. *Clark v. Sheldon*, 106 N. Y. 104, 12 N. E. Rep. 341, 8 N. Y. S. R. 537, 7 Cent. Rep. 923.

A town, by bonding itself in accordance with the statute and causing a railroad to be built, creates a new and additional property, which becomes the subject of taxation; the remainder of the county is, for the time being, deprived of the benefit to be derived from the taxation thereof, so that the town may reap the benefits by having the taxes applied in satisfaction of its bonded indebtedness, and thus the sinking fund provided for by the statutes (ch. 907, Laws of 1869, as amended) is, up to the time the bonds become due and payable, a fund which the town has an absolute right to have applied in payment of its bonds. *Crowninshield v. Cayuga County Sup'rs*, 124 N. Y. 583, 27 N. E. Rep. 242, 37 N. Y. S. R. 96.

The act of 1874, ch. 296, repealed a former statute which exempted the New York & Oswego Midland railroad from taxation, and provided that all moneys collected from the road for county taxes should be appropriated to the towns which had issued bonds in aid of the road, and should be paid over to the railroad commissioners; but it did not repeal the provision of the act of 1869, ch. 907, which required all railroad taxes collected in any municipality which had granted aid to the road to be paid over to the county treasurer, and constitute a sinking fund for the payment of the municipal bonds issued. Under the latter act a town has a right to have both state and county

taxes from railroad property applied to such sinking fund. *Kilbourne v. Sullivan County Sup'rs*, 41 N. Y. S. R. 838, 62 Hun 210, 16 N. Y. Supp. 507; affirmed in 137 N. Y. 170, 33 N. E. Rep. 159, 50 N. Y. S. R. 376.

Where a county treasurer fails to pay over such moneys for the benefit of the sinking fund, a cause of action arises whenever he has misappropriated the funds, and the statute of limitations begins to run from that time; but there cannot be said to be a misappropriation so long as he has in his hands moneys raised during the current year, from which he might pay the required amount. *Kilbourne v. Sullivan County Sup'rs*, 41 N. Y. S. R. 838, 62 Hun 210, 16 N. Y. Supp. 507; affirmed in 137 N. Y. 170, 33 N. E. Rep. 159, 50 N. Y. S. R. 376.

And where the action is to compel the proper authorities to levy and collect a sum equal to that which has been misappropriated by the treasurer, the action is an equitable one, and may include moneys misappropriated both before and after the action was commenced. *Kilbourne v. Sullivan County Sup'rs*, 41 N. Y. S. R. 838, 62 Hun 210, 16 N. Y. Supp. 507; affirmed in 137 N. Y. 170, 33 N. E. Rep. 159, 50 N. Y. S. R. 376.

Where the supervisors of a county levy a tax to pay the interest on bonds which a city has issued in aid of the construction of a railroad, pursuant to the act of 1866, ch. 433, the money must be paid to the railroad commissioners. *People ex rel. v. Stupp*, 18 N. Y. S. R. 500, 49 Hun 544, 2 N. Y. Supp. 537.

Under the act of 1869, ch. 907, as amended in 1871, ch. 283, a county treasurer receives such taxes in trust, and cannot plead the statute of limitations when sued therefor; but where the county has applied the taxes to general purposes and is sued therefor, it may plead the six-year statute of limitations, which commences to run from the time the money is appropriated; and the case does not come within the provision of the statute that the limitation, in cases of fraud, shall only begin to run from the time that the fraud is discovered. *Wood v. Monroe County Sup'rs*, 50 Hun 1, 18 N. Y. S. R. 671, 2 N. Y. Supp. 369.

(4) *Purchase of bonds with tax money.*—Where a county appropriates to its own use taxes which have been collected from a railroad, instead of investing them in a sinking fund, or in the purchase of bonds which have been issued in aid of the road, as re-

quired by N. Y. Act of 1869, ch. 907, as amended in 1871, the town may pursue either a common law or an equitable remedy to recover the same; and it is not bound to proceed by petition before the county judge, as provided by the latter act. *Wood v. Monroe County Sup'rs*, 50 Hun 1, 18 N. Y. S. R. 671, 2 N. Y. Supp. 369.

And where a county converts taxes which should have been used in the purchase of such bonds, or invested in the sinking fund, an action against it may be brought in the name of the town supervisor, instead of in the name of the town. *Wood v. Monroe County Sup'rs*, 50 Hun 1, 18 N. Y. S. R. 671, 2 N. Y. Supp. 369.

And his complaint need not explicitly aver that "all" the taxes collected had been paid over to the treasurer. *Hand v. Columbia County Sup'rs*, 31 Hun (N. Y.) 531.

(5) *Remedies for diversion of tax money.*—Under the Railroad Act of 1869, ch. 907, § 4, as amended by ch. 283 of 1871, making it the duty of the county treasurer to purchase with such taxes the bonds of the town or to otherwise invest the same and hold the investment as a sinking fund for the redemption of said bonds, a county treasurer in his relation to these taxes is not the agent of the county or the town, but holds them as a trust fund, for the purpose expressed in the act, and any action that diverts it from that purpose is illegal. *Clark v. Shadon*, 134 N. Y. 333, 32 N. E. Rep. 23, 46 N. Y. S. R. 279; affirming 10 N. Y. Supp. 357.

State and county taxes which a town collects from a railroad, and which should have gone into a sinking fund to pay the town bonds, under the statute, but which are diverted to other purposes by the county supervisors, may be recovered back in a suit by the town supervisors. *Wood v. Monroe County Sup'rs*, 9 N. Y. Supp. 699, 56 Hun 643, mem., 30 N. Y. S. R. 706; affirmed in 124 N. Y. 676, mem., 27 N. E. Rep. 855, mem.—FOLLOWING *Strough v. Jefferson County Sup'rs*, 119 N. Y. 212, 23 N. E. Rep. 552.—CROWNINSHIELD *v. Cayuga County Sup'rs*, 124 N. Y. 583, 27 N. E. Rep. 242, 37 N. Y. S. R. 96.—DISTINGUISHING *Spaulding v. Arnold*, 34 N. Y. S. R. 980, 125 N. Y. 194.—FOLLOWED IN *Wood v. Monroe County Sup'rs*, 124 N. Y. 676.

A county is not entitled to have the stock of the railroad company received by the town in exchange for its bonds sold and the proceeds applied in payment of said

bonds; the town has the absolute right to have the sinking fund provided for by law applied in payment of the bonds without regard to the stock. *Crowninshield v. Cayuga County Sup'rs*, 124 N. Y. 583, 27 N. E. Rep. 242, 37 N. Y. S. R. 96.

In such a case the town has an equitable cause of action against the board of supervisors of the county to compel the levying and collection of a tax upon the taxable property of the county for the amount so misappropriated, to be paid to the treasurer and used as required by the act. *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170, 33 N. E. Rep. 159.

The fact that the municipality has presented its claim to the board and demanded the levying and collection of the tax, and that the demand has been refused, does not confine the remedy of the claimant to a certiorari to review the action of the board, or a mandamus to compel a compliance with the demand. *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170, 33 N. E. Rep. 159.

The exception of school taxes from the requirement of said act does not include that part of the state taxes collected from the railroad company which is to be paid to the state treasurer for school purposes. The school taxes excepted are those collected in the municipality for local school purposes. *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170, 33 N. E. Rep. 159.

Such a cause of action arises when the county treasurer appropriates the money to the payment of county obligations, and where the statute of limitations is pleaded as a bar, the burden is upon defendant to show that the money was so misappropriated more than six years before the commencement of the action. Where, therefore, an action was commenced December 24, 1888, to recover for a tax of 1881 which, it appeared, was paid to the county treasurer early in 1882, but there was no evidence to show when the county treasurer misappropriated it—*held*, that the defense of the statute was not sustained. *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170, 33 N. E. Rep. 159.

Plaintiff's recovery included the tax of 1887; this was paid to the county treasurer before, but was not misappropriated until shortly after, the commencement of the action. *Held*, that, as the action was an equitable one, said tax was properly included.

Kilbourne v. Sullivan County Sup'rs, 137 N. Y. 170, 33 N. E. Rep. 159.

This action was brought to recover the state taxes collected in the town of Liberty assessed upon the property of the N. Y. & O. M. R. Co. and its successor in that town, which, prior to 1874, was exempt from taxation. A previous action was brought, based upon the act of 1874, ch. 296, which removed the exemption, made the property of the company liable to taxation, and required the county taxes collected from its property, in a municipality which had issued its bonds to aid in the construction of its road, to be paid over to the railroad commissioners. The recovery in that action was limited to the county taxes (92 N. Y. 570). *Held*, that the former judgment was not a bar to a recovery herein. *Kilbourne v. Sullivan County Sup'rs*, 137 N. Y. 170, 33 N. E. Rep. 159.—REVIEWING *Woods v. Madison County Sup'rs*, 136 N. Y. 403.

Where a town sues a county and its treasurer for failing to apply railroad taxes to the purchase of bonds, or place them in a sinking fund, as required by the statute, it is no defense that such taxes went to defray township expenses, and that the county treasurer in fact never received them. *Ackerson v. Niagara County Sup'rs*, 25 N. Y. Supp. 196, 77 Hun 616, 55 N. Y. S. R. 277; affirming 18 N. Y. Supp. 219.

(6) *Action by taxpayer to restrain payment to company.*—Where the court of appeals declares town bonds issued in aid of a railroad void, a taxpayer of the town may restrain the collection of a tax which the board of supervisors has directed to pay interest on the bonds, and to prevent the collector from paying over any moneys in his hands, arising from such tax, to the railroad commissioners. *Newton v. Keech*, 9 Hun (N. Y.) 355.—DISTINGUISHING *Kilbourne v. St. John*, 59 N. Y. 21. FOLLOWING *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 30; *Ayres v. Lawrence*, 63 Barb. (N. Y.) 454.

(7) *Other remedies of taxpayer or town.*—Where a statute creates a right, and no mode is specified for its enforcement, it is enforceable by any remedy then known to the law. So under the act of 1869 providing that railroad taxes collected in a town that has given aid to the road shall be invested in a sinking fund, or be used in the purchase of such bonds, the town has a right to such

taxes, but, as the statute prescribes no mode for its enforcement, a town may bring an action against the board of supervisors of the county for failing to pay over such taxes. *Vinton v. Cattaraugus County Sup'rs*, 18 N. Y. S. R. 435, 2 N. Y. Supp. 367.

And the remedy by petition provided for in the amendatory acts of 1870, ch. 789, and of 1871, ch. 283, are but cumulative, and an aggrieved town has its election to proceed either by action or by petition. *Vinton v. Cattaraugus County Sup'rs*, 18 N. Y. S. R. 435, 2 N. Y. Supp. 367.

A taxpayer of a town cannot maintain an action against railroad commissioners of the town to restrain them from paying out moneys in their hands, paid to them by the collector by direction of his warrant to pay interest on bonds claimed to have been issued on behalf of the town, to aid in the construction of a railroad, but which were alleged in the complaint to have been illegally issued, and void. *Kilbourne v. St. John*, 59 N. Y. 21.—DISTINGUISHED IN *Newton v. Keech*, 9 Hun (N. Y.) 355.

In an action by a taxpayer to restrain the collection of a tax for the payment of certain bonds issued by some of the defendants as commissioners of a town to pay for railroad stock, a preliminary order of injunction was vacated on the grounds that the plaintiff himself had taken part in the issue of the bonds, that it did not appear that the town desired to contest them, and that the bondholders had no opportunity to be heard. *Held*, that, even if there was any supposable case where this court would review the discretion of the court below in refusing or vacating a temporary order of injunction, this was not one. *Young v. Campbell*, 75 N. Y. 525.

In proceedings under the General Railroad Act, as amended in 1869 and 1871 (§ 4, ch. 907, Laws of 1869; ch. 283, Laws of 1871), by a taxpayer of a municipality, which had issued its bonds in aid of the construction of a railroad, to compel the county treasurer to comply with the provisions of said act requiring him to invest and hold as a sinking fund, for the payment of said bonds, the taxes collected on the assessed valuation of the railroad in the municipality and paid over to said county treasurer, it appeared that during the years in question there was an account on the said treasurer's books called a general fund, in which was carried

items of money not otherwise especially appropriated, and that there was in said fund at all times since the taxes in question had been collected a greater sum than the total amount of said taxes. It did not appear that any portion of the moneys so collected and paid over had ever been paid out. *Held*, that it was not necessary that the particular moneys paid by the railroad company should be identified; that the presumption was they still remained in the hands of the county treasurer and were part of the general fund; and that an order requiring their investment, as prescribed by the statute, was proper. *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. Rep. 295; *affirming* 6 N. Y. Supp. 336.—DISTINGUISHED IN *Crowninshield v. Cayuga County Sup'rs*, 124 N. Y. 583.

As there was a continuing duty in the county treasurer to make the application required, the statute of limitations did not apply. *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. Rep. 295; *affirming* 6 N. Y. Supp. 336.—DISTINGUISHING *Strough v. Jefferson County Sup'rs*, 119 N. Y. 2.

It is not material that the county treasurer defendant did not receive all the moneys directly from the railroad company, but that a portion thereof was received by his predecessors in office, the same having been paid over to and being now held by him as treasurer. *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. Rep. 295; *affirming* 6 N. Y. Supp. 336.

It seems that, as the taxes so collected are specifically appropriated, the question is not affected by the fact that the objects in each year for which the taxes of the year were raised did not include the creation of a sinking fund. *Spaulding v. Arnold*, 125 N. Y. 194, 26 N. E. Rep. 295; *affirming* 6 N. Y. Supp. 336.

A bondholder sued a town on bonds which it had issued in aid of a railroad in the United States circuit court, and recovered judgment, which was affirmed in the supreme court of the United States. The county board of supervisors proceeded to levy a tax to pay the judgment, but a taxpayer applied for an injunction. *Held*, that the judgment was conclusive, and that the taxpayer could not contest the levy of the tax; that the act of 1881, ch. 531, was only intended to prevent fraudulent recoveries of judgments by default or by collu-

sion, and had no application to the case. *Lee v. Jefferson County Sup'rs*, 62 *How. Pr. (N. Y.)* 201.

422. North Carolina.—When, by the act authorizing a county to subscribe for stock in a railroad, it is provided that such county may "levy such taxes annually as may be sufficient to pay the amount of such loan and interest thereon," the board of commissioners of the county have the power to lay a tax of \$2 on every \$100 of property. *Street v. Craven County Com'rs*, 70 *N. Car.* 644.

A county, prior to the adoption of the present constitution, contracted a debt for which it issued bonds, and since that constitution went into effect the board of commissioners issued other bonds in exchange for the first, under an act of the general assembly which provided that such "bonds shall be deemed and held to be a continuation of the liability created by the county" for the original bonds. *Held*, that all the securities and remedies which attached to the bonds first issued entered into and became a part of the new obligation, and that the limitations upon the rate of taxation contained in the constitution of 1868 did not apply to them. *Blanton v. McDowell County Com'rs*, 101 *N. Car.* 532, 8 *S. E. Rep.* 162.

423. Ohio.—Taxation can only be authorized for public purposes. Where, therefore, a statute authorizes a city, township, or municipality to levy taxes not above a given per cent. on the taxable property of the locality for the purpose of building so much of a railroad as can be built for that amount, and the part of a railroad so to be built can be of no public utility unless used to accomplish an unconstitutional purpose, such tax is illegal and cannot be imposed. *Taylor v. Ross County Com'rs*, 23 *Ohio St.* 22.

Taxes levied by the city of Cincinnati for payment of interest on Southern railroad bonds issued by the city are included in the aggregate of sixteen mills on the dollar to which cities of her class are limited by section 648 of the municipal code, as amended May 2, 1871 (vol. 68, p. 135), and a levy by the city in any one year of an aggregate amount greater than sixteen mills on the dollar, including such tax for interest, and excluding state, county, school, and school-house taxes, is unauthorized by law. *State v. Humphreys*, 25 *Ohio St.* 520.

The act of April 10, 1880, "to authorize certain townships to build railroads and to lease and operate the same" (77 *Ohio L.* 165), being unconstitutional, a taxpayer may maintain an action (Rev. St. §§ 5848-5851) to restrain the collection of a tax levied for the payment of bonds issued under the act, and the fact that the bonds were issued and the money arising from the sale thereof was expended by the trustees, with the knowledge of the plaintiff, in the construction of a railroad in the township, which enhanced the value of the property therein, including that of the plaintiff, and was otherwise useful to the citizens of the township generally, and that the plaintiff did not commence an action to restrain the issue or negotiation of the bonds or prosecution of the work, is not sufficient to estop the plaintiff from maintaining such action to restrain the enforcement of such tax. *Counterman v. Dublin Tp.*, 38 *Ohio St.* 515.

424. Pennsylvania.—A municipal corporation, under a power to make such by-laws as shall be necessary "to promote peace, good order, benefit and advantage of the borough," and to assess such taxes as shall be necessary for carrying the same into effect, is not authorized to levy a tax for the payment of part of the expense of a railroad company in bringing its road nearer to the town than originally located. *McDermond v. Kennedy, Bright, N. P. (Pa.)* 332.

Bonds bearing on their face the unqualified promise of the county to pay the principal and interest, and the object and intention being clearly to make them negotiable in the market, it follows that "the authority to create the debt implies an obligation to pay it, and where no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way, by the levy and collection of taxes." *Com. ex rel. v. Perkins*, 43 *Pa. St.* 400.

The act of 1843 authorizing subscriptions by Allegheny county, among others, to the stock of Pittsburgh & Cornellville R. Co., and the act of April 8, 1853, giving authority to borrow money to pay subscriptions, and to make provisions for the payment of the principal and interest of the money so borrowed, as in other cases of loans of said counties, repeal the proviso of 1834 limiting assessments, so far as it conflicts with their provisions, and empower the commissioners to levy taxes sufficient

to meet the obligation incurred under said authority. *Com. ex rel. v. Allegheny County Com'rs*, 40 Pa. St. 348.—FOLLOWING *Amey v. Mayor*, etc., of Allegheny, 24 How. (U. S.) 364.

425. South Carolina.—A tax voted by the people of a township to aid in the construction of a railroad is not a state, county, or municipal tax, and therefore a manufacturing company paying such tax is not entitled to have it refunded under the act of 1873 directing manufacturing companies to be repaid the amount of their state, county, and municipal taxes. *Carolina, C. G. & C. R. Co. v. Tribble*, 25 So. Car. 260.

If the manufacturing company were entitled to such repayment, it could not be made out of the money raised to pay the railroad subscription, for by the terms of the act authorizing this subscription the moneys so raised were to be paid over to the railroad company. *Carolina, C. G. & C. R. Co. v. Tribble*, 25 So. Car. 260.

A county treasurer, by public advertisement, called for the payment of a railroad subscription tax, and threatened to enforce its collection by levy and sale. Under this call a taxpayer paid under protest the amount demanded of him, and then brought action for its recovery under the provisions of "an act to facilitate the collection of taxes" (16 St. 785). At the trial the county treasurer testified that he had been forbidden by the comptroller-general to enter these railroad subscription assessments upon the tax duplicate, and that he collected only as agent for the railroad company. *Held*, that the presiding judge erred in granting a nonsuit. *Cade v. Perrin*, 14 So. Car. 1.

426. Tennessee.—The act of 1851-52, ch. 117, § 5, making it the duty of the county court, when stock is taken in a railroad company, to provide for its payment by levying a tax upon the taxable property, privileges, and persons by law liable to taxation within the county, which tax shall be levied and paid upon the principle of levying the state and county tax, is only intended to restrict the county court in levying this tax to the principle that all property should be taxed according to value; but it does not limit the court in taxing privileges to the amount and mode of taxation for state and county purposes. *Byrd v. Kilston*, 3 Head (Tenn.) 477.

The constitution, art. 2, § 29, provides that the legislature shall have power to authorize counties and incorporated towns to impose taxes for "county and corporation purposes." This clause authorizes the imposition of taxes by an incorporated town, under legislative authority, for the execution of regulations for the support of good order, for the opening and preservation of highways, streets, and alleys, the erection of market houses and hospitals, supplying the town with water, etc. It also authorizes the imposition of taxes for the construction of canals and roads, and for the improvement of rivers, provided such improvements begin at or near, or pass by, such incorporated town so as to increase its commercial facilities. *Nichol v. Mayor, etc., of Nashville*, 9 Humph. (Tenn.) 252.—APPROVING *Bridgeport v. Housatonic R. Co.*, 15 Conn. 475.

The legislature in saying that tax receipts or certificates issued to the taxpayer under the act authorizing county subscriptions "may be traded, assigned, or transferred, and shall be receivable in payment of either freight or passage on any road on which such subscription may have been expended," intended to make these receipts a kind of local currency, and this object was accomplished by making them transferable or assignable either by written indorsement or by mere delivery. *Mobile & O. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125, 1 Am. Ry. Rep. 107.—EXPLAINED IN *State ex rel. v. Nashville, C. & St. L. R. Co.*, 7 Lea (Tenn.) 15.

The receipts, though dated 1854, and not demanded to be received until after completion of the railroad, and the date of the completion not appearing, the court cannot assume that the petitioner has delayed unreasonably long the assertion of his rights. *Mobile & O. R. Co. v. Wisdom*, 5 Heisk. (Tenn.) 125, 1 Am. Ry. Rep. 107.

Where a county has made an unauthorized subscription of stock to a railroad company, any taxpayer of the county as such has such an interest in the contract as enables him to file a bill to have the subscription declared void, and to restrain the issuance of bonds with which to pay it, and the assessment and collection of taxes to pay the principal and interest on the bonds, and this without being a stockholder in the railroad company. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

A county or corporation as such, so far as it uses the funds or means gathered from the taxpayers, is a trustee to a certain extent, at least in using these funds, or collecting them for purposes authorized by law; and, having only authority so to use them or collect them for such use, such trustee will not be allowed to misapply such funds to an unauthorized purpose, nor to create an unauthorized liability upon the corporation or taxpayers. *Winston v. Tennessee & P. R. Co.*, 1 Baxt. (Tenn.) 60.

427. Texas.—In a suit by injunction to restrain the collection of a tax imposed by the police court of Colorado county, November 26, 1867, on the people and property holders of the town of Columbus, to pay for the redemption of the bonds of the town of Columbus, to the amount of \$12,000, issued and negotiated by the town, under the authority and direction of the police court of Colorado county, to aid in the construction of a railroad bridge over the Colorado river at Columbus—*held*, that such tax could be collected. *Harcourt v. Good*, 39 Tex. 455. —**APPROVING** *People ex rel. v. Salem Tp.*, 20 Mich. 452.

Such tax may be enforced even though the election was held only in the town of Columbus, was ordered by the police court, and held under ordinance 10, passed by the convention of 1866 under the general election laws at the time. *Harcourt v. Good*, 39 Tex. 455.

Texas Act of March 10, 1875, was intended to relieve the International railroad from taxation for the time specified except as to county taxes in such counties as had voted bonds in aid of the railroad, and a county which had donated no bonds to the road could not tax the road even after it was consolidated and became part of a system under another name. *International & G. N. R. Co. v. Anderson County*, 59 Tex. 654. —**FOLLOWED IN** *International & G. N. R. Co. v. Smith County*, 65 Tex. 21. **QUOTED IN** *Campbell v. Wiggins*, 2 Tex. Civ. App. 1.

428. Wisconsin.—An act of the legislature which is an unlimited grant of power to the common council of a city to levy and collect special taxes, or borrow money on the credit of the city, for any purpose whatever which may be considered essential to promote the common interest of the city, is in conflict with Const. art. 11, § 3, which provides that it shall be the duty of the legislature to restrict the power of cities as

to "taxation, assessment, borrowing money, contracting debts, and loaning their credit," and a subscription made by the city in aid of a railroad under such statute is unauthorized, and the collection of a tax to pay the same should be restrained. *Foster v. Kenosha*, 12 Wis. 616. —**DISAPPROVED IN** *Kenosha v. Lamson*, 9 Wall. (U. S.) 477.

XIV. REVIEW.

1. Appeal.

429. When an appeal will lie.—Where in Indiana a tax has been levied on the taxable property of a township to enable it to aid a railroad company by subscribing to its stock, and certain of the taxes so assessed are in the treasury of the township, and the board of commissioners on petition, after deliberation, refuse to subscribe to the stock, an appeal lies from said board to the circuit court. *White County Com'rs v. Karp*, 12 Am. & Eng. R. Cas. 642, 90 Ind. 236.

The judgment of the county judge, in proceedings under the N. Y. statute of 1869, to bond a town may be questioned for want of jurisdiction. *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405.

The only effect of the provision of said statute giving to such judgment and record "the same force and effect as other judgments and records in courts of record" is to relieve the holders of bonds issued under it from proving the proceedings prior to the judgment, and to impose upon the town the burden of proving want of jurisdiction. *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405. —**FOLLOWED IN** *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. Rep. 27, 30 N. Y. S. R. 759.

Jurisdiction can only be conferred under said act by the presentation of a petition conforming to its requirements; it confers no jurisdiction upon the county judge to pass conclusively upon the form of the petition, and its sufficiency is always open to inquiry. *Craig v. Andes*, 15 Am. & Eng. R. Cas. 662, 93 N. Y. 405.

The action of a county judge in a proceeding under the New York statutes to bond a town in which he determines that the persons signing the petition are a majority of the taxpayers of the town is conclusive evidence of the fact, and such judgment can only be reversed or modified by an appeal taken, as prescribed by the stat-

ute, and cannot be attacked collaterally. *Calhoun v. Delhi & M. R. Co.*, 28 Hun (N. Y.) 379, 64 How Pr. 291.

430. Who may appeal.—A town subscribed \$40,000 to the capital stock of a railroad and issued its bonds therefor, which were sold by the railroad. Of the bonds \$10,000 were adjudged illegal. The holder of the bonds then filed his bill against the town and the company, and obtained a decree directing a surrender of the illegal bonds, and a transfer to him of \$10,000 of the valid railroad stock held by the town. *Held*, that the railroad alone had no appealable interest in the decree. *Illinois G. T. R. Co. v. Wade*, 140 U. S. 65, 11 Sup. Ct. Rep. 709.—DISTINGUISHING *Aetna Life Ins. Co., v. Middleport*, 124 U. S. 534.—FOLLOWED IN *Illinois G. T. R. Co. v. Wade*, 140 U. S. 70.

431. What questions are up for review.—On appeal from an order of the county commissioners levying a tax to meet an appropriation in aid of a railroad, the questions to be tried are those only which have been put in issue before the board. *Irwin v. Lowe*, 89 Ind. 540. Compare *Gavin v. Decatur County Com'rs*, 12 Am. & Eng. R. Cas. 685, 81 Ind. 480.

432. Reversal, and its effect.—Where a county judge made an order for the issue of certain bonds, assuming to act under a state law, and on appeal by the taxpayers this order was reversed, such judgment between the original parties to the bonds was equivalent to a refusal to make the original order, and the bonds issued under it are invalid as between such parties. *Stewart v. Lansing*, 7 Am. & Eng. R. Cas. 225, 104 U. S. 505.

A taxpayer of a town brought an action to restrain the town officers from issuing bonds in aid of a railroad. Judgment was entered for the defendants and the plaintiff appealed. The defendants moved to dismiss the appeal on the ground that, since the entry of the judgment appealed from, the bonds had been issued, and that, therefore, the question whether the defendants ought to issue them had become a mere abstract one. *Held*, that the motion should prevail were it not that the judgment is also for costs against the plaintiff. In such case he has the right to have the judgment examined to determine whether it was correct, and if not, to require the defendants to pay the costs. *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. Rep. 777.

—FOLLOWED IN *Plainview v. Winona & St. P. R. Co.*, 30 Am. & Eng. R. Cas. 259, 36 Minn. 505, 32 N. W. Rep. 745.

2. Certiorari.

433. When certiorari will lie.—Proceedings having been had to authorize the issue of bonds of a municipal corporation to aid in the construction of a railroad, under the act of 1869 requiring the county judge to determine certain facts and render judgment thereon (Laws of 1869, ch. 907, p. 2303), a writ of certiorari may properly issue to such county judge for the purpose of a review of his proceedings by the supreme court, notwithstanding his determination has been entered of record. *People ex rel. v. Smith*, 45 N. Y. 772; *affirming 3 Lans.* 291.—DISTINGUISHING *People v. Com'rs of Highways*, 30 N. Y. 72.

A certiorari may be brought to review the proceedings of a county judge either by one who petitions for bonding a town for railroad purposes or by the town. *People ex rel. v. Wagner*, 7 Lans. (N. Y.) 467, 1 T. & C. 221.

A taxpayer cannot maintain an equitable action to set aside proceedings to bond his town in aid of a railroad, and cannot maintain a legal action to protect himself against an unlawful issue of bonds; but he may review the proceedings by certiorari to determine whether the required number of taxpayers had given their consent, as decided by the assessors. *People ex rel. v. Morgan*, 65 Barb. (N. Y.) 473; *overruled in 18 Hun* 116; *reversed in 55 N. Y.* 587.

A certiorari only lies to bring up for review a final determination or judgment; but where town assessors have considered and decided that the required number of taxpayers have consented to the bonding of the town, and nothing remains but the action of the commissioners in preparing the bonds and making the subscription, the action of the assessors is so far final as to authorize a certiorari. *People v. Morgan*, 65 Barb. (N. Y.) 473.

Proceedings under New York Act of 1869, and its amendments, known as the "bonding acts," have always been reviewed on certiorari, and all objections affecting the legality of the proceedings or the jurisdiction of the county judge are available on such review. Besides, express authority for thus reviewing them is given by the

amendment of 1871, ch. 925, § 4. *Ayres v. Lawrence*, 63 Barb. (N. Y.) 454; reversed in 59 N. Y. 192.

434. Time to apply for the writ.—If a writ of certiorari is allowable at all to review the action of town assessors in certifying that a majority of the taxpayers of a town have consented to bonding the town in aid of a railway, such writ may be obtained as soon as the assessors make an affidavit of the above facts; but if taxpayers remain silent and suffer the subscription to be made, and the bonds to be issued and put in circulation, and the proceeds used for the construction of the road through the town, they cannot apply for such writ more than two years after such affidavit is made, and if it is granted it should be dismissed. *People ex rel. v. Hill*, 65 Barb. (N. Y.) 435; appeal dismissed in 53 N. Y. 547.

435. To whom the writ should be directed.—The office of a town commissioner under the acts authorizing the bonding of certain towns in aid of the Lake Ontario Shore R. Co. (ch. 811, Laws of 1868, as amended by ch. 241, Laws of 1869) is strictly ministerial, and the title to office of commissioners appointed under said act cannot be determined, nor can their proceedings be reviewed, upon a certiorari directed to them; to review the appointment of the commissioners the writ should be directed to the county judge making the appointment. A return, therefore, by such commissioners to a writ directed to them brings up nothing for review. *People ex rel. v. Walter*, 68 N. Y. 403; reversing 2 Hun 385, 4 T. & C. 638. Compare *People ex rel. v. Phillips*, 67 N. Y. 582.

The jurisdiction of assessors under said statute may be inquired into upon return to a certiorari, brought before their action has been consummated, and put beyond their recall or the power of the court, directed to them, and which is not vitiated by being united with other writs in the same proceeding directed to other officers. But where the duties of the assessors have been fully performed, and the commissioners, acting upon their determination, have issued and delivered the bonds of the town in exchange for stock of the railroad corporation, a writ thereafter issued directed to the assessor is fruitless and ineffectual, and should be quashed. *People ex rel. v. Walter*, 68 N. Y. 403; reversing 2 Hun 385, 4 T. & C. 638.

436. The return.—To justify an affirmation of proceedings to bond a town the return of a county judge to a writ of certiorari must show affirmatively that he had jurisdiction, and the proof of the jurisdictional fact should be returned to enable the higher court to determine whether the fact was established. It should at least appear that those whose names were affixed to the petition by others were present at the time of signing, and authorized it, or that the one who affixed the signature had written authority so to do, which authority was annexed to the petition and presented to the county judge. *People ex rel. v. Knowles*, 47 N. Y. 415.

So where a county judge does not return the evidence before him to prove the identity of the petitioners and their signatures, but simply returns that it was proven that "each name subscribed to the petition was written by or upon the request of the persons so named," without showing how many signed personally, the return is insufficient. *People ex rel. v. Knowles*, 47 N. Y. 415.

437. What questions are open.—Upon the return to a writ of certiorari to review proceedings before a county judge to bond a town the court is not limited to the inquiry whether jurisdiction of the parties and subject-matter was acquired, but should examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties had been violated. *People ex rel. v. Smith*, 45 N. Y. 772; affirming 3 Lans. 291.

It is not competent for the relators to question the eligibility of the persons whom the county judge has appointed as commissioners to make the subscription and issue the bonds, where no such question is raised by the complaint on which the certiorari issued, is not required by the writ, and the return fails to show anything on the subject, except that the record shows that they are freeholders, taxpayers, and residents of the towns. *People ex rel. v. Hubbert*, 59 Barb. (N. Y.) 446; reversed on another point in 46 N. Y. 110.

Under New York Act of 1871, ch. 925, § 4, where the judgment of a county judge in a proceeding to bond a town is reversed on certiorari, discretion is given the court to dismiss the proceeding or send it back for correction; but where a new assessment roll

and tax list have been made in the meantime, the proceeding will be dismissed. *People ex rel. v. Smith*, 45 N. Y. 772; affirming 3 Lans. 291. *People ex rel. v. Hulbert*, 46 N. Y. 110; reversing 59 Barb. 446. *People ex rel. v. Knowles*, 47 N. Y. 415.

438. Effect of the writ while pending.—A county judge decided in favor of bonding a town in aid of a railroad, and appointed commissioners to make the subscription and issue the bonds. The matter was taken by certiorari to the general term of the supreme court, where the decision of the county judge was affirmed, but on appeal it was reversed by the court of appeals. After the certiorari was taken, but before the order of affirmance in the supreme court, the commissioners issued the bonds, and the same were received and used by the company. Held, that the commissioners might act on the judgment of the county judge until it was reversed, and if it was desired that they should not issue the bonds they should have been restrained. *Mitchell v. Strough*, 35 Hun (N. Y.) 83.

3. Mandamus.*

439. United States courts.—(1) *When lies.*—A mandamus is the proper remedy to compel a levy of a tax to pay a judgment against a county on bonds issued for stock in a railroad, where the law specially provides for such a tax, though the public property of the county might be sold on execution. *Knox County Com'rs v. Aspinwall*, 24 How. (U. S.) 376.

And this notwithstanding subsequent legislation attempting to restrict the taxing power of the city. *Wolff v. New Orleans*, 12 Am. & Eng. R. Cas. 625, 103 U. S. 358.—DISTINGUISHING *Meriwether v. Garrett*, 102 U. S. 472.

And if the county officers make no return to the writ or refuse to obey it an attachment may issue. *United States ex rel. v. Lee County Sup'rs*, 2 Biss. (U. S.) 77.

If the amount already in the county treasury is applicable to such debts, a mandamus may issue to compel the county court to draw a warrant to pay the judgment. *United States ex rel. v. Buchanan County*, 5 Dill. (U. S.) 285.

* Mandamus to enforce payment of municipal aid bonds, see note, 15 AM. & ENG. R. CAS. 629; 12 Id. 609.

Where a circuit court of the United States determines that certain municipal bonds issued in aid of a railroad are valid and enters judgment against the town thereon, the court will enforce payment by mandamus, though the town officers had been enjoined by a state court before the judgment was obtained. *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. Rep. 846. *United States ex rel. v. Johnson County Sup'rs*, 6 Wall. (U. S.) 166.—FOLLOWED IN *United States ex rel. v. Keokuk City Council*, 6 Wall. (U. S.) 514.

Where the debt of a municipal corporation on bonds issued to a railroad has been reduced to judgment, and the judgment creditor has no other remedy to enforce the payment, the remedy in the supreme court of the state is mandamus to compel the proper officers of the municipality to levy and collect a tax for that purpose. Having no other remedy, the relator is entitled to the same remedy in the circuit court where he recovered his judgment. *United States ex rel. v. Keokuk City Council*, 6 Wall. (U. S.) 514.—NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.

The United States supreme court has not the power to direct a tax to be levied to pay a judgment against a city rendered on its bonds issued to a railroad. The proper remedy is by mandamus, which may be repeated as often as necessary. But if that remedy fails, this court has no power to appoint a marshal to levy and collect a tax. *Rees v. Watertown*, 19 Wall. (U. S.) 107.—DISAPPROVING *Welch v. St. Genevieve*, 1 Dill. (U. S.) 130. DISTINGUISHING *Lee County v. Rogers*, 7 Wall. 175; *United States v. Muscatine County Treasurer*, 2 Abb. (U. S.) 53.—QUOTED IN *McLean County v. Deposit Bank*, 81 Ky. 254.

(2) *When does not lie.*—Where a statute authorizes a county to subscribe for railroad stock and to issue its bonds in payment, but limits its power to impose a tax of more than one twentieth of one per cent. per annum to pay the same, in the absence of other legislation a mandamus will not issue to compel the levy of a tax beyond the amount specified. *United States v. Macon County*, 99 U. S. 582.—DISTINGUISHED IN *Ralls County Court v. United States*, 105 U. S. 733. QUOTED IN *United States ex rel. v. Lincoln County Court*, 5 Dill. (U. S.) 184.

A mandamus will not be awarded to compel a town to levy a tax to pay a judgment

against it where the judgment is based on bonds issued for stock in a railroad which have been adjudged void. *Brownsville Com'rs v. Loague*, 129 U. S. 493, 9 Sup. Ct. Rep. 327.

(3) *Necessity of judgment.*—In case of non-payment a mandamus will, by the laws of the state, lie against the county court to compel the assessment and levy of the necessary taxes, but the holder who resorts to the courts of the United States must there reduce the bonds or the coupons to judgment before he is entitled to that remedy. *Green County v. Daniel*, 3 Am. & Eng. R. Cas. 105, 102 U. S. 187.

In such proceedings federal courts can only require state officers to enforce state laws. *United States ex rel. v. Knox County Court*, 5 McCrary (U. S.) 76.

(4) *Parties.*—A single writ of mandamus will lie against the various county officers to compel them to levy and collect a tax to pay a judgment on municipal railroad aid bonds. Each officer may be joined whose duty it is in any way to assist in providing the means of paying the judgment, though their several duties be individual and distinct. *Labette County Com'rs v. United States ex rel.*, 112 U. S. 217, 5 Sup. Ct. Rep. 108.

(5) *Defenses.*—Where a bondholder has obtained judgment on coupons from county bonds issued in aid of a railroad, and makes application for a writ of mandamus to compel the county commissioners to levy a tax to pay the judgment, no matter can be set up in defense which was properly used as a defense to the recovery of the judgment. *Clews v. Lee County*, 2 Woods (U. S.) 474.

But the fact that the county commissioners have been enjoined by a state court from the assessment and collection of such tax is no defense to the issuance of the writ. *Clews v. Lee County*, 2 Woods (U. S.) 474.

The power of a city to issue bonds in payment of railroad stock implies the power to levy taxes to pay the same, and it is no defense to a proceeding to compel it to do so after the bonds have passed into judgment that the stock itself was by law forever pledged to payment of the bonds, and that the law made no provision for a tax to pay the bonds. The pledge of the stock is only as collateral security for the bonds, and does not prevent the holder from proceeding directly against the city. *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559.

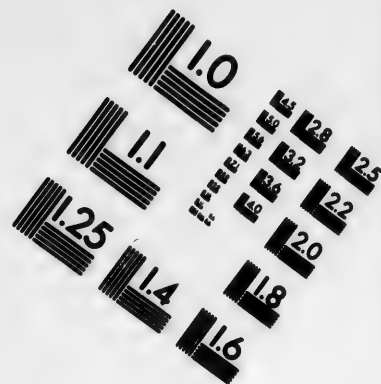
Where the power of a city as to taxation

is limited, and it has neglected to levy and collect enough taxes to pay interest on certain bonds as it falls due, it cannot defend an application for a mandamus to compel it to levy taxes to pay interest on later bonds, issued in aid of a railroad, by showing that the payment of back interest on the older bonds would exhaust its tax rate, especially where it alleges no purpose to levy such tax. *Sibley v. Mobile*, 3 Woods (U. S.) 535.

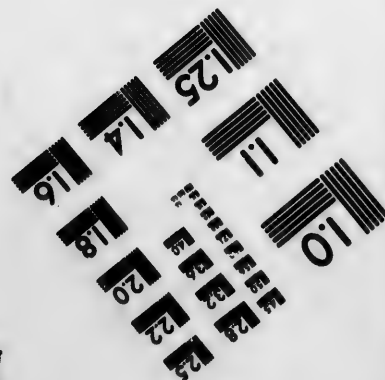
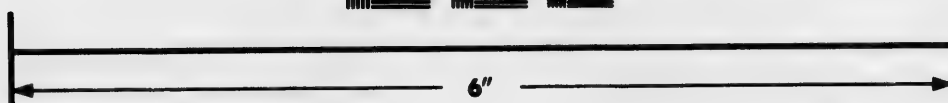
A county that was authorized to levy 50 cents on the \$100 for county taxes levied 30 cents, whereupon the holders of the county's railroad bonds brought a mandamus to compel a further levy. *Held*, that the county could not set up as a defense that it had levied 30 cents and the townships had levied 20 cents, where the county and township taxes composed funds for independent purposes. *Macon County v. Huidekoper*, 134 U. S. 332, 10 Sup. Ct. Rep. 491.

(6) *Questions involved.*—Suit was brought on county bonds which recited that they were issued under the charter of the railroad company, which limited the power of taxation to pay them to one twentieth of one per cent. per annum; but the complaint filed stated that they were issued under the general statutes of the state, which did not impose any limit upon the tax rate. The bonds were filed in the case and judgment was taken by default. Mandamus proceedings were then instituted to enforce the judgment; and the return to the writ set up that the bonds were issued under the charter of the company, and the limit upon the tax rate was relied upon. *Held*, that the court would look to the bonds to determine the limit of taxation imposed, and, in the absence of evidence that such recitals were the result of mistake or inadvertence, they would be deemed true. *United States v. Knox County Court*, 5 McCrary (U. S.) 76.

(7) *Punishment for disobedience.*—Where a board of county commissioners in Alabama, when ordered by mandamus to levy and cause to be collected a tax to pay their railroad bonds, held a meeting, levied the tax, ordered the tax collector to collect it, and so far set the machinery of collection in motion that it depended on the tax collector alone to collect it, and, on his failure so to do, informed the governor of the state of the fact, the duties imposed on them by the state statutes were fully performed; an order committing them for contempt for not causing the collection of the tax was *coram*



Resolution test chart showing patterns of vertical and horizontal lines with numerical values: 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0, 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10.



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non judice and void, and a habeas corpus was granted to release them from imprisonment. *Ex parte Rowland*, 5 Am. & Eng. R. Cas. 208, 104 U. S. 604.

440. Alabama.—When the validity and amount of coupons annexed to bonds issued by a county in aid of a railroad company are definitely fixed by the statute under which the bonds are issued, so that their presentment to the commissioners' court for allowance is not necessary, if that court refuses to levy a tax for their payment, mandamus lies to compel it. *Shinbone v. Randolph County*, 56 Ala. 183.—FOLLOWED IN *Greene County v. Daniel*, 102 U. S. 187.—*Limestone County Com'rs Court v. Rath*, 48 Ala. 433.—FOLLOWED IN *Chambers County v. Clews*, 21 Wall. (U. S.) 317.

441. California.—Where the court is satisfied from the record that the conditions precedent upon which a company was entitled to have bonds issued to it have all been performed before the commencement of the action, it is entitled to a mandamus to compel county authorities to issue and deliver the bonds. *Santa Cruz R. Co. v. Santa Cruz County Sup'rs*, 62 Cal. 239.

A mandamus will not be granted to compel the loan commissioners of the county of Santa Clara to satisfy, in gold coin, the bonds issued under the act of April 9, 1861, to authorize the board of supervisors of said county to subscribe to the capital stock of the San Francisco & San José railroad, where the only fund under their charge applicable to the discharge of said bonds consists of legal tender notes. *People ex rel. v. Cook*, 39 Cal. 658.

442. Florida.—A county was divided after it had issued its bonds in payment of a subscription to railroad stock, and a new county was organized, the act providing that the commissioners of the old county should make a "fair division" of the stock between the counties, and that the new county should execute bonds to the old county for the amount of the stock transferred, which was done. *Held*, that the assignment of the proper number of shares to the new county transferred the ownership thereof, and that it was immaterial that it did not have a transfer made on the books of the company. It, being the real owner, might be compelled by mandamus to levy a tax to pay the bonds; and it was no defense that the old county had compromised its indebtedness after the division.

State ex rel. v. Suwannee County Com'rs, 21 Fla. 1.

Where a mandamus issues to compel a county to levy a tax to pay railroad aid bonds, and distinct defenses are set up, one or more may be demurred to and issue taken on the others. *State ex rel. v. Suwannee County Com'rs*, 21 Fla. 1.

Issues of fact in such cases are tried by the court, and not by a jury. *State ex rel. v. Suwannee County Com'rs*, 21 Fla. 1.

443. Illinois.—Under the laws of Illinois, where the facts attending an issue of bonds by a town in aid of a railroad, and the liability of the town for their payment, have passed into judgment, no certificate from any town officer is required to compel a county clerk to levy a tax to pay the judgment. *Hawley v. Fairbanks*, 108 U. S. 543, 2 Sup. Ct. Rep. 846.

When the law requires the trustees of a township to certify the result of an election on the question of a donation to a railroad to the county clerk, a petition for a mandamus to compel the county clerk to extend a tax to pay such donation which alleges that a majority of the votes cast were in favor of such donation, and that that fact was certified by the town clerk, and that the town clerk was the proper officer so to certify, is bad on demurrer. *Springfield & I. S. E. R. Co. v. Wayne County Clerk*, 74 Ill. 27.

Where the petition shows that two propositions were submitted to the people of a town upon the question of a donation to a railroad company, one for the levying of a tax and the other for issuing bonds to pay such donation if made, and that a majority of the votes cast were in favor of "said proposition," a mandamus to compel the county clerk to extend the tax mentioned in the first proposition will not be awarded. *Springfield & I. S. E. R. Co. v. Wayne County Clerk*, 74 Ill. 27.

444. Indiana.—A company cannot have a mandamus to compel a county to pay over money which it has raised by taxation for the purpose of taking stock. Under the state constitution a county cannot take stock in a company without paying the money down, and the company has no control over the matter until the stock is taken. But a taxpayer may sue out a mandamus for such purpose. *Crawford County Com'rs v. Louisville N. A. & St. L. A. L. R. Co.*, 39 Ind. 192, 10 Am. Ry. Rep. 416.—RE-

VIEWS IN *Sankey v. Terre Haute & S. W. R. Co.*, 42 Ind. 402.—*Sankey v. Terre Haute & S. W. R. Co.*, 42 Ind. 402.—REVIEWING *Crawford County Com'rs v. Louisville, N. A. & St. L. A. L. R. Co.*, 39 Ind. 192.—*Hamilton County Com'rs v. State ex rel.*, 36 Am. & Eng. R. Cas. 210, 115 Ind. 64, 4 N. E. Rep. 589, 17 N. E. Rep. 855.

A township which had voted aid to a railroad, for two years levied a tax of one per cent. upon the property of the township, as the statute provided, but, owing to a shrinkage in the value of the taxable property, the levies did not produce sufficient revenue to pay the sum as fast as it fell due. *Held*: (1) that a mandamus would lie to compel the county commissioners to make an additional levy; (2) that a taxpayer of the township was a proper relation to prosecute the suit. *Decatur County Com'rs v. State ex rel.*, 12 Am. & Eng. R. Cas. 604, 86 Ind. 8.

It is not the duty of the board of county commissioners to cause a tax levied in aid of a railroad company to be placed upon the tax duplicate, and mandamus will not lie. *State ex rel. v. Knox County Com'rs*, 101 Ind. 398.

In an alternative writ of mandate to compel the auditor to place on the duplicate taxes levied in aid of a railroad, it is sufficient to aver as a fact that the railroad has been permanently located in the township without alleging that the fact has been judicially determined. *Caffyn v. State ex rel.*, 91 Ind. 324.

A proper record of a county board, appropriating money to aid a railroad named therein, and showing all the facts necessary to give jurisdiction, is sufficient evidence of the appropriation and of the corporate existence of the company in a proceeding by mandate to have the tax put upon the duplicate. So that the railroad has been permanently located is sufficiently shown by the map and profile filed in the clerk's office, with proof of the actual construction of the road accordingly. *Caffyn v. State ex rel.*, 91 Ind. 324.

A petition to obtain the levy of a tax in pursuance of an appropriation voted in aid of a railroad may be first presented to the board of commissioners, and in the event of an adverse decision an appeal will lie; but if the board should refuse to act, mandamus is the appropriate remedy. *Knox County Com'rs v. Montgomery*, 106 Ind. 517, 6 N. E. Rep. 915.

The delay of the board of commissioners in acting upon the petition at the time required by law will not prejudice the rights of the petitioner. *Knox County Com'rs v. Montgomery*, 106 Ind. 517, 6 N. E. Rep. 915.

The decision of the board of commissioners is conclusive upon all questions essential to the validity of the judgment pronounced by it, and they cannot again be litigated except in case of a direct attack upon the judgment. *Knox County Com'rs v. Montgomery*, 106 Ind. 517, 6 N. E. Rep. 915.

Upon a petition for a mandate to compel county commissioners to reinstate on the duplicate taxes assessed in favor of a railroad company, a return showing that in a prior proceeding the beneficiaries of the tax had agreed to accept a certain sum, if paid within sixty days, in full satisfaction of all claims on account of such tax, and that each taxpayer who should pay his proportion of such sum should be entitled to a receipt in full, and further showing that such per cent. had been collected from all who paid within sixty days, and from all others the full amount assessed against them, which had been paid over to the beneficiaries, excepting only the expenses of the election, is good even though the withholding of the election expenses was wrongful. *Huntington County Com'rs v. State ex rel.*, 109 Ind. 596, 10 N. E. Rep. 625.

445. Iowa.—The public property of counties in the state of Iowa is exempt from execution, and the property of private citizens can in no case be taken to pay the debts of counties. Therefore the proper remedy for one holding a judgment against the county on bonds issued for railroad stock, whether recovered in a U. S. circuit court or in a state court, is a mandamus to the proper county officers to compel them to levy a tax to pay the same. *Weber v. Lee County*, 6 Wall. (U. S.) 210.—NOT FOLLOWED IN *Leavenworth County Com'rs v. Miller*, 7 Kan. 479.—*United States v. Johnson County*, 6 Wall. (U. S.) 166.

But mandamus will not issue to compel county officers to levy a special tax to pay a judgment for ordinary expenses of the county. *Carroll County Sup'rs v. United States*, 18 Wall. (U. S.) 71.—DISTINGUISHED IN *United States v. Clark County* 96 U. S. 211. QUOTED IN *State ex rel. v. Macon County Court*, 68 Mo. 29.

Mandamus may be properly invoked to compel the treasurer to pay over a tax col-

lected to a railroad company entitled thereto under the law. *McGregor & S. C. R. Co. v. Birdsall*, 30 Iowa 255.

But a company cannot enforce this duty by mandamus until it shows itself fully entitled to the tax by presenting to the treasurer an order of the president or managing director accompanied by certified estimates of the engineer showing that an amount equal to the tax has been expended by the company within the county. Until this is done the tax does not become delinquent. *Harwood & C. F. & M. R. Co. v. Case*, 37 Iowa 692.

Under the act of 1872 the same steps must precede the right to the compulsory collection of the tax that under the act of 1868 preceded the right to have the tax paid over. *Harwood & C. F. & M. R. Co. v. Case*, 37 Iowa 692.

Mandamus will not lie to compel the board of supervisors to levy a tax voted to aid a railroad or to compel the county treasurer to collect such tax, until his refusal to do so, made after the tax lists have been placed in his hands. *Chicago, D. & M. R. Co. v. Olmstead*, 46 Iowa 316.—DISTINGUISHED IN *Harwood v. Brownell*, 48 Iowa 657.

Mandamus to compel a county treasurer to enter upon the tax books a tax voted in aid of a railway in 1868, but which was not certified up by the township trustees until 1876, will not be barred by the statute for three years after such certificate was made. Whether or not the statute of limitations would at any time operate to bar such a proceeding, *quære*. *Harwood v. Brownell*, 48 Iowa 657.

446. Kansas.—Mandamus is the usual and appropriate if not the only remedy to compel the issue by a county of its bonds in payment of a subscription to capital stock of a corporation. *Atchison, T. & S. F. R. Co. v. Jefferson County Com'rs*, 12 Kan. 127.

A mandamus will lie against county officers to compel them to levy and collect a tax to satisfy a judgment against a township for interest on bonds issued in aid of a railroad, the county officers being charged with the duty under the law of providing the means of paying the bonds. *Labette County Com'rs v. United States ex rel.*, 112 U. S. 217, 5 Sup. Ct. Rep. 108.

County commissioners are not relieved by a vacancy in the office of township trus-

tee of any township in the county, from the duty imposed upon them by the statute of levying and collecting taxes in such township. *Cherokee County Com'rs v. Wilson*, 15 Am. & Eng. R. Cas. 625, 109 U. S. 621, 3 Sup. Ct. Rep. 352.

447. Kentucky.—Mandamus is the appropriate remedy in proceedings against a county court to compel the issue of bonds in pursuance of county subscriptions. *Shelby County Court v. Cumberland & O. R. Co.*, 8 Bush (Ky.) 209.—DISTINGUISHED IN *Kentucky Union R. Co. v. Bourbon County*, 85 Ky. 98, 2 S. W. Rep. 687.

After the subscriptions are made, a mandamus will lie against a county judge to compel him to levy an annual tax to pay the interest thereon, and to see that the same is collected, but nothing beyond this. *Bass v. Taft*, 137 U. S. 458, 11 Sup. Ct. Rep. 154.

448. Maine.—Whether mandamus would be a proper remedy for a railroad company to compel the issuing of bonds of a town in case the condition of the vote had been complied with by the railroad company, *quære*. *Portland & O. C. R. Co. v. Hartford*, 58 Me. 23.

449. Missouri.—A mandamus will issue to a municipal corporation requiring it to levy taxes for the purpose of paying interest upon bonds issued by it in payment of its subscription to the stock of a railroad company. *Flagg v. Mayor, etc., of Palmyra*, 33 Mo. 440.

Bondholders who have recovered judgments on bonds issued by counties in Missouri in aid of railroads are entitled to a mandamus to compel the county courts to levy a special tax where it is necessary to pay such judgments. *United States ex rel. v. Lincoln County*, 5 Dill. (U. S.) 184.—QUOTING *United States v. Macon County*, 99 U. S. 582.—*Jordan v. Cass County*, 3 Dill. (U. S.) 185. *Cass County v. Johnston*, 95 U. S. 360.

And where such bonds are issued when the power of the county courts was absolute and unconditional, and the duty simply ministerial and capable of direct enforcement by a writ of mandamus, a subsequent statute, like the Mo. Act of March 8, 1879, known as the "Cottey Act," which takes away from the county court such power, and only authorizes it to act upon the order of the circuit court, is in conflict with the provision of the United States constitution which prohibits laws impairing the obliga-

tion of contracts. *United States ex rel. v. Lincoln County*, 5 Dill. (U. S.) 124.

But as federal courts do not have original jurisdiction in mandamus, a bondholder can only enforce such right by first recovering a judgment on his bonds and then enforcing it by mandamus. *Jordan v. Cass County*, 3 Dill. (U. S.) 185.

A circuit court may disregard a prayer in a petition for a mandamus to compel a county to deliver bonds in payment of a subscription to railroad stock and conform its final order to the facts alleged and established. *Osage Valley & S. K. R. Co. v. Morgan County Court*, 53 Mo. 156.—OVER- RULED IN *State ex rel. v. Kansas City, St. J. & C. B. R. Co.*, 77 Mo. 143.

County bonds were authorized in 1871 to issue for stock in a Missouri railroad. The bonds were prepared with interest coupons for 1872 and 1873, but in fact were not executed and delivered until Jan. 1, 1874. *Held*, that they only became the debt of the county from the time of delivery, and the holders were not entitled to a mandamus to compel a levy of a tax to pay interest for 1872 and 1873. *United States v. Clark County*, 95 U. S. 769.

In mandamus to compel the county court of Macon county to levy a tax to meet the indebtedness of the county on railroad bonds issued for the Missouri & Mississippi R. Co.—*held*, that, under section 15 of the charter of the company (Sess. Acts 1863, p. 86), said county court had no power to levy in one year a tax of more than one twentieth of one per cent. upon the assessed value of the taxable property in the county. County courts have only such powers as are granted by statute; they can have no implied right to levy taxes. *State ex rel. v. Shortridge*, 56 Mo. 126.—DISTINGUISHED IN *United States v. Clark County*, 96 U. S. 211.—QUOTED IN *United States ex rel. v. Johnson County*, 5 Dill. (U. S.) 207.

450. New York.—Any taxpayer of a town may apply to the county judge for an order compelling the county treasurer to execute the law in case of his refusal so to do, and this order it is the duty of the county judge to grant. *Clark v. Sheldon*, 134 N. Y. 333, 32 N. E. Rep. 23, 48 N. Y. S. R. 279; *affirming* 10 N. Y. Supp. 357.

It is no defense to the proceeding that the county treasurer has paid over the fund to an officer of the town, or that the town has had the benefit of it for other town

purposes. *Clark v. Sheldon*, 134 N. Y. 333, 32 N. E. Rep. 23, 48 N. Y. S. R. 279; *affirming* 10 N. Y. Supp. 357. *People ex rel. v. Brown*, 55 N. Y. 180.

The first order of a county judge dismissed the proceedings; before it was made the county treasurer had settled with the town collector, receiving from him receipts of county officers for the fund in lieu of the money; said order was subsequently reversed. It was claimed by the treasurer that this order operated as a prohibition against the investment of the fund as directed by the statute. *Held*, untenable. *Clark v. Sheldon*, 134 N. Y. 333, 32 N. E. Rep. 23, 48 N. Y. S. R. 279; *affirming* 10 N. Y. Supp. 357.

451. Ohio.—Commissioners of Clinton county issued negotiable bonds, to a railroad, with interest warrants attached, under Ohio Act of March 1, 1851. *Held*, that the holders of the bonds were entitled to interest from the county, and that the county must look to the company to be reimbursed. It was the duty of the county commissioners, in case the company did not provide for payment of the interest, to assess a tax sufficient to meet it, and, in default thereof, a holder of a bond, as relator, could enforce the duty of the county commissioners by mandamus. *State ex rel. v. Clinton County Com'rs*, 6 Ohio St. 280.

A railroad charter provided that a county through which the railroad passed could, through its commissioners and on authorization by a majority of its qualified voters, subscribe any sum not exceeding \$50,000 to the capital stock of the company and borrow money to pay the same, and upon failure of such county to subscribe, any township therein through which the road passed might, through its trustees, duly authorized by a majority of its qualified voters, subscribe any sum not exceeding \$50,000, and provide for its payment in the same manner that the county commissioners were authorized. An act was subsequently passed authorizing any county through which the road passed, or any township or city in such county, to subscribe to the stock under the provisions of the act incorporating the company. A county subscribed \$12,500, and subsequently a township in the same county authorized a subscription and issued certificates of indebtedness to the same amount. On proceedings in mandamus, on the relation of a *bona fide* assignee and holder of a

portion of such certificates, to compel the township to levy a tax for the payment of the principal and interest due thereon—*held*, that the trustees of the township were not authorized to subscribe after a subscription had been duly made by the county, and that the acts of the trustees imposed no liability upon the township. *State ex rel. v. Union Tp.*, 15 *Ohio St.* 437.

452. Pennsylvania.—Mandamus is the proper and appropriate writ to compel a municipal corporation to make provisions for the payment of interest due upon bonds issued by it in payment of a subscription to the stock of a railroad company, by the assessment and collection of the necessary taxes. *Com. ex rel. v. Select & C. Councils of Pittsburgh*, 34 *Pa. St.* 496.

453. South Carolina.—Mandamus will not lie to compel a county treasurer to pay out money on a coupon of a railroad aid bond, when the only constitutional law that recognizes such bond and its coupons as a debt declares that no tax shall be levied to pay interest on such debt until the railroad has been completed, and that all taxes heretofore collected for such purpose shall be refunded to the taxpayers, and where no tax has been or could have been collected since the railroad was completed. *State ex rel. v. Neely*, 30 *So. Car.* 587, 9 *S. E. Rep.* 664.

454. Tennessee.—In mandamus, by a *bona fide* holder of its bonds, against a county to compel it to levy a tax to pay interest coupons, whose title accrued before maturity, the county cannot show by way of defense, if the legal authority to issue the bonds is clear, a want of compliance on its part with formalities required by the law authorizing their issuance, or show fraud in its own agents in issuing them. Where the county has received the consideration for the bonds, it is thereby estopped from impeaching their validity, except by showing a want of authority to issue them. *State ex rel. v. Anderson County*, 8 *Baxt. (Tenn.)* 249.

455. Wisconsin.—On the hearing of an order to show cause why a peremptory mandamus should not issue to enforce the levy and collection of a tax to pay interest upon bonds of a city, the validity of the bonds was questioned by the city, and various questions, both of law and of material facts affecting their validity, were raised. *Held*, that it was error to grant the writ before the relator had established his right in

an ordinary action at law. *State ex rel. v. Mayor, etc., of Manitowoc*, 52 *Wis.* 423, 9 *N. W. Rep.* 607.

MUNICIPAL AID BONDS.

Negotiability of, see BONDS, 18.

MUNICIPAL CONSENT.

Effect of, on right of abutting owner to injunction, see STREETS AND HIGHWAYS, 223.

MUNICIPAL CORPORATIONS.

Appointment of directors by, see DIRECTORS, ETC., 4.

Construction of statutes limiting indebtedness of, see MUNICIPAL AND LOCAL AID, 57.

Effect of division of, in railway aid cases, see MUNICIPAL AND LOCAL AID, 197.

Estoppels against, see ESTOPPEL, 4.

Joint construction of railroad by state and, see GOVERNMENT RAILROADS, 8.

Judicial notice of existence and location of, see EVIDENCE, 103.

Liability of, for debts of company aided, see MUNICIPAL AND LOCAL AID, 203.

License tax for privilege of doing business in, see INTERSTATE COMMERCE, 211.

Mandamus to municipal officers, see MANDAMUS, 24.

Occupation of streets by steam roads under grants of, see STREETS AND HIGHWAYS, 61-105.

Power of legislature to compel subscriptions by, to railway stock, see MUNICIPAL AND LOCAL AID, 15.

— to grant franchise to private railroads, see PRIVATE CARS, 2.

— — issue bonds in aid of railways, see MUNICIPAL AND LOCAL AID, 268-283.

Ratification of irregular railway aid bonds by, see MUNICIPAL AND LOCAL AID, 339.

Regulation of hacks at stations by, see HACKS AND HACK LINES, 4.

— — speed by, see NEGLIGENCE, 28-31.

— — steam roads in streets by, see STREETS AND HIGHWAYS, 296-359.

Right of, to impose conditions on subscription in aid, see MUNICIPAL AND LOCAL AID, 226.

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I. IN GENERAL.

1. What acts are within the corporate powers, generally.—There can

ordinarily be no judicial restraint or interference with municipal corporations in the *bona fide* exercise of powers legislative or discretionary in their nature, provided private rights are not violated. But when the corporation has fulfilled its legislative functions, and exercised its legislative discretion, and is about to carry its legislation into effect, if vested rights are violated, or irreparable wrong will be inflicted, the courts may intervene. *Cape May & S. L. R. Co. v. Cape May*, 9 Am. & Eng. R. Cas. 474, 35 N. J. Eq. 419.—DISTINGUISHING *Paterson & P. H. R. Co. v. Mayor, etc.*, of Paterson, 24 N. J. Eq. 158.—QUOTED IN *Platte & D. C. & M. Co. v. Lee*, 2 Colo. App. 184.

A municipal corporation may own property, to and over which the legislature has, while said corporation exists, no right or control in opposition to or independently of the will or consent of the corporation. *New Orleans, M. & C. R. Co. v. New Orleans*, 26 La. Ann. 478.

Where a city has subscribed to railroad stock and issued its bonds in payment, and the company is financially unable to build the road to the city, and the stock is therefore greatly depreciated and likely to become worthless, an agreement between the city and a corporation to complete the road is not *ultra vires*. *Mayor, etc., of Athens v. Camak*, 75 Ga. 429.—FOLLOWING *Semmes v. Mayor, etc., of Columbus*, 19 Ga. 471.

2. What are not.—The indorsement of the bonds of a street railroad by the city authorities is not within the ordinary administrative powers of the corporation, and requires a special legislative grant. *Blake v. Mayor, etc., of Macon*, 53 Ga. 172.

The purchase of land by a town for the use of a railroad for right of way, though ostensibly for a public street, is *ultra vires*, and the purchase price cannot be collected by one having knowledge of the facts and aiding in the transaction. *Strahan v. Malvern*, 77 Iowa 454, 42 N. W. Rep. 369.

A city of the first class cannot extend its limits so as to include unplatted territory of over five acres against the protest of the owner thereof unless the same is circumscribed by platted territory that is taken into said city. *Union Pac. R. Co. v. Kansas City*, 42 Kan. 497, 22 Pac. Rep. 633.

Tex. Const. art. 11, § 3, prohibits a city or a town from appropriating its revenues or using its credit to obtain a right of way

or depot grounds for a road; and the section is not modified in this particular by art. 10, § 9, requiring companies projecting a road within three miles of a county seat to run through it, "provided such town or its citizens shall grant the right of way through its limits and sufficient ground for ordinary depot purposes." *Cleburne v. Gulf, C. & S. F. R. Co.*, 25 Am. & Eng. R. Cas. 130, 66 Tex. 457, 1 S. W. Rep. 342.

An agreement of a city to refund the money paid out by a company for a right of way and depot grounds contemplates an appropriation which is prohibited by the above section 3. *Cleburne v. Gulf, C. & S. F. R. Co.*, 25 Am. & Eng. R. Cas. 130, 66 Tex. 457, 1 S. W. Rep. 342.

3. Municipal grants.—A city by-law granting \$1000 to an individual in consideration of his having at the instance of the corporation advanced the amount in aid of a railway—held, not within the powers of the corporation, for it was not a grant to a railway, and it had not been assented to by the electors. *In re Bate*, 23 U. C. C. P. 32.

4. Municipal power to tax.*—Municipal corporations are mere auxiliaries of the government, established for the more effective administration of justice; and the power of taxation confided to them is a delegated trust. *Richmond v. Richmond & D. R. Co.*, 21 Gratt. (Va.) 604.

A city charter is not a contract between the state and the city, securing to the city the absolute power of taxation beyond the control or modification of the legislature. *Richmond v. Richmond & D. R. Co.*, 21 Gratt. (Va.) 604.

Though it is true that laws conferring the power of taxation upon municipal corporations are to be construed strictly, it is also true that exemptions from taxation are to be construed strictly; and where the power has once been conferred, it is not to be crippled or destroyed by strained interpretations of subsequent laws. *Orange & A. R. Co. v. Alexandria City Council*, 17 Gratt. (Va.) 176.

Although a municipal corporation may be divested of its corporate powers, and they are in no sense vested rights as against the state, yet it may not lawfully be deprived of its right to collect taxes which

* Legislative restrictions on power of municipal taxation as affecting existing contracts, see note, 16 AM. & ENG. R. CAS. 677.

have been legally levied. *Dubuque v. Illinois C. R. Co.*, 39 Iowa 56.

An action at law can be maintained by a city for the recovery of municipal taxes upon the property of a railroad, notwithstanding the legislature has provided a special remedy therefor. *Burlington v. Burlington & M. R. R. Co.*, 41 Iowa 134.—FOLLOWING *Dubuque v. Illinois C. R. Co.*, 39 Iowa 56; *Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa 633.

5. Contract to exempt from taxation void.—A city cannot exempt particular property from municipal taxation, when the general law requires it to levy annually an equal and uniform tax upon all real and personal property within the city. *New Orleans v. St. Charles St. R. Co.*, 28 La. Ann. 497.

In Missouri municipal corporations have no power to grant a commutation of taxes to a railroad company or others, and a contract to do so is void. *State v. Hannibal & St. J. R. Co.*, 75 Mo. 208.

6. License taxes.*—(1) *In general.*—The constitution of California does not prohibit the legislature from taxing occupations, nor from authorizing municipal corporations to tax them, for the purpose of revenue. *San José v. San José & S. C. R. Co.*, 53 Cal. 475.

Where the charter of a municipal corporation authorizes it "to license and regulate" occupations, in determining whether this includes the power to tax occupations for revenue purposes, the whole charter and the general laws of the state relating to the subject must be considered. *San José v. San José & S. C. R. Co.*, 53 Cal. 475.—DISTINGUISHED IN *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 143.

A municipal authority cannot, under its power to license, regulate, and tax an occupation or business, tax the property engaged in such business. *Denver City R. Co. v. Denver*, 2 Colo. App. 34, 30 Pac. Rep. 1048.

(2) *Railroad companies.*—An ordinance by a county requiring a railroad company to take out a license to continue its business

of carrying persons or freight for hire in the county is void, when the charter and franchise of the company are derived by grant of the congress of the United States. *San Benito County v. Southern Pac. R. Co.*, 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827.—DISTINGUISHING *Thomson v. Union Pac. R. Co.*, 9 Wall. (U. S.) 579; *Union Pac. R. Co. v. Peniston*, 18 Wall. 5. FOLLOWING *California v. Central Pac. R. Co.*, 127 U. S. 1. NOT FOLLOWING *Central Pac. R. Co. v. State Board*, 60 Cal. 35; *Los Angeles v. Southern Pac. R. Co.*, 61 Cal. 59; *Santa Clara County v. Southern Pac. R. Co.*, 66 Cal. 642.

(3) *Express companies.*—The city ordinance of Mobile of 1866 requiring any express company whose business extends out of the state to pay an annual license of \$500; "if within the limits of the state, \$100"; and "if within the limits of the city of Mobile, \$50," is valid. *Southern Exp. Co. v. Mayor, etc., of Mobile*, 49 Ala. 404.—FOLLOWING *Osborne v. Mayor, etc., of Mobile*, 44 Ala. 493.—*Osborne v. Mobile*, 16 Wall. (U. S.) 479, 4 Am. Ry. Rep. 364; *affirming* 44 Ala. 493.—APPROVED IN *State v. Cumberland & P. R. Co.*, 40 Md. 22. DISTINGUISHED IN *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34.—But see *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380.

The city of Montgomery has authority under its charter to levy and collect a specific tax on all express companies doing business within its corporate limits, and this power is not taken away as to the Southern Express company by that provision of the act in relation to said company, approved February 26, 1872, which declares: "Nor shall any municipal corporation levy any percentage tax upon the receipts of said company," nor by any other provision of said act. *Montgomery City Council v. Shoemaker*, 51 Ala. 114.—REVIEWING *Orange & A. R. Co. v. Alexandria City Council*, 17 Gratt. (Va.) 176.

While as to useful trades and employments the power of a municipal corporation to license does not ordinarily include the power to tax, yet where useful occupations are in this regard placed upon the same footing as those which serve for amusement only, and the municipal charter provides that in granting such licenses the common council "shall charge such sum or sums of money as they shall deem fit and reason-

* See also INTERSTATE COMMERCE, 208-214.

License tax on foreign corporations, see note, 45 AM. & ENG. R. CAS. 8.

When a municipal license tax on each company entering corporate limits is not a tax on interstate commerce, see 37 AM. & ENG. R. CAS. 378, *abstr.*

able," they are authorized to use the power to license as a means of taxation if they see proper to do so. *Adams Exp. Co. v. Owensboro*, 85 Ky. 265, 3 S. W. Rep. 370.

A city which is authorized by its charter to license, tax, and regulate merchants, agents, express companies, insurance companies, etc., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city; and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675.

A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city is properly collected from the gross earnings without deduction for expenses incurred in conducting the business. If a part of the gross receipts has been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amount so paid may not be liable to taxation under the ordinance, yet when such part is embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back. *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675.

Foreign express companies being exempted by statute from local taxation by the payment of a state tax for the privilege of doing business, a provision in the charter of a city authorizing it to impose a license tax upon "each" express company cannot be held to apply to foreign companies. *Adams Exp. Co. v. Lexington*, 83 Ky. 657. —QUOTING *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush (Ky.) 233.—FOLLOWED IN *Adams Exp. Co. v. Owensboro*, 85 Ky. 265.

7. Validity of tax for local improvement.*—An ordinance which shows on its face an attempt to subject property to special taxation to pay for an improvement, which property will in no way be benefited by such improvement, will not justify proceedings for the levy of such taxes. Special taxes for local improvements are justified only on the ground that the subject of

the tax receives an equivalent. *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. Rep. 366.

Corporate authorities of cities and villages may not arbitrarily provide by ordinance that an improvement within their limits shall be treated as a local improvement, to be paid for by special taxation of abutting property without reference to benefits, without having their action reviewed by the courts. *Bloomington v. Chicago & A. R. Co.*, 134 Ill. 451, 26 N. E. Rep. 366.

Cities and towns are only empowered to lay out, open, and improve streets for such public use as that persons and property within the municipality may be legitimately assessed or taxed for payment therefor, and persons and property within the same cannot be legitimately assessed or taxed for the right of way or for making and improving a street for railway purposes alone. *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. Rep. 934.

8. Validity of assessments for local improvements.*—Under an authority to a municipal corporation to curb and pave a public highway, and to file liens for the expense thereof against the lots of ground "fronting thereon," a lien cannot be supported against a lot which is separated from such highway by a railway running side by side therewith. *Philadelphia v. Eastwick*, 35 Pa. St. 75.

A city assessed a railroad company for the cost of paving a street along its track, and the company filed a bill to restrain the assessment on the ground that the resolution ordering the paving to be done was not adopted by a majority of the council, as required by the city charter. The council consisted of eight members and the mayor, who was the presiding officer and only entitled to a vote when there was a tie. At the meeting passing the resolution there was a tie, and the mayor voted in favor of it, and declared it adopted. *Held*, that the resolution was legally adopted. *Lake Shore & M. S. R. Co. v. Dunkirk*, 48 N. Y. S. R. 208, 65 Hun 494, 20 N. Y. Supp. 596.

9. Vacating and restraining assessments for local improvements.—It is well settled that where proceedings upon an assessment are void upon their face a

* Liability of railroad property to assessment for local improvements, see notes, 7 AM. & ENG. R. CAS. 836; 13 *Id.* 417.

* See also **STREETS AND HIGHWAYS, 341-359.**

court of chancery has no jurisdiction to interfere and set aside the assessment, or to restrain the corporation from proceeding to sell the land assessed, on the ground that the complainant has a perfect remedy at law. *Sixth Ave. R. Co. v. Mayor, etc., of N. Y.*, 43 N. Y. S. R. 759, 63 Hun 271, 17 N. Y. Supp. 903.

But as to New York city such action is specially forbidden by the Consolidation Act, § 897, providing that "no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city or to remove a cloud upon title, but owners of property shall be confined to their remedies in such cases to the proceedings" provided for by the act. *Sixth Ave. R. Co. v. Mayor, etc., of N. Y.*, 43 N. Y. S. R. 759, 63 Hun 271, 17 N. Y. Supp. 903.

10. Determining validity of ordinances.—An ordinance must not conflict with any constitutional law upon the statute books or be unreasonable. *Philadelphia v. Empire Pass. R. Co.*, 7 Phila. (Pa.) 321.—*REVIEWING Northern Liberties Com'rs v. Northern Liberties Gas Co.*, 12 Pa. St. 318.

The validity of city ordinances once passed and recorded cannot be affected by subsequent unauthorized alterations or interlineations. *Houston & T. C. R. Co. v. Odum*, 2 Am. & Eng. R. Cas. 503, 53 Tex. 343.

If an ordinance is based upon a general power, and its provisions are more detailed than the expression of power confers, the court may look into its reasonableness. The presumption is that it is reasonable, and the burden is upon the party who denies the validity of the ordinance. *State v. Trenton*, 53 N. J. L. 132, 20 Atl. Rep. 1079.

11. Publication—Recording.—Iowa Code, § 492, provides that all city ordinances shall, as soon as may be, be recorded in a book kept for that purpose, and be authenticated by the signature of the presiding officer of the council and the clerk, and that such ordinances shall take effect at the expiration of five days after they have been published. *Held*, in an action against a railroad company for violating an ordinance, that the record provided for by the statute is not sufficient proof of the ordinance, but when objected to by the company the burden was on the city to show that the ordinance had been duly published. *Lar-*

kin v. Burlington, C. R. & N. R. Co., 85 Iowa 492, 52 N. W. Rep. 480.

12. Force and effect of ordinances.—A valid ordinance of a city stands on the same footing as a statute; therefore it is error to leave it to the jury to determine the applicability of an ordinance, relating to running trains on the streets, to the circumstances and its legal effect. It presents a question of law. *Pennsylvania Co. v. Frana*, 13 Ill. App. 91.

A city passed an ordinance submitting to the voters the question of taking stock in a railroad company, but before the election the law under which the city was acting was amended, but the amendment neither conflicted with nor superseded the provisions of the ordinance. *Held*, that the rule prescribed by the legislature that "the provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuance of such provision, and not as a new enactment," was applicable. *Troy v. Atchison & N. R. Co.*, 11 Kan. 519.

13. Construing two ordinances together.—Where two ordinances for the widening of a part of a street are passed on the same day, and the last one expressly refers to and is by its terms dependent upon the adoption and enforcement of the first, and requires that the entire expense of enforcing both, and all damages which may be adjudged against the city, shall be paid by certain railway companies in whose interest the ordinances are passed, they will be treated as two parts of a single and entire scheme the same as if both were embodied in one ordinance. *Ligare v. Chicago*, 139 Ill. 46, 28 N. E. Rep. 934.

14. Ratifying former invalid ordinance.—A city council passed an ordinance attempting to grant a corporation certain exclusive privileges which was void for want of authority, but subsequently it adopted and ratified the invalid ordinance. *Held*, that the ratifying ordinance was not invalid because it provided that ordinances granting privileges should not be enlarged thereby. The proper meaning was that they should not be enlarged beyond their original intention. *Des Moines St. R. Co. v. Des Moines B. G. St. R. Co.*, 32 Am. & Eng. R. Cas. 209, 73 Iowa 513, 33 N. W. Rep. 610, 35 N. W. Rep. 602.

15. Enjoining enforcement of ordinances.—Ordinances of towns and cities

for the protection of persons and property and preservation of peace and good order, and proceedings under them, although civil in form, to recover a penalty, are *quasi* criminal in character. And a court of equity will not interfere, by injunction, to restrain their enforcement in the appropriate courts upon the ground that such ordinances are alleged to be illegal, or because of the alleged innocence of the party charged. Nor will that court enjoin such proceedings for the purpose of determining the validity of the ordinance in a court of law, when the defendant has an adequate remedy at law for any injury he may sustain. *Poyer v. Des Plaines*, 123 Ill. 111, 13 N. E. Rep. 819.—FOLLOWED IN Chicago, B. & Q. R. Co. v. Ottawa, 47 Ill. App. 73.

16. Repeal of ordinances.—The repeal of an ordinance will not operate to disturb private rights vested under it. *Cape May & S. L. R. Co. v. Cape May*, 9 Am. & Eng. R. Cas. 474, 35 N. J. Eq. 419.

17. Ordinances changing grade of streets.—If an ordinance, which is intended to change the grade of a street so as to carry it over an intersecting railroad by means of a bridge and approaches, contains a clause vacating a part of the street on which the approach is to rest, it thereby defeats its main object, and it will be set aside as unreasonable. *Read v. Camden*, 54 N. J. L. 347, 24 Atl. Rep. 549; *reversing* 53 N. J. L. 322, 21 Atl. Rep. 565.

18. Ordinances to prevent nuisances.—The legislature may, for public purposes, prescribe the limits of municipal bodies, enlarging or contracting them at pleasure, and give them power to pass ordinances to prevent nuisances to operate beyond their boundaries. *Chicago, P. & P. Co. v. Chicago*, 88 Ill. 221.—APPLIED IN *Alerton v. Chicago*, 9 Biss. (U. S.) 552.

A city or incorporated town has no authority to provide by ordinance for the punishment by fine of persons guilty of the crime of nuisance. *Knoxville v. Chicago, B. & Q. R. Co.*, 83 Iowa 636, 50 N. W. Rep. 61.

A railroad track is not a lot, street, dock, wharf, or pier, within the meaning of the charter of Jersey City; it is a public highway, created under the authority of the legislature. *State v. Jersey City*, 29 N. J. L. 170.

19. Ordinances relative to ice and snow.—An ordinance requiring all persons

to keep their sidewalks free from ice imposes a purely public duty, and persons injured by slipping on the ice cannot bring private actions against the owners of the premises. *Taylor v. Lake Shore & M. S. R. Co.*, 9 Am. & Eng. R. Cas. 127, 45 Mich. 74, 7 N. W. Rep. 728.

Breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages; though when the duty imposed is for the protection and benefit of a particular individual or class, as well as for that of the public, there may be an individual right of action for individual injury, as well as a public prosecution. *Taylor v. Lake Shore & M. S. R. Co.*, 9 Am. & Eng. R. Cas. 127, 45 Mich. 74, 7 N. W. Rep. 728.

When a municipal charter empowers the common council to regulate the care of sidewalks for the public benefit, and provides that lot owners shall be liable to the city for all damages which the city may be compelled to pay for the default in neglecting to observe such regulations, no action against a lot owner can arise, if at all, until after the city has been held liable in a suit against it. *Taylor v. Lake Shore & M. S. R. Co.*, 9 Am. & Eng. R. Cas. 127, 45 Mich. 74, 7 N. W. Rep. 728.

20. Municipal officers.—A city is liable in damages for a trespass committed by the city officers and men employed by them in removing a railroad depot. *Pontchartrain R. Co. v. New Orleans*, 27 La. Ann. 162.

A mayor has the same jurisdiction and powers within the city limits as a justice of the peace, and by statute the jurisdiction of justices is confined to their own townships; but, as a rule, an action may be brought before a mayor upon a contract made, or for a tort committed, without the city, if the defendant lives in the city. *Wabash, St. L. & P. R. Co. v. Lash*, 103 Ind. 80, 2 N. E. Rep. 250.

The mayor of an incorporated city secretly contracted to purchase, at a discount of £10,000, a large amount of debentures of the city which were expected to be issued under a future by-law of the city council for stock of a railroad, and was himself an active party afterwards in procuring and giving effect to the by-law, which was subsequently passed. *Held*, that he was a trustee for the city of the profit he derived from the transaction. *Toronto v. Bowes*, 4

Grant's Ch. (U. C.) 489; affirmed in 6 Grant's Ch. 1.

A municipal corporation is not estopped to set up a defense to a judgment held against it by an assignee, although its officers—e. g., its treasurer or attorney—represented to such assignee when about to purchase the judgment that it would be settled or funded, if such representation was made in good faith and without knowledge or culpable ignorance of the defense, or as mere expression of opinion, or was made without express authority of the city council. *Taylor v. Nashville & C. R. Co., 86 Tenn. 228, 6 S. W. Rep. 393.*

A city solicitor is not authorized to begin a suit on behalf of the city by virtue of the inherent power of his office. Where, however, he has assumed to act by virtue of such authority in filing a bill for an injunction on behalf of the city, in a proper case the court will hold the bill until the city councils have an opportunity to ratify the suit and authorize it to be proceeded with. *Lebanon v. Lebanon & A. St. R. Co., 1 Pa. Dist. 563.*

A board of public works of a city is not justified in refusing to supply water for the use of the engines of a railroad being operated by a receiver under the direction of the court on the ground that certain water rents, which were due when the railroad was declared insolvent, are unpaid. *Coe v. New Jersey Midland R. Co., 30 N. J. Eq. 440.*—FOLLOWING *Dayton v. Quigley, 29 N. J. Eq. 77.*

II. PARTICULAR MUNICIPALITIES.

21. Athens.—The city has no power under its charter to make a contract with a railroad company promising to secure for it a right of way through the city, together with certain lots of land therein. Such power is not conferred by the authority granted in the charter to pass ordinances relating to the opening and laying out of streets, the same having no reference to the roadbed of a railroad company. *Covington & M. R. Co. v. Mayor, etc., of Athens, 85 Ga. 367, 11 S. E. Rep. 663.*

Money expended in fulfilment of such contract, and on the faith of the promise, is not due for purely charitable purposes, but for the interest and purposes of the railroad company; and even were it shown that the city received any benefit from the con-

tract, the same is void as contrary to public policy. *Covington & M. R. Co. v. Mayor, etc., of Athens, 85 Ga. 367, 11 S. E. Rep. 663.*

22. Augusta.—The act of 1856 which permits the city council to authorize the connection by common depots, tracks, or otherwise, of all railroads in the city, or of any of them, upon such terms and conditions as may be fixed and agreed on between the city council and them, confers a discretionary power upon the municipal authorities, but does not compel them to allow such connections. *Augusta City Council v. Port Royal & A. R. Co., 74 Ga. 658.*

23. Baltimore.—The ordinance of the mayor and city council entitled "An ordinance to provide for raising the sum of one million of dollars by the mayor and city council of Baltimore, by means of the hypothecation of such number of shares of the capital stock of the Baltimore and Ohio R. Co. as may be necessary for that purpose; and for investment of said sum of money in the bonds of the Western Maryland R. Co., to be secured by a mortgage, next in priority after the mortgages already executed by said company," is within the scope and purview of the provision contained in the Md. Const. of 1867, art. 11, § 7, which declares that "no debt shall be created by the mayor and city council of Baltimore unless it be authorized by an act of the general assembly, and by an ordinance of the mayor and city council of Baltimore, submitted to the legal voters of the city, and approved by a majority of the votes cast," and the same not having been so authorized and approved, is null and void. *Mayor, etc., of Baltimore v. Gill, 31 Md. 375.*—DISTINGUISHED IN *Western Md. R. Co. v. Patterson, 37 Md. 125.* REVIEWED IN *Newmeyer v. Missouri & M. R. Co., 52 Mo. 81.*

24. Bangor.—The city council is a body entirely distinct and different from the mayor and aldermen, and the assent of the former to the construction of a railroad across a street in that city is nugatory and confers no authority for that purpose. *Veazie v. Mayo, 45 Me. 560.*

25. Bayonne.—A resolution passed by the common council authorizing a person, at his own expense, to grade a portion of a street and build a bridge therein across a private canal is invalid. Such authorization should have been by ordinance. *State (Bergen Neck R. Co., Pros.) v. Bayonne, 54 N. J.*

L. 474, 24 Atl. Rep. 448.—FOLLOWING Story *v. Bayonne*, 35 N. J. L. 335; *Packard v. Bergen Neck R. Co.*, 48 N. J. Eq. 281. REVIEWING *Hunt v. Lambertville*, 45 N. J. L. 279.

26. Brooklyn.—New York Act of 1876, ch. 187, specially authorizing the Atlantic Avenue R. Co. and the Long Island R. Co., as lessee of the former, to use steam power on Atlantic avenue, is valid, notwithstanding that under the act of 1859, ch. 484, the company had, among other things, agreed, for a consideration, to relinquish the use of steam power within the city. Such contract would not prevent the legislature from again conferring upon the company the right to use steam power. *People v. Long Island R. Co.*, 60 How. Pr. (N. Y.) 395, 9 Abb. N. Cas. 181.

It was not within the power of said company by contract to bind itself to a particular mode of propelling its trains in the absence of a statute authorizing it, and regardless of the interest of the people. *People v. Long Island R. Co.*, 60 How. Pr. (N. Y.) 395, 9 Abb. N. Cas. 181.

And the above act of 1876 is not in conflict with that provision of the constitution of the United States which provides that no person shall be deprived of life, liberty, or property without due process of law; neither is it in conflict with the provision of the state constitution which prohibits the legislature from passing any private or local bill granting to any corporation, association, or individual the right to lay down railroad tracks, or from granting any corporation any exclusive privilege, immunity, or franchise. *People v. Long Island R. Co.*, 60 How. Pr. (N. Y.) 395, 9 Abb. N. Cas. 181.

27. Buffalo.—N. Y. Act of 1892, ch. 466, entitled "An act to authorize the city of Buffalo to take and improve lands for park purposes," does not authorize it to take land already in actual use for railroad purposes. *In re Buffalo*, 72 Hun 422, 25 N. Y. Supp. 218.

Neither can said city take land already used for railway purposes for park purposes, under a statute which authorizes the extension of highways over the right of way of railroads. *In re Buffalo*, 72 Hun 422, 25 N. Y. Supp. 218.

28. Chicago.—As riparian owner of grounds fronting on Lake Michigan, the city has the power to maintain wharves at the end of streets, and to maintain break-

waters to protect the shore; and it may delegate the duty to erect such breakwaters to a railroad company, as a consideration for allowing the road to enter the city. *Illinois v. Illinois C. R. Co.*, 33 Fed. Rep. 730; modified and affirmed in 146 U. S. 387, 13 Sup. Ct. Rep. 110.

When such breakwater is erected and the intermediate space between it and the edge of the water is reclaimed by filling in, the land thus reclaimed belongs to the city. *Illinois v. Illinois C. R. Co.*, 33 Fed. Rep. 730; modified and affirmed in 146 U. S. 387, 13 Sup. Ct. Rep. 110.

29. Columbus.—Under the act incorporating the city, the fee in the streets is in the state and the use in the public; and the municipal authorities have no power to authorize any obstructions to be placed in the streets, legislative action being necessary for that purpose. The act of 1857 authorized the connection of the Muscogee R. with the Opelika Branch R. and the Mobile & Girard R. at Columbus by extending their roads through the city commons and streets, with such side tracks, turnouts, and sheds as might be necessary for the convenience of freights and passengers, provided they first obtained the consent of the people of the city upon such terms as might be agreed on and should be satisfactory to them. But where the municipal authorities, by resolution, proposed to the people to vote "connection" or "no connection," only submitting the question of allowing a connection by a single track, and the vote was in favor of "connection," this action, without more, did not authorize the laying of side tracks in the street, nor could the mayor and council, without further authority, grant such power. *Kavanagh v. Mobile & G. R. Co.*, 32 Am. & Eng. R. Cas. 267, 78 Ga. 271, 2 S. E. Rep. 636.

30. Covington.—A provision in the charter of a railway company that it "may construct, operate, and maintain a railway from any point over the line of its railway to the cities of Newport, Covington, or either of them," does not confer upon the company power to operate and maintain its railway upon any street of the city of Covington with or without the sanction of the city council, the power to use a street for such purpose being only capable of being conferred by express enactment, or by the use of language which necessarily implies the power. *Ruttles v. Covington*, (Ky.) 38

Am. & Eng. R. Cas. 408, 10 *S. W. Rep.* 644.

31. Denver.—In 1873 and 1874 the city could not grant to individuals or a corporation a special privilege or franchise of constructing and operating a railway in the public streets of the city, because the legislative assembly, from which the city received its authority, had not at that time any such power, and in the general power over the streets of the city which was conferred by the charter of 1866 no such authority is given. And if the charter of 1874 was intended to confer such power, the legislative assembly exceeded its authority, and the act is in that particular void. *Denver & S. R. Co. v. Denver City R. Co.*, 2 *Colo.* 673, 20 *Am. Ry. Rep.* 339. *Denver Circle R. Co. v. Nestor*, 10 *Colo.* 403, 15 *Pac. Rep.* 714. See also *Denver Circle R. Co. v. Wiggins*, 10 *Colo.* 426, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Clark*, 10 *Colo.* 427, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Bigler*, 10 *Colo.* 428, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Martin*, 10 *Colo.* 428, 15 *Pac. Rep.* 726.

Under *Colo. Rev. St.* 1868, p. 619, § 5, the city only acquired a qualified fee in streets of an addition to the city platted in May, 1876, and could only hold them in trust for ordinary public purposes; and it had no authority to authorize railroad tracks on such streets so as to prevent an abutting owner from recovering damages. *Denver Circle R. Co. v. Nestor*, 10 *Colo.* 403, 15 *Pac. Rep.* 714. See also *Denver Circle R. Co. v. Wiggins*, 10 *Colo.* 426, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Clark*, 10 *Colo.* 427, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Bigler*, 10 *Colo.* 428, 15 *Pac. Rep.* 726. *Denver Circle R. Co. v. Martin*, 10 *Colo.* 428, 15 *Pac. Rep.* 726.

32. Detroit.—The city, under its charter as existing in 1885, cannot build a bridge for a crossing over a railroad track in a public street in the city, and plaintiff properly recovered damages for injuries sustained by him as an abutting landowner through the building of such a bridge. (Campbell, J., Sherwood, C. J., and Morse, J., qualifying.) *Schneider v. Detroit*, 72 *Mich.* 240, 40 *N. W. Rep.* 329.

33. Dubuque.—Bayous and sloughs of the Mississippi river which are not required to be preserved for the purposes of navigation are subject to state or municipal control; therefore the city is authorized to fill a slough in the river at that place, and to

authorize railroad tracks to be built thereon. *Ingraham v. Chicago, D. & M. R. Co.*, 34 *Iowa* 249, 5 *Am. Ry. Rep.* 99.

34. East St. Louis.—Section 20 of the charter of the city, authorizing the city council to make any contract or arrangement with any street or horse-railroad company for the use of any street, etc., provided the consent, in writing, of the owners of three fourths of the property per lineal foot fronting on such streets, etc., be first obtained, applies exclusively to the street or horse railroads strictly so called, and has no application to railroads contemplated in the General Railroad Law. *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 20 *Am. & Eng. R. Cas.* 9, 107 *Ill.* 450.

35. Elmira.—The N. Y. canal board having declared abandoned by the state certain land, part of the Chemung canal, in the city, the legislature in 1872 (ch. 785, Laws of 1872) conferred upon the city authority to convert the abandoned land into a street; this was accepted by the city. Previous to this the state had granted letters patent for a portion of the land to an individual. In 1878 an act was passed (ch. 171, Laws of 1878) by the terms of which the state released and transferred to the city the abandoned land "for the use and purposes of a street" on condition that it pay to the claimants under the letters patent a sum specified "for the title and interests of the state and of said defendants," the same to be raised by assessment upon the lands to be benefited by changing the canal into a street. The payment was made by the city and accepted by the claimants. By act of 1881 (ch. 482, Laws of 1881) plaintiffs, who owned lots adjoining said street, acquired whatever title then remained in the state, to the center of the street opposite their lots. In an action to restrain defendant, a street railroad corporation, from laying its tracks on that portion of the street—held, that by the act of 1878 the city acquired not merely the easement but all the title of the state then outstanding, to be held in trust for the public use as a street; and so, that plaintiffs had no title and the action was not maintainable. *De Witt v. Elmira Transfer R. Co.*, 134 *N. Y.* 495, 32 *N. E. Rep.* 42, 48 *N. Y. S. R.* 320; *affirming* 55 *Hun* 612, 29 *N. Y. S. R.* 613, 5 *Silv. Sup. Ct.* 568, 9 *N. Y. Supp.* 149.

36. Henderson.—A bridge across the Ohio river from the city to a point on the

Indiana shore is subject to taxation by the city for school and railroad purposes, under an act of the legislature authorizing the city to impose such a tax upon real estate within its limits, the limits of the city extending to low-water mark on the Indiana shore. *Henderson Bridge Co. v. Henderson*, 90 Ky. 498, 14 S. W. Rep. 493.

37. Hoboken.—The power to regulate and grade streets, and to declare what shall be nuisances, must be exercised by ordinance, and not by resolution. *State v. Mayor, etc., of Hoboken*, 35 N. J. L. 205.—FOLLOWING *State v. Bergen*, 33 N. J. L. 72.—FOLLOWED IN *State (Halsey, Pros.) v. Mayor, etc., of Newark*, 54 N. J. L. 102.

38. Hudson.—The supplement to the charter of the city of March 15, 1861, authorizing the common council to grant permission to any persons or corporations to lay railroad tracks through the streets and run cars on them, under such licenses and conditions as said council should think proper, and subject to be revoked at pleasure—*held*, to be prospective, and not to affect existing rights. *State (Hoboken & W. H. R. Co., Pros.) v. Mayor, etc., of Hoboken*, 30 N. J. L. 225.

39. Jamaica.—The village passed an ordinance prohibiting the loading or unloading of manure along the line of any railroad, or allowing any car so loaded to be left standing on the track, in the village. Subsequently, in 1866, the legislature passed an act creating a metropolitan sanitary district and board of health therein, which included said village. *Held*, that the statute superseded the ordinance, and prohibited any action under the ordinance by the village. *Jamaica v. Long Island R. Co.*, 37 How. Pr. (N. Y.) 379.

And independent of the statute the ordinance was void, and could not be enforced, where it was so broad as to interfere with the rights and privileges conferred by general laws upon railroad companies. *Jamaica v. Long Island R. Co.*, 37 How. Pr. (N. Y.) 379.

40. Jefferson.—After the passage of Mo. Act of March 10, 1871, prescribing a method of taxing railroads, the city had no power under its charter to collect taxes from railroad property within the city limits; and the act prohibited the collecting of such taxes in the year 1871. *Pacific R. Co. v. Watson*, 61 Mo. 57.—QUOTED IN *State ex*

rel. v. St. Louis, K. C. & N. R. Co., 9 Mo. App. 532.

41. Levis.—Under 44 & 45 Vict. c. 40, § 2 (P. Q.) passed on petition of the Quebec Central R. Co., the town passed a by-law guaranteeing to pay the whole cost of expropriation for the right of way for the extension of the railway to deep water on the St. Lawrence river over and above \$30,000. Certain ratepayers of the town obtained an injunction to stay further proceedings on the by-law on the ground of illegality. The proviso in section 2 of the act under which it was contended that the by-law was authorized was, "Provided that within thirty days from the sanction of the present act the corporation of the town of Levis furnishes said company with its said guaranty and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the act of incorporation of the town no power or authority is given to the corporation to give such guaranty. The statute 44 & 45 Vict. c. 40 was passed June 30, 1881, and the by-law forming the guaranty was passed July 27 following. *Held*, that the statute in question did not authorize the corporation of the town to impose burdens upon the municipality which were not authorized by their acts of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. *Quebec Warehouse Co. v. Levis*, 11 Can. Sup. Ct. 666.—REVIEWING *Manchester, S. & L. R. Co. v. Worksope Local Board of Health*, 3 Jur. N. S. 304; *Carlisle v. South-Eastern R. Co.*, 1 Mc.N. & G. 689; *Winch v. Birkenhead, L. & C. J. R. Co.*, 16 Jur. 1035.

42. Los Angeles.—The city has power to impose a license tax "for every steam railroad company having a depot in the city," and the fact that the business of the company extends beyond the city limits does not prevent the imposition of such tax; and the city is empowered to prescribe either an ordinary action for the recovery of such license tax, or a penalty for non-payment, or both. *Los Angeles v. Southern Pac. R. Co.* 61 Cal. 59.—DISTINGUISHING *Santa Cruz v. Santa Cruz R. Co.*, 56 Cal. 151. NOT FOLLOWED IN *San Benito County v. Southern Pac. R. Co.*, 37 Am. & Eng. R. Cas. 374, 77 Cal. 518, 19 Pac. Rep. 827.

The fact that plaintiff city granted a right

of way to a railroad company "free of any claim for damages or other compensation," does not prevent it from subsequently imposing a license tax on all railroads alike. *Los Angeles v. Southern Pac. R. Co.*, 67 Cal. 433, 7 Pac. Rep. 819.—DISTINGUISHING *Los Angeles v. Los Angeles Water Co.*, 61 Cal. 65.

43. Lynchburg.—Section 5 of the city charter, granting authority to impose a license tax upon persons engaged in certain enumerated callings, and "upon any other person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such tax upon a railroad corporation, which is neither a person nor an employment within the ordinary acceptance of those words. *Lynchburg v. Norfolk & W. R. Co.*, 80 Va. 237.

The provisions of the charter empowering the council, when water mains are laid in the street, to levy an annual special assessment on the real estate on both sides of such street to meet expenses of the water works, and further authorizing it to exempt from such assessment any property to which water is supplied and water rates charged, are not repugnant to the state constitution. *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473.

44. Macon.—The Georgia Southern & Florida R. Co. is not authorized to appropriate streets set apart for public use by that clause in its charter permitting it to build a railroad from Macon to Homersville, that clause only conferring the privilege of entering the city by condemning its right of way; nor by the provisions of the act transferring to it all the rights and privileges of the Central Railroad & Banking Co.; under the act of Feb. 11, 1850, the latter company is expressly required to compensate in damages the owners of the property through which it may pass. *Daly v. Georgia S. & F. R. Co.*, 36 Am. & Eng. R. Cas. 20, 80 Ga. 793, 7 S. E. Rep. 146.

The fee to the streets is in the state, and they cannot be appropriated to the use of a railroad without a legislative grant. *Daly v. Georgia S. & F. R. Co.*, 36 Am. & Eng. R. Cas. 20, 80 Ga. 793, 7 S. E. Rep. 146.

The return of ten acres of land formerly donated by the corporation to the railroad company on condition that large encroachments upon its streets shall be granted is

not a compliance with a statute requiring a "fair and reasonable compensation in money." *Daly v. Georgia S. & F. R. Co.*, 36 Am. & Eng. R. Cas. 20, 80 Ga. 793, 7 S. E. Rep. 146.

The act of the legislature of Dec. 17, 1888, authorizing the city to grant to the railroad company a permanent encroachment on Fifth street of eighty feet or less, adjoining lots Nos. 1 and 8 in block 57, and extending from Plum to Pine street in front of and adjoining lands now owned by the railroad company on Fifth street, was not intended to authorize the closing of a public alley running between lots 1 and 8 into Fifth street, nor the closing of Fifth street at the mouth of the alley. *Georgia S. & F. R. Co. v. Harvey*, 84 Ga. 372, 10 S. E. Rep. 971.

45. Memphis.—The United States ceded to the mayor and aldermen seventy-five acres of land lying within the corporate limits for the benefit of the city. The mayor and aldermen mortgaged the land to aid a railroad, one of whose termini was on the east bank of the Mississippi, opposite the city. Held, that this was a proper corporation purpose, and for the benefit of the city. *Adams v. Memphis & L. R. R. Co.*, 2 Coldw. (Tenn.) 645.

46. New Albany.—The city having made a subscription to the stock of a railroad company and issued bonds therefor, suit was brought by B. and T., individuals, against the city and the railroad company to enjoin the collection of taxes to pay the interest on the bonds. A compromise was agreed upon between the city and the company by which the bonds were to be surrendered and the subscription canceled; in consideration of which the city, by ordinance, agreed, among other things, to pay all costs of the suit, and also the fees of the attorneys of the plaintiffs, "as agreed between them and their said attorneys, and said city and attorneys of said railroad company." Held, that the ordinance did not bind the city to pay the fees of the attorneys of the railroad company. *New Albany v. Smith*, 16 Ind. 215.

47. New Orleans.—A compromise fairly entered into between the city authorities and a railroad company, respecting the right to use certain alluvion in front of the city known as the "Batture," is authorized by the general powers conferred upon such authorities, notwithstanding La. Act of 1880 creating a board of liquidation of the

debt of the city. *Board of Liquidation v. Louisville & N. R. Co.*, 109 U. S. 221, 3 Sup. Ct. Rep. 144.

The civil government of the city cannot be permitted to deny the rights derived by the relators in this case from their contract with said city on the ground that it was under military authority at the time, when, after the cessation of that military authority, those rights have been, in part, frequently recognized and ratified by its ordinances. That contract was an entirety. The city had no right to sever its obligations so as to ratify one part of the contract and reject another. *State ex rel. v. Cockrem*, 25 La. Ann. 356.

An ordinance of the city enacted before the passage of Act 133 of 1888, and which becomes a part of a contract between said city and a railroad corporation, requiring notice to be given to said corporation of certain repairs to be done on the streets, must be complied with before the city can invoke the remedy by mandamus as provided in said Act 133 of 1888. *State ex rel. v. New Orleans & C. R. Co.*, 44 La. Ann. 1026, 11 So. Rep. 709.

48. New Rochelle.—The village is not a necessary party to a proceeding to foreclose a railroad mortgage because it has taken a bond from the railroad company, conditioned that it shall indemnify the village against all damages, as a condition to consenting to the construction and operation of the road in the village, and because it has already commenced suit on the bond. The village is only a general creditor of the road, and cannot be made a party under N. Y. Code, § 452. *Farmers' L. & T. Co. v. New Rochelle & P. R. Co.*, 32 N. Y. S. R. 714, 57 Hun 376, 10 N. Y. Supp. 810; affirmed in 126 N. Y. 624, mem., 27 N. E. Rep. 410, mem., 36 N. Y. S. R. 1012.—**FOLLOWING** *Herring v. New York, L. E. & W. R. Co.*, 105 N. Y. 340, 7 N. Y. S. R. 547.

49. New York.—The fee to the streets of the city existing at the time that the island was acquired by the English from the Dutch vested in the city, but such tenure is not absolute, but is for the public use of the inhabitants of the island; but the state so far lost the control of such streets as to be unable to authorize their use for railroad purposes without compensation to those who may be injured. *Carter v. New York El. R. Co.*, 14 N. Y. S. R. 859.

The legislature has the right to make

grants of railroad privileges and franchises over the streets and avenues; and when the power is exercised, it is superior to and exclusive of any power which previously resided in the local authorities. *People v. New York & H. R. Co.*, 26 How. Pr. (N. Y.) 44.

The city has no right to grant railroad privileges or establish railroads independent of legislative action and approval. *People v. New York & H. R. Co.*, 26 How. Pr. (N. Y.) 44.

The permission which was given to the New York & Harlem R. Co. to build a road in the city and to lay a double track meant permission to lay two tracks essentially upon the same location, and not two essentially different routes through different avenues or streets, especially when one of the roads would be on streets and avenues expressly reserved by the legislature, with the right to grant it to another company. *People v. New York & H. R. Co.*, 26 How. Pr. (N. Y.) 44.

By N. Y. Act of April 6, 1832, the company was authorized to extend its road south on Fourth avenue to Fourteenth street, and then through such other streets as the city authorities might from time to time permit. *Held*, that this power was not spent by a single grant or permission to extend its road, but might be repeatedly exercised according to the public needs. And the extension authorized by the act of 1832 was to be longitudinal in a southern direction, and not lateral, but not necessarily pursuing the precise direction that the existing portion of the road 'id, but should have the same general direction, and not a direction to opposite or widely divergent points of the compass. *People v. New York & H. R. Co.*, 26 How. Pr. (N. Y.) 44.

50. Ottawa.—The city passed resolutions providing for a lease of right of way to a company over lands expropriated by the city for waterworks purposes, under 35 Vict. c. 80 (O). *Held*, that, though *prima facie* the only right intended to be conferred on a company is that of expropriating the private property of individuals or corporations, and not property already devoted to public uses, or already expropriated under other acts, yet under some circumstances the right to make such expropriation might exist, and if so, then the city would have the corresponding power to convey. *In re Bronson*, 1 Ont. 415.—

CRITICISING *North-Eastern R. Co. v. Payne*, 8 Rich. (So. Car.) 177. QUOTING *Union Pac. R. Co. v. Hall*, 91 U. S. 343. REVIEWING *Morris & E. R. Co. v. Central R. Co.*, 31 N. J. L. 205; *In re Boston & A. R. Co.*, 53 N. Y. 574, 5 Am. Ry. Rep. 92; *Queen v. South Wales R. Co.*, 19 L. J. Q. B. 272.

51. Parkdale.—A special statute in Ontario (46 Vict. c. 45) authorized the municipalities of the city of Toronto and the village of Parkdale, jointly or separately, and the railway companies whose lines of railway ran into the city of Toronto, to agree together for the construction of railway subways. The municipalities not being able to agree, Parkdale and the railway companies entered into an agreement to have a subway constructed at their joint expense, but under the direction of the municipality and its engineer, and on application to the privy council of Canada, purporting to be made under 46 Vict. c. 24 (D), an order was obtained authorizing the work to be done according to the terms of such agreement. The municipality of Parkdale then contracted with one G. for the construction of the subway, and a by-law providing for the raising of Parkdale's share of the cost of construction was submitted to and approved of by the ratepayers of that municipality. In an action by the owner of property injured by the work—*held*, that the work was not done under the special act, nor merely as agent of the railway companies, and the municipality was therefore liable as a wrong-doer. *West v. Parkdale*, 12 Can. Sup. Ct. 250; reversing 12 Ont. App. 393, which reverses 8 Ont. 59, 7 Ont. 270.

52. Passaic.—The charter of the village provided for the assessment of the cost of grading streets upon the lands fronting upon the improvement, in proportion to the benefit to be received by each lot or parcel thereof. *Held*, that the legislature intended by the language "in proportion to the benefit to be received" not only ratio of assessment, but limitation also, and by implication to have limited the assessment to the amount of benefit. It is a necessary implication from the language of the provision that the assessment must be confined to those whose lands are benefited by the improvement, because the ratio is based on the benefit received. *Passaic v. State (Delaware L. &*

W. R. Co. Pros.), 37 N. J. L. 538; affirming 37 N. J. L. 137.

It is essential to the validity of an assessment made under the provisions of the village charter for the cost of grading streets that it affirmatively and unequivocally appear that the assessment does not exceed the benefits. *Passaic v. State (Delaware L. & W. R. Co. Pros.)*, 37 N. J. L. 538; affirming 37 N. J. L. 137.

53. Philadelphia.—The city has not the power to invest its stocks, money, or credit directly or indirectly in aid of a steamship line between the city and foreign ports without the authority of a special act of assembly. The passage of an ordinance authorizing the retention of a part of the dividends due to the city stock of the Pennsylvania R. Co. held by it for the purpose of aiding in the establishment of an ocean steamship company is in violation of the constitutional amendment of 1857, and void. *Pennsylvania R. Co. v. Philadelphia*, 47 Pa. St. 189.

In respect to the care, regulation, and control of the highways within its corporate limits, the city exercises a portion of the power of the commonwealth, subject only to a higher control of the state and the use of the public, and therefore a written license, granted by the city for a valuable consideration, authorizing the holder to connect his property with the city railroad by a turnout and track is not such a contract as will prevent the city from abandoning or removing said railroad whenever in the opinion of its authorized authorities such action will tend to the benefit of the public. *Branson v. Philadelphia*, 47 Pa. St. 329.—FOLLOWING *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 320; *Barter v. Com.*, 3 P. & W. (Pa.) 259; *Case of Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25; *Susquehanna Canal Co. v. Wright*, 9 Watts & S. (Pa.) 9; —FOLLOWED IN *Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. St. 253.

By various acts of assembly the city was authorized to culvert Cohocksink creek; by a subsequent act the North Pa. R. Co. was authorized to construct a railroad from any point north of Vine street, etc. *Held*, that this last act gave no exclusive right to any street, and that the city could remove complainant's railroad in order to build the culvert. *North Pa. R. Co. v. Stone*, 3 Phila. (Pa.) 421.

The Fairmount Park commissioners have the power to use the name of the city in any proceeding at law or in equity that may be necessary to carry into effect the objects for which they are created; and therefore they may use the name of the city in a proceeding to prevent a railroad company from grading or interfering with the grounds or avenues within the park, or from constructing or maintaining a railroad therein. *Philadelphia v. Germantown Pass. R. Co.*, 10 Phila. (Pa.) 165.

54. Savannah.—Under the charter of the city, the mayor and aldermen have no power to grant to a railroad company the privilege of appropriating a portion of any street from end to end, and by excavations and embankments, preclude all other uses of such portion. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601.

The mayor and aldermen of the city have no such property in the streets and squares of the city, under the act of 1760, or any act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude consisting of running a railroad thereon. *Savannah & T. R. Co. v. Mayor, etc.*, of Savannah, 45 Ga. 602, 3 Am. Ry. Rep. 36.

55. Schenectady.—N. Y. Act of 1884, ch. 137, authorized the council of the city to discontinue a portion of a street to be used as a site for a railroad depot. By the act of 1884, ch. 546, § 2, the above act is amended, and it is provided that the street shall not be closed without compensation to property owners, to be ascertained as provided in the city charter. *Held*, that it was not the intention of the legislature to make the charter a part of the latter act, and it was, therefore, not unconstitutional for failing to embrace the terms of the charter. *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

Neither is the act of 1884 in conflict with the state Const. art. 3, § 18, which prohibits the legislature from passing any local act "discontinuing any road, highway, or alley." *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

Neither is the above act in conflict with that provision of the state constitution which prohibits local acts granting any cor-

poration the right to lay down tracks, or granting to any private corporation an exclusive privilege, immunity, or franchise. *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

The provision in such statute authorizing the council to close a portion of a street to the passage of "vehicles, horses, and cattle" is sufficient to authorize it to empower the company to close the surface of the street entirely by a fence, after providing a foot bridge for persons walking. *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

In such case it is immaterial that the depot proper was not placed on the discontinued portion of the street, where it appears that it is needed for depot purposes, and a portion of the depot sheds extends over it. *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

An ordinance of said city confirming a report of commissioners awarding damages to property owners for closing such street is sufficient, under 2 N. Y. Rev. St. p. 555, § 27, when passed by a majority vote. *Weinckie v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 689, 61 Hun 619, mem., 39 N. Y. S. R. 584; affirmed in 133 N. Y. 656, mem., 31 N. E. Rep. 625, mem.

56. Seattle.—Where the city has laid out a street over tide land, and granted a railway company the right to lay tracks thereon by virtue of provisions contained in the charter conferred upon the city by the territorial legislature, and its acts in exercising such power have been subsequently confirmed by the provision of the state constitution authorizing cities to extend their streets over tide lands, the city is estopped to dispute the validity of the franchise granted the railway company on the ground of want of authority in the city. *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. Rep. 1048.

MUNICIPAL GRANTS.

Right to construct and operate street railway under, see STREET RAILWAYS, 16-57.

MURDER.

Prosecutions for, see CRIMINAL LAW, 30.

— matters sought to be offset, see SET-OFF, ETC., 2.

MUTUALITY.

Of contracts, see CONTRACTS, 10; SPECIFIC PERFORMANCE, 4.

MUTUAL NEGLIGENCE.

Rule as to, see CONTRIBUTORY NEGLIGENCE, 5-8.

N**NAME OF RAILROAD.**

Change in, when releases subscriber to stock, see SUBSCRIPTIONS TO STOCK, 123.

Of road aided, effect of change of, see MUNICIPAL AND LOCAL AID, 205.

1. Change of name.*—A change in the name of a corporation can only be effected by changing the articles of incorporation, and the best evidence of this change is the articles themselves. *Chicago, D. & M. R. Co. v. Keisel*, 43 Iowa 39.

Where the name of a corporation has been changed by an amendatory act, and suit is brought by it in its first name, it is not necessary that the corporation should show that the amendatory act has been rejected by its stockholders. *Beene v. Cahawba & M. R. Co.*, 3 Ala. 660.

A finding that a resolution for the change of name of a railway company was adopted by a two-thirds vote of the stockholders, and that the required certificates of the change were filed in the proper offices, will be sufficient to show a *prima facie* compliance with the statute. *Illinois Midland R. Co. v. Barnett Sup'rs*, 85 Ill. 313.

Minn. Special Act of 1867, ch. 1, permitting the St. Paul & Pacific R. Co. to change its name, and that of any of its branches or divisions of the road, did not authorize it to create a separate corporation of any of its branches, and suits thereafter must be in the name of the company, and not of any of the branches. *Morris v. St. Paul & C. R. Co.*, 19 Minn. 528 (Gil. 459), 10 Am. Ry. Rep. 289.

It is only where the court is satisfied that there is no reasonable objection to a proposed change in a corporate name that it is empowered to make an order authorizing the alteration, under N. Y. Act of 1870, ch.

* Consolidation, change of name, etc., as affecting power of municipal corporations to issue bonds in aid of railroads, see note, 5 L. R. A. 728.

322; and where there is a strongly indicated intent to imitate the name of an existing corporation as closely as might be without actually appropriating it, the application will be denied. *In re United States M. R. & C. Assoc.*, 22 N. Y. S. R. 494, 52 Hun 611, mem.; appeal dismissed in 115 N. Y. 176, 21 N. E. Rep. 1034, 24 N. Y. S. R. 548.

While a corporation has probably no right to change its name without legislative authority, it seems that by doing so, and doing business under the new name, it does not forfeit its franchises or the title to its property. *Com. v. Pennsylvania & W. R. Co.*, 17 Phila. (Pa.) 609.

A court of equity may, upon objection made to the organization of a corporation by a specific name on the ground that another corporation has already adopted the proposed name or one so near like it as to lead to confusion, require a sufficient modification of the name to obviate objection. *Ex parte Walker*, 1 Tenn. Ch. 97.

Where the name of a railway is changed pending an action against it, and a motion is afterwards made, a suggestion should be entered of the change of name and the affidavits entitled in the new name. *Hibbithwaite v. Leeds & T. R. Co.*, 15 Jur. 1015, 21 L. J. Ex. 37.

A deed to defendant company described it by its original name, when in fact its name had then been changed. *Held*, a sufficient *descriptio personæ* to enable the company to take, though it might not be sufficient to sue in. *Grand Junction R. Co. v. Midland R. Co.*, 7 Ont. App. 681.

An incorporated railroad company has no power to change its name without authority of the legislature. Where property is conveyed to a company under the name by which it is afterwards incorporated, but which had no legal existence at the time, nothing passes by the conveyance. *Lloyd v. European & N. A. R. Co.*, 18 New Brun. 194.

By Colorado Act of Feb. 5, 1866, certain persons were incorporated as the "Holladay Overland Mail and Express Company," with the privilege and power of changing its name by "order" of its directors "approved" by the stockholders. The bill alleged that the stockholders, in pursuance of said act, duly changed the name of the corporation to "Wells, Fargo & Co.," which change was approved by the legislature by the act of January 26, 1872. *Held*: (1) that, until the contrary appears, it should be presumed that the final action of the stockholders was had in pursuance of the orders of the directors; (2) that the essential act in the proceeding was the vote of the stockholders, to which the order of the board was only preliminary, and therefore that portion of the act providing for such order ought to be considered merely directory; (3) that the act of 1872 approving the change is not in conflict with Rev. St. § 1889, forbidding the legislature from granting "private charters or especial privileges." *Wells v. Oregon R. & N. Co.*, 8 Sawy. (U. S.) 600, 15 Fed. Rep. 561.—DISTINGUISHING *Newby v. Oregon C. R. Co.*, Deady (U. S.) 609.—FOLLOWED IN *Ex parte Koehler*, 21 Am. & Eng. R. Cas. 52, 23 Fed. Rep. 529.

Wis. Act of 1874, ch. 273, classifying railroads, placed a road in a certain class, and referred to it as the "Milwaukee & St. Paul Railway Company." The same year a general statute was passed providing for changes of corporate names, and the name of the company was changed to Chicago, Milwaukee & St. Paul railway company, and no other company of the first name had ever been chartered in the state. *Held*, that the provisions of the first act so far as they relate to the company must be regarded as referring to the company under the changed name. *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

2. Misnomer, and its effect.—Where a corporate name consists of several words, a mere transposition of the words in contracting with it is unimportant so long as there is no doubt what corporation is meant. *So held*, where a note was payable to the Rock Island & Alton railroad company, when the true name of the company was Alton & Rock Island railroad company. *Chadsey v. McCreery*, 27 Ill. 253.

Where a contract is made with a corporation about the time its name is changed,

but the contract uses the old name, an assignee may sue thereon where the complaint avers that the name of the corporation was changed from the one used in the contract to the name by which the company is sued about the time of making the contract. *Racine County Bank v. Ayres*, 12 Wis. 512.

An act creating a railroad company styled it "The Wabash Railroad Company," but the secretary of state, in preparing the act for publication, in the title of the act styled the company "The Wabash Valley Railroad Company." *Held*, that the insertion of the word "valley" did not affect the legal name of the corporation. *Peake v. Wabash R. Co.*, 18 Ill. 88.

Upon an application by the purchaser of stock at a sheriff's sale for mandamus to compel a railway company to register a transfer of stock in the company, it appeared that the stock had been sold under an execution against "the mayor, aldermen, and commonalty of the city of Ottawa," and by U. C. Con. St. c. 54, the name of the corporation was changed to "the corporation of the city of Ottawa." *Held*, that the writ properly followed the judgment as recovered, and was sufficient, the corporation being formerly known by the name therein given. *Goodwin v. Ottawa & P. R. Co.*, 13 U. C. C. P. 254.

3. How misnomers must be pleaded.—Misnomer of a plaintiff corporation can be taken advantage of only by a plea in abatement, and will be considered waived by a plea to the merits. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. Rep. 185.

When sued by the wrong name, the defendant must disclose his true name in making objection to the misnomer by plea in the nature of a plea in abatement or otherwise. If the plea, answer, or objection to the misnomer does not disclose the true name, and judgment is rendered against the defendant in the name in which he was sued for the want of a sufficient answer, the judgment will not be reversed because of the alleged misnomer. *Louisville & N. R. Co. v. Hall*, 12 Bush (Ky.) 131.—QUOTED IN *Heckman v. Louisville & N. R. Co.*, 85 Ky. 631.

A corporation may be known by several names, and can only take advantage of a misnomer by a plea in abatement, and no defense on this ground is admissible after a step in the cause recognizing the identity of

the corporation sued with the corporation defending. *Louisville, N. & G. S. R. Co. v. Reidmond*, 13 *Am. & Eng. R. Cas.* 515, 11 *Lea (Tenn.)* 205.—APPLYING *East Tenn. & G. R. Co. v. Evans*, 6 *Heisk. (Tenn.)* 607.

4. Curing misnomers by amendment.—Where a corporation has been brought into court under a wrong name, the court has power to amend the process by striking out that name and inserting the right one. *Lane v. Seaboard & R. R. Co.*, 5 *Jones (N. Car.)* 25.

In an action against a railroad company, the summons and complaint may be amended by substituting the word "railway" for "railroad" as a part of the defendant's corporate name. *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518, 3 *So. Rep.* 764. *East Tenn., V. & G. R. Co. v. Mahoney*, 89 *Tenn.* 311, 15 *S. W. Rep.* 652. *Parks v. West Side R. Co.*, 50 *Am. & Eng. R. Cas.* 616, 82 *Wis.* 219, 52 *N. W. Rep.* 92.

Where, in an action against a railroad corporation, the plaintiff in his narr., through an inadvertence caused by a change in the name of the corporation, makes an error, the court may permit an amendment after verdict so as to make the narr. conform to the true name of the corporation. *Pittsburgh, B. & W. R. Co. v. Rohrman, (Pa.)* 12 *Am. & Eng. R. Cas.* 176.

In an action against a railroad corporation described in the original summons and complaint as the "Atlanta & West Point Railroad and Western Railway of Alabama Company, a foreign corporation incorporated under the laws of Georgia," an amendment cannot be allowed (Code, § 2833) changing the name to the "Western Railway of Alabama Company, a corporation incorporated under the laws of Alabama." *Western R. Co. v. McCall*, 89 *Ala.* 375, 7 *So. Rep.* 650.

Where suit is brought against "the Central Railroad and Banking Company," and a motion is made to dismiss on the ground that there is no such corporation, an amendment adding the words "of Georgia" to the name of the defendant should be allowed. *Johnson v. Central R. Co.*, 74 *Ga.* 397.

Amendment of a declaration against the Chattanooga, Rome & Carrollton railroad company by substituting "Columbus" for "Carrollton," so as to give the defendant its proper corporate name, is not adding a new party, but simply correcting a misnomer.

Chattanooga, R. & C. R. Co. v. Jackson, 86 *Ga.* 676, 13 *S. E. Rep.* 109.

After the allowance of the amendment it is not error to require the defendant to go to trial, its counsel not stating that they were less prepared for trial, nor giving any reason why the trial should not proceed except that a new party had been entered as to which this was the appearance term, and it appearing from the record that defendant's counsel recognized that the true defendant had been sued and served by acknowledging service on its behalf and filing pleas of abatement in its name. *Chattanooga, R. & C. R. Co. v. Jackson*, 86 *Ga.* 676, 13 *S. E. Rep.* 109.

Where a suit is brought against the "Merchants' Despatch Company," and afterwards it is amended by leave so as to style defendants the "Merchants' Despatch Transportation Company," it is no ground for exclusion of a deposition taken before the amendment. *Merchants' Despatch Transp. Co. v. Leysor*, 89 *Ill.* 43.

A company was sued as "The West Side Railroad Company," and after judgment and execution returned unsatisfied it was within the power of the court to allow the papers in the suit from the summons to the execution to be amended so as to make the corporate name "The West Side & Yonkers Railroad Company." *Tasker v. Wallace*, 6 *Daly (N. Y.)* 364.

But where the sheriff simply returns the execution indorsed "no property found," it is not necessary to amend the return by showing that the execution was against the company under the amended name. *Tasker v. Wallace*, 6 *Daly (N. Y.)* 364.

NAMES.

Of beneficiaries alleging in complaint, see DEATH BY WRONGFUL ACT, 130.

— parties in process, see PROCESS, 4-6.

— passengers, failure to sign on ticket, see EJECTION OF PASSENGERS, 37.

Removal of, from list of shareholders, see STOCK, 85.

Right of receiver to sue in his own name, see RECEIVERS, 118.

NAVIGABLE WATERS.

Bridges over, see BRIDGES, ETC., 59-88.

Crossing over, under charter provisions, see CHARTERS, 66.

Loss of access to, as the measure of damages, see EMINENT DOMAIN, 124C.

Title to led of navigable stream, see **RIPARIAN RIGHTS, 3.**
See **WATERS AND WATERCOURSES, 1-8.**

NAVIGATION.

Action for damages for obstruction of, see **EMINENT DOMAIN, 994.**
Liability for obstructing, in construction of roads, see **CONSTRUCTION OF RAILWAYS, 8.**
Obstruction of, by bridges, see **BRIDGES, ETC., 82-88.**
— to, as an element of land damages, see **EMINENT DOMAIN, 715.**
— — when deemed a nuisance, see **NUISANCE, 11.**
Prosecutions for obstructing, see **CRIMINAL LAW, 33.**
Remedies for obstruction of, see **RIPARIAN RIGHTS, 9.**
Validity of state laws regulating, see **COMMERCE, 6, 10.**

NEBRASKA.

Assessment and levy of taxes in, see **TAXATION, 271.**
Constitutionality of statutes of, as to municipal aid for railways, see **MUNICIPAL AND LOCAL AID, 41.**
— — tax laws of, see **TAXATION, 37.**
Constitutional provisions in, relative to condemnation of land, see **EMINENT DOMAIN, 15.**
Deductions for benefits under condemnation laws of, see **EMINENT DOMAIN, 743.**
Duty to locate station under statutes of, see **STATIONS AND DEPOTS, 19.**
Grants by, to railroads, see **LAND GRANTS, 122.**
Jurisdiction of district court in, see **JURISDICTION, 18.**
Mechanics' lien law of, see **LIENS, 11.**
Statutes of, relative to distribution of damages for causing death, see **DEATH BY WRONGFUL ACT, 63.**
— — — intersection of railways, see **CROSSING OF RAILROADS, 12.**
Statutory duty of company in construction of street crossing railway, see **CROSSING OF STREETS AND HIGHWAYS, 62.**
— — to fence in, see **FENCES, 30.**
— regulation of grade crossings in, see **CROSSING OF STREETS AND HIGHWAYS, 89.**
Taxation in aid of railways in, see **MUNICIPAL AND LOCAL AID, 419.**
— of land grants in, see **TAXATION, 121.**

NECESSITY.

Condemnation of railway property must be founded on, see **EMINENT DOMAIN, 110, 111.**

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For condemnation of franchises, see **EMINENT DOMAIN, 102.**

— corroboration of witnesses, see **WITNESSES, 43.**

Of assessment or call on stock, see **SUBSCRIPTIONS TO STOCK, 45, 46.**

— bond or undertaking on appeal, see **EMINENT DOMAIN, 941.**

— condemnation proceedings to acquire right to use streets, see **STREETS AND HIGHWAYS, 106, 107, 111.**

— describing property sought to be condemned, see **EMINENT DOMAIN, 314.**

— effort to agree with landowner, see **EMINENT DOMAIN, 274-276.**

— exercise of right of eminent domain, see **EMINENT DOMAIN, 3, 61, 321, 346, 366, 554, 791, 820, 1089.**

— instructions to jury on assessment of land damages, see **EMINENT DOMAIN, 577.**

— making or securing compensation for lands condemned, see **EMINENT DOMAIN, 371-423.**

— motion for new trial in court below, see **EMINENT DOMAIN, 918.**

— municipal consent to occupation of street by steam roads, see **STREETS AND HIGHWAYS, 61-68.**

— notice of appeal in condemnation proceedings, see **EMINENT DOMAIN, 938.**

— objections on trial, see **TRIAL, 52.**

— payment, to the passing of title for lands condemned, see **EMINENT DOMAIN, 852.**

— pleading in condemnation proceedings, see **EMINENT DOMAIN, 305, 306, 350-352.**

— prayer for instructions, see **EMINENT DOMAIN, 917; NEGLIGENCE, 112; TRIAL, 159.**

Receivers' certificates should be issued only in cases of, see **RECEIVERS, 98.**

Ways of, see **PRIVATE WAYS, 3.**

NEGATIVE EVIDENCE.

Competency of, see **EVIDENCE, 50.**

In stock killing cases, see **ANIMALS, INJURIES TO, 406.**

Questions to witness calling for, see **WITNESSES, 59.**

Weight and sufficiency of, see **EVIDENCE, 290-299.**

NEGLIGENCE.

As a defense to action on insurance policy, see **ACCIDENT INSURANCE, 9-12.**

— towards trespassers, what amounts to, see **TRESPASSERS, INJURIES TO, 31.**

At crossings, how pleaded, see CROSSINGS, INJURIES, ETC., AT, 334, 336.

Averment of, in actions against carriers, see CARRIAGE OF MERCHANDISE, 725.

Burden of proof as to, see LIMITATION OF LIABILITY, 40.

— — — **to disprove, when on carrier, see CARRIAGE OF MERCHANDISE, 153; DEATH BY WRONGFUL ACT, 239; FIRES, 288, 289.**

— — — **when on plaintiff to prove, see CARRIAGE OF MERCHANDISE, 152.**

Causing loss by fire, liability of company for, see FIRES, 19-101.

Evidence under the pleadings in actions for, see PLEADING, 107-112.

Exemplary damages in cases of, see DAMAGES, 27, 28.

Facts constituting, must be set out in complaint, see DEATH BY WRONGFUL ACT, 138, 139.

Failure of traveler at crossing to look and listen, see CROSSINGS, INJURIES, ETC., AT, 250-253.

— **to adopt rules, when deemed to be, see EMPLOYÉS, INJURIES TO, 20-22.**

— **block frogs, when deemed to be, see EMPLOYÉS, INJURIES TO, 65, 66.**

— **give signals is, see CROSSINGS, INJURIES, ETC., AT, 130-135.**

How alleged in action against carrier of passengers, see CARRIAGE OF PASSENGERS, 542, 544-549.

In destruction of property by fire, presumptive evidence of, see FIRES, 261-270.

— **expelling passenger from train, how pleaded, see EJECTION OF PASSENGERS, 87.**

— **retaining incompetent servant, burden of proof to show, see FELLOW-SERVANTS, 493.**

— **selection of servants, allegation of, see FELLOW-SERVANTS, 454.**

— **setting fire, weight of evidence to show, see FIRES, 246-256.**

— **starting train, competency of evidence of, see EVIDENCE, 65.**

— **unloading, liability of consignee for, see CARRIAGE OF MERCHANDISE, 245.**

Injuries at station caused by, see STATIONS AND DEPOTS, 58-145.

— **caused by, in streets and highways, liability for, see STREETS AND HIGHWAYS, 360-402.**

— — — **liability of tramways for, see TRAMWAYS, 6.**

— **to passengers on cable cars caused by, see CABLE RAILWAYS, 8-13.**

Instructions as to the different degrees of, see DEATH BY WRONGFUL ACT, 310.

— **on questions of, see TRIAL, 123-129, 148-154.**

Liability of agent to principal for, see AGENCY, 31.

— **electric railway for injuries caused by, see ELECTRIC RAILWAYS, 19-38.**

— **mine owner for personal injuries caused by, see MINES, ETC., 11.**

— **principal for negligent acts of agent, see AGENCY, 83-85.**

— **receiver for, see RECEIVERS, 69.**

— **street-car company for injuries caused by, see STREET RAILWAYS, 313-331.**

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Limitation of liability for, see BILLS OF LADING, 62-72; CARRIAGE OF LIVE STOCK, 65, 67, 72-79; CARRIAGE OF MERCHANDISE, 458-484; CARRIAGE OF PASSENGERS, 333, 334; EMPLOYÉS, INJURIES TO, 179-181.

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— **auxiliary companies, who liable for, see AUXILIARY COMPANIES, 1.**

— **car company, liability of railroad company for, see SLEEPING, ETC., COMPANIES, 37.**

— **carrier as regards duty to passenger, see STREET RAILWAYS, 338-372.**

— **of cattle, presumption of, see CARRIAGE OF LIVE STOCK, 147.**

— — — **live stock, see CARRIAGE OF LIVE STOCK, 39, 44.**

— — — **passengers, see CARRIAGE OF PASSENGERS, 126-341.**

— — — **passengers, burden of proof to show, see CARRIAGE OF PASSENGERS, 592.**

— **sufficiency of evidence to show, see CARRIAGE OF MERCHANDISE, 756; CARRIAGE OF PASSENGERS, 572, 574.**

— **company, admissibility of evidence to show, see FIRES, 203-207.**

— **allegation of, in action for injuries caused by fire, see FIRES, 176-189.**

— — — **suit for injury to employe, see EMPLOYÉS, INJURIES TO, 517-538.**

— **as to speed near crossings, see CROSSINGS, INJURIES, ETC., AT, 187-189.**

— **at crossing, evidence to show, see CROSSINGS, INJURIES, ETC., AT, 342-349.**

— **burden on plaintiff to show, see FIRES, 280-286.**

— **contributory negligence where peril is**

- occasioned by, see EMPLOYÉS, INJURIES TO, 332-333.
- Of company does not excuse contributory negligence of person injured, see CROSSINGS, INJURIES, ETC., AT, 321.
- duty to look and listen as affected by, see CROSSINGS, INJURIES, ETC., AT, 263.
 - evidence to disprove, see FIRES, 222-224.
 - in management of turntables, evidence of, see CHILDREN, INJURIES TO, 30-32.
 - selecting fellow-servants of employe injured, see FELLOW-SERVANTS, 132-162, 487.
 - instructions relative to, see FIRES, 294-302.
 - questions as to, when for the jury, see EMPLOYÉS, INJURIES TO, 600-703; FELLOW-SERVANTS, 507-510; FIRES, 313-323.
 - sufficiency of evidence of, see ANIMALS, INJURIES TO, 447-468; EMPLOYÉS, INJURIES TO, 561-571, 604-617.
 - towards employes, as the proximate cause of injury, see EMPLOYÉS, INJURIES TO, 15-17.
 - when presumed in actions for injury to employe, see EMPLOYÉS, INJURIES TO, 625-627.
 - connecting carrier, right to limit liability for, see CARRIAGE OF MERCHANDISE, 677.
 - contractors, liability of company for, see CONSTRUCTION OF RAILWAYS, 14.
 - defendant, how alleged, see ANIMALS, INJURIES TO, 342-345.
 - must be affirmatively proved, see DAMAGES, 85; DEATH BY WRONGFUL ACT, 234, 238; EMPLOYÉS, INJURIES TO, 590-594.
 - presumption of, see DEATH BY WRONGFUL ACT, 232.
 - when question of fact for jury, see DEATH BY WRONGFUL ACT, 292, 293.
 - employe, burden of proof to show, see EVIDENCE, 141.
 - employes, in the manner of using tools, see EMPLOYÉS, INJURIES TO, 351.
 - operation of trains, use of machinery, etc., see EMPLOYÉS, INJURIES TO, 341-395.
 - injuries to passengers caused by, see SLEEPING, ETC., COMPANIES, 18.
 - liability of mortgage trustees for, see MORTGAGES, 153.
 - fellow-servants, as a defense to action for causing death, see DEATH BY WRONGFUL ACT, 166.
 - rule of non-liability, for, see FELLOW-SERVANTS, 1-72.
 - when must be negated in complaint,

- see CONTRIBUTORY NEGLIGENCE, 73; EMPLOYÉS, INJURIES TO, 540.
- Of fellow-servants, whether sole cause of injury a question of fact, see FELLOW-SERVANTS, 517.
- independent contractor or his servants, liability for, see INDEPENDENT CONTRACTORS, 7.
 - initial carrier, when presumed, see CARRIAGE OF MERCHANDISE, 560.
 - injured child, when question of fact for jury, see CHILDREN, INJURIES TO, 103, 104.
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 - lessee, liability of lessor for, see LEASES, ETC., 40, 111.
 - managers of government railroads, when binds the government, see GOVERNMENT RAILROADS, 13.
 - original companies, liability of consolidated company for, see CONSOLIDATION, 46.
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 - necessity of averring, in answer, see EMPLOYÉS, INJURIES TO, 546.
 - public agents, liabilities of, see AGENCY, 119.
 - railway company, liability of express company for, see EXPRESS COMPANIES, 34.
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 - servants, compensatory damages for, see DAMAGES, 20.
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 - station agents, liability of company for, see STATION AGENTS, 9.
 - street-railway companies, as regards children, see CHILDREN, INJURIES TO, 42-66.
 - superintendent, when binds company, see SUPERINTENDENT, 3.
 - third persons, liability of carrier for, see CARRIAGE OF PASSENGERS, 133.
 - vice-principal, allegation of, see FELLOW-SERVANTS, 456.
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 - union depot company, liability of railroad company for, see UNION DEPOT COMPANIES, 8.
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I. WHAT CONSTITUTES.

1. *In General.*

1. "Negligence" defined.—Negligence is a relative term, and implies the non-observance of, or omission to perform, a duty prescribed by law, or it arises from the situation of the parties and the circumstances surrounding the transaction. *Kelley v. Michigan C. R. Co.*, 28 Am. & Eng. R. Cas. 633, 65 Mich. 186, 31 N. W. Rep. 904. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174, 17 Wash. L. Rep. 550. *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 15 S. W. Rep. 1112. — QUOTING *Heaven v. Pender*, L. R. 11 Q. B. D. 503, 17 Rep. 511. — *Warner v. Railroad Co.*, 6 Phila. (Pa.) 537.

Negligence is the failure to use ordinary care—that is, such care as a person of common prudence would exercise under the circumstances. *Miller v. Union Pac. R. Co.*, 5 McCrary (U. S.) 300, 17 Fed. Rep. 67. *Gravelle v. Minneapolis & St. L. R. Co.*, 3 McCrary (U. S.) 352, 10 Fed. Rep. 711. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591. *Jacksonville St. R. Co. v. Chappell*, 28 Am. & Eng. R. Cas. 227, 21 Fla. 175. *Kennedy v. North Mo. R. Co.*, 36 Mo. 351. *O'Brien v. Philadelphia, W. & B. R. Co.*, 3 Phila. (Pa.) 76. *Carter v. Columbia & G. R. Co.*, 15 Am. & Eng. R. Cas. 414, 19 So. Car. 20, 45 Am. Rep. 754. *Johnson v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 155, 49 Wis. 529, 5 N. W. Rep. 886. — QUOTING *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455.

Negligence is the omission to do something which a reasonable man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or doing something which a reasonable and prudent man would not do. *Jamison v. San José & S. C. R. Co.*, 3 Am. & Eng. R. Cas. 350, 55 Cal. 593. *Hot Springs R. Co. v. Newman*, 36 Ark. 607. *Galloway v. Chicago, R. I. & P. R. Co.*, 58 Am. & Eng. R. Cas. 245, 87 Iowa 458, 54 N. W. Rep. 447. *Philadelphia, W. & B. R. Co. v. Kerr*, 25 Md. 521. *Wilkins v. St. Louis, I. M. & S. R. Co.*, 101 Mo. 97, 13 S. W. Rep. 893. *Omaha*

* Active and passive negligence, see note, 34 AM. & ENG. R. CAS. 21.

St. R. Co. v. Craig, 58 Am. & Eng. R. Cas. 208, 39 Neb. 601, 58 N. W. Rep. 209. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem. *Rost v. Missouri Pac. R. Co.*, 76 Tex. 168, 12 S. W. Rep. 1131.

An action for negligence will only lie where the defendant was under some duty to the plaintiff which he has omitted to perform. *Evansville & T. H. R. Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783.

Unless there is some contract, duty, or service which a party is bound to fulfil there can be no negligence, fault, or breach of the obligation. *McAlpin v. Powell*, 55 How. Pr. (N. Y.) 163.

Negligence may consist either in a violation of some duty imposed by the general law or of some duty imposed by some more definite enactment. *Kenney v. Hannibal & St. J. R. Co.*, 105 Mo. 270, 15 S. W. Rep. 983, 16 S. W. Rep. 837.

As a general rule, where an obligation is imposed by a statute, it is negligence *per se* to disregard the obligation thus imposed, and if injury is thereby inflicted, the party disregarding the statute is liable. This rule has peculiar application to the management of railroads and railroad trains. *Indiana, B. & W. R. Co. v. Barnhart*, 115 Ind. 399, 13 West. Rep. 431, 16 N. E. Rep. 121.

Before an act can be deemed as negligent *per se* it must either have been done in violation of a statutory duty, or must in its nature be so violative of common prudence that without doubt no prudent man would have committed it. *Gulf, C. & S. F. R. Co. v. Gasscamp*, 34 Am. & Eng. R. Cas. 6, 69 Tex. 545, 7 S. W. Rep. 227.

It is of the essence of negligence that the party charged should have knowledge that there was a duty for him to perform, or he must have omitted to inform himself as to what his duty was in a given case. Knowledge is presumed in a great number of cases, and the party will not be permitted to prove that he had not knowledge of his duty. Every man is presumed to know the law; and hence, when the law imposes a duty on a man, it presumes that he knew of it, and it will not permit him to prove that he did not. When the specified duty is not imposed by either the statute or the common law, the party alleging negligence must show that the accused was cognizant of the duty he is charged with having neglected. *Sherman v. Western Transp. Co.*,

62 Barb. (N. Y.) 150.—FOLLOWING *Olmsted v. Watertown & R. R. Co.*, unreported.

No fixed rule of duty applicable to all cases can be established. When the standard of duty shifts, not according to any certain rule, but with the facts and circumstances developed at the trial, what constitutes negligence cannot be determined by the court, but must be submitted to the jury. When a duty is defined, a failure to perform it is negligence, and may be so declared by the court. *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430, 3 Atl. Rep. 234.—FOLLOWED IN *Pennsylvania R. Co. v. Peters*, 30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206.

The term "negligence" embraces acts of omission as well as of commission in its legal signification, and "diligence" implies action as well as forbearance to act; hence the result of a mere accident may constitute a good cause of action. *Grant v. Moseley*, 29 Ala. 302.

Negligence is the failure to exercise the care required by law. Negligence cannot exist where the duty enjoined is omitted, or the act done is required to be forborne, and the act of omission or commission is the result of wilfulness, fraud, or intention. *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181.—QUOTING *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439.

Where the term "negligence" is used without any qualifying word, it will be generally understood that "ordinary negligence" is meant. *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37.

Negligence or carelessness signifies want of care, caution, attention, diligence, or discretion in one having no positive intention to injure the person complaining thereof. The words "recklessness," "indifferent," "careless," and "wanton" are never understood to signify positive will or intention unless when joined with other words which show that they are to receive an artificial or unusual, if not an unnatural, interpretation. *Lexington v. Lewis*, 10 Bush (Ky.) 677.

"Carelessness" and "negligence" in law are synonyms, and so too are "wilfully" and "intentionally," but "carelessness" and "wilfulness" are not equivalents, the one of the other, in any legal sense; they are repugnant and inconsistent in their signification and meaning. *Bindbeutel v. Street R. Co.*, 43 Mo. App. 463.

In an action based on the carelessness

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and negligence of an engineer, an instruction telling the jury that the terms "careless," "reckless," and "negligent" do not imply a lack of skill or capacity, but simply a wilful disregard of ordinary prudence, and the engineer was wilfully careless, negligent, and reckless, etc., does not change the action and permit a recovery for the wilfulness of the engineer. There may be a wilful negligence without an intention to injure. *Holmes v. Atchison, T. & S. F. R. Co.*, 48 Mo. App. 79.—DISTINGUISHING *Bindbeutel v. Street R. Co.*, 43 Mo. App. 463.

Negligence is not ordinarily criminal, yet it implies culpability—an intentional disregard or violation of the duties due to others. And it should not be imputed unless there is capacity to perform the duty under the circumstances surrounding the person at the time the duty devolves upon him. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem.

In determining whether a party is or is not chargeable with negligence, regard must be had to his moral, intellectual, and physical capacity. Capacity up to manhood is properly measured by the years one has lived. A man of full age and mature judgment will be presumed to act with care and caution proportioned to the emergency and the necessity for their exercise. One of less age and experience might act very differently. *Mowrey v. Central City R. Co.*, 66 Barb. (N. Y.) 43; affirmed in 51 N. Y. 666, mem.

Negligence is an omission of care and caution in what we do. But the duty to be actively cautious and vigilant is relative, and where that duty has no existence between particular parties there can be no such thing as negligence in the legal sense of the term. *Morris v. Brown*, 19 N. Y. S. R. 355; reversing 4 N. Y. S. R. 832.

Negligence can be attributed to a railroad company only when it has notice of the emergency in time, by the use of ordinary diligence, the means being at hand, to avoid the accident. *Rigler v. Charlotte, C. & A. R. Co.*, 26 Am. & Eng. R. Cas. 386, 94 N. Car. 604.—QUOTING *Wilson v. Norfolk & S. R. Co.*, 90 N. Car. 69.

When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, such omission constitutes

actionable negligence, if as an ordinary and rational sequence it produces damages to another. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.

2. Different kinds and degrees of negligence.—Refinement of distinction as to different degrees of negligence is often difficult of application in the administration of justice. What facts will constitute that degree of diligence which the law requires, and from the absence of which, when injury results, damages should be recovered, must depend on the circumstances of each case. The greater the hazard and danger to others involved in the business pursued the more complete must be the exercise of care. *Galveston C. R. Co. v. Hewitt*, 67 Tex. 473, 3 S. W. Rep. 705.

What may be gross negligence in one case may not be so under the particular facts of another; and ordinary care in one case may be very gross negligence in another and a different case. *Northern C. R. Co. v. State*, 29 Md. 420.—REVIEWED IN *Baltimore & O. R. Co. v. State*, 36 Md. 366.—*Louisville & N. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866, 20 Am. Ry. Rep. 65.—QUOTING *Louisville & N. R. Co. v. Collins*, 2 Duv. (Ky.) 114.

A state of facts which would show ordinary negligence in case of injury of a person who has arrived at years of maturity might in case of a child establish gross negligence. *Sabine & E. T. R. Co. v. Hanks*, 73 Tex. 323, 11 S. W. Rep. 377.

There are no degrees in negligence as applied in the courts of New York. *Baxter v. Second Ave. R. Co.*, 3 Robt. (N. Y.) 510, 30 How. Pr. 219.—FOLLOWING *Wilds v. Hudson River R. Co.*, 24 N. Y. 430.

In relation to the liability of a railroad company to third persons for wrongful acts, there is no such thing as "corporate negligence," as distinguished from the negligence of employes of the corporation, since as to such third person the corporation can only act through its employes or agents. *Kansas City, M. & B. R. Co. v. Sanders*, 58 Am. & Eng. R. Cas. 140, 98 Ala. 293, 13 So. Rep. 57.

3. "Gross negligence" defined.—Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term ordinary negligence. But, after all, it means the absence of the care that is required under the circumstances. *Kansas*

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Pac. R. Co. v. Messler, 18 Kan. 523, 15 Am. Ry. Rep. 338.—QUOTING *Milwaukee & St. P. R. Co. v. Arins*, 91 U. S. 489; *Western Union Tel. Co. v. Eyser*, 91 U. S. 495, n.

If the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed or from inattention, is gross negligence. *Au v. New York, L. E. & W. R. Co.*, 29 Fed. Rep. 72.—FOLLOWING *Randall v. Baltimore & O. R. Co.*, 109 U. S. 478, 3 Sup. Ct. Rep. 322; *Metropolitan R. Co. v. Jackson*, 3 App. Cas. 193; *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. Rep. 806; *Anderson County Com'rs v. Beal*, 113 U. S. 227, 5 Sup. Ct. Rep. 433.

Gross negligence on the part of a carrier includes the want of that reasonable skill, care, and expedition which may reasonably be expected. *Beal v. South Devon R. Co.*, 3 H. & C. 337, 12 W. R. 1115, 11 L. T. 184.

In the management of a railroad or any department thereof gross neglect is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403.

Gross negligence is a technical term. It is the omission of that care which even inattentive and thoughtless men never fail to take of their own property—it is a violation of good faith. It implies malice and evil intention. Hence in all questions of punitive or vindictive damages the intention of the defendants is a material consideration. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.

Gross negligence is that entire want of care which would raise a presumption of a conscious indifference to consequences. Such indifference is morally criminal, and, if it leads to actual injury, may well be regarded as criminal in law. *Southern C. P. & M. Co. v. Bradley*, 52 Tex. 587. *Missouri Pac. R. Co. v. Shuford*, 37 Am. & Eng. R. Cas. 194, 72 Tex. 165, 10 S. W. Rep. 408. *Missouri Pac. R. Co. v. Lawler*, 3 Tex. App. (Civ. Cas.) 38.

Neither intentional wrong nor the implication of bad faith necessarily belongs to the proper definition of gross neglect. A person may be guilty of gross neglect without intending to do wrong to others, or to act in bad faith, in the performance of a

duty. It is not equivalent to fraud or malice, although it may "furnish evidence of fraud" or may tend to show malice. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403.—DISAPPROVING *Louisville & N. R. Co. v. Robinson*, 4 Bush 509; *Maysville & L. R. Co. v. Herrick*, 13 Bush 127.—CRITICISED IN *Downey v. Chesapeake & O. R. Co.*, 28 W. Va. 732.

Gross neglect is either such an intentional or reckless disregard of security and right as to imply bad faith, and therefore squints at fraud, and is tantamount to the *magna culpa* of the civil law, which in some respects is quasi criminal. *Louisville & N. R. Co. v. Robinson*, 4 Bush (Ky.) 507.—OVER- RULED IN *Louisville & N. R. Co. v. McCoy*, 81 Ky. 403.

Where a passenger is injured owing to a derailment caused by a broken rail, evidence that the cross ties at the point of derailment were "unsound," "decayed," "rotten," and that the rail which was broken was an "old rail," tends to show such gross negligence, implying recklessness and wantonness on the part of the company, as to authorize a jury to return a verdict for exemplary damages. *Alabama G. S. R. Co. v. Hill*, 44 Am. & Eng. R. Cas. 441, 90 Ala. 71, 8 So. Rep. 90.

Gross negligence in Illinois is simply a want of the use of ordinary care; and ordinary care is all that is required, which varies with circumstances and the different situations under which the injury may occur; but under all circumstances one must act as a reasonable, prudent person would act, which is ordinary care. *Chicago, W. & V. Coal Co. v. Peterson*, 39 Ill. App. 114.

Gross negligence is not a term which, grammatically at least, and apparently not in law, though frequently so applied, is a subject of comparison, as it would be absurd to say "gross gross, grosser gross, and grossest gross." *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232.

Gross negligence of itself is not in law a design and intention of mischief, although it may be cogent evidence of such fact. *Illinois C. R. Co. v. Beard*, 49 Ill. App. 232.

Gross negligence evidencing wilfulness or wantonness is such gross want of care and regard for the rights of others as to justify the presumption of wilfulness or wantonness, or to imply a disregard of consequences, or a willingness to inflict injury. *Lake Shore & M. S. R. Co. v. Bodemer*, 54

Am. & Eng. R. Cas. 177, 139 *Ill.* 596, 29 *N. E. Rep.* 692; *affirming* 33 *Ill. App.* 479.—*QUOTING* *Illinois C. R. Co. v. Godfrey*, 71 *Ill.* 500; *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 *Mo.* 22.

4. "Wilful negligence" defined.—What degree of evidence the law considers equivalent to a wilful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of a general statement. *Illinois C. R. Co. v. Beard*, 49 *Ill. App.* 232.

Where an intent, either actual or constructive, to commit an injury exists at the time of its commission, such injury ceases to be a merely negligent act and becomes one of violence or aggression. *Pennsylvania Co. v. Sinclair*, 62 *Ind.* 301.

Wilful negligence, in the meaning of the statute, is such conduct as evidences reckless indifference to the safety of the public, or is an intentional failure to perform a plain and manifest duty, in the performance of which the public and the party injured had an interest. *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 *Am. & Eng. R. Cas.* 176, 89 *Ky.* 367, 12 *S. W. Rep.* 580. *Louisville & N. R. Co. v. Filbern*, 6 *Bush (Ky.)* 574. *Louisville & P. Canal Co. v. Murphy*, 9 *Bush (Ky.)* 522. *Claxton v. Lexington & B. S. R. Co.*, 13 *Bush (Ky.)* 636, 17 *Am. Ry. Rep.* 12. *Kentucky C. R. Co. v. Gastineau*, 83 *Ky.* 119.

Recklessness reaching in degree to an utter disregard of consequences may supply the place of a specific intent, and be sufficient to establish wilfulness. *Cincinnati, I., St. L. & C. R. Co. v. Cooper*, 120 *Ind.* 469, 22 *N. E. Rep.* 340, 6 *L. R. A.* 241. *Shumacher v. St. Louis & S. F. R. Co.*, 39 *Fed. Rep.* 174, 17 *Wash. L. Rep.* 550.

Slight neglect may be culpable, ordinary and gross neglect are always culpable, but wilful is intentional neglect or such as implies actual malice, as in the case of knowledge, express or necessarily implied from the surrounding circumstances, of the perilous character of the work and the voluntary or intentional failure to provide the ordinary means of security. *Lexington v. Lewis*, 10 *Bush (Ky.)* 677.

"Wilful" is not to be taken as synonymous with "gross," a word which, when applied to negligence, has a well-defined meaning. *Hansford v. Payne*, 11 *Bush (Ky.)* 380.

5. The care required from the company, generally.*—One engaged in the prosecution of a lawful work is bound to use such care and caution in carrying it on as will reasonably enable others by the practice of ordinary prudent care to avoid personal hurt, and prevent injury to their property. *Myers v. Snyder, Bright, N. P. (Pa.)* 489.

The liability to make reparation for an injury by negligence is founded upon an original moral duty enjoined upon every person so to conduct himself or exercise his own rights as not to injure another. *Blaine v. Chesapeake & O. R. Co.*, 9 *W. Va.* 252.

In general, if a voluntary act lawful in itself may naturally result in the injury of another or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor, and this is true regardless of the motive or the degree of care with which the act is performed. *Georgetown, B. & L. R. Co. v. Eagles*, 30 *Am. & Eng. R. Cas.* 228, 9 *Colo.* 544, 13 *Pac. Rep.* 696.—*QUOTING* *Milwaukee & St. P. R. Co. v. Kellogg*, 94 *U. S.* 469.

There is no distinction between railroads and ordinary highways in regard to the degree of care which the law requires on the part of those who have the direction or management of vehicles upon them. *Beers v. Housatonic R. Co.*, 19 *Conn.* 566.

The degree of care to be exercised by a railroad company in preventing the destruction of property or other injuries must be proportioned to the dangerous nature of the means and instruments employed by it. *Gorman v. Pacific R. Co.*, 26 *Mo.* 441. *Gerke v. California Steam Nav. Co.*, 9 *Cal.* 251.—*REVIEWING* *Road v. New York & E. R. Co.*, 18 *Barb. (N. Y.)* 80.—*Pennsylvania R. Co. v. Richter*, 2 *Am. & Eng. R. Cas.* 220, 42 *N. J. L.* 180. *Houston & T. C. R. Co. v. Booser*, 34 *Am. & Eng. R. Cas.* 63, 70 *Tex.* 530, 8 *S. W. Rep.* 119.—*REVIEWED IN* *Artusv v. Missouri Pac. R. Co.*, 37 *Am. & Eng. R. Cas.* 288, 73 *Tex.* 191, 11 *S. W. Rep.* 177.

But the duty is not imposed upon it of using every possible contrivance that human ingenuity might provide, but it should

* Amount of care railroad companies must exercise to avoid injuring others, see note, 75 *AM. DEC.* 383.

be vigilant in making use of every reasonable safeguard which the nature of its business will admit, to avoid unjust interference with others. *Baltimore & O. R. Co. v. State*, 29 *Md.* 252.

Where both parties stand on an equality as to the means of avoiding an accident, and both are engaged in a lawful employment, no more than ordinary diligence can be demanded of either. *Brand v. Schenectady & T. R. Co.*, 8 *Barb.* (N. Y.) 368.

The liability of the New York & Erie R. Co. to damages for injuries resulting from carelessness, negligence, or want of proper conduct on its part does not result from New Jersey Act of March 14, 1853, which enacts that it shall be liable for damages arising from its operating certain roads specified. *Austin v. New York & E. R. Co.*, 25 *N. J. L.* 381.

It seems, that the fact that a railroad company has complied with the requirements of the statute in the running and management of its trains does not necessarily, and in all cases, relieve it from liability for negligence; the care necessary to be observed is not in all cases confined to the statutory requirements, but depends upon circumstances. *Cordell v. New York C. & H. R. R. Co.*, 70 *N. Y.* 119, 18 *Am. Ry. Rep.* 511.—FOLLOWED IN *Salter v. Utica & B. R. R. Co.*, 8 *Am. & Eng. R. Cas.* 437, 88 *N. Y.* 42.

While a railroad company as a carrier of passengers owes a duty to its passengers and also to its employes of active diligence to guard them from danger, as to a stranger, it owes him no such duty, either to guard him from danger or in any way to anticipate and so avoid the consequences of his own negligence. *New York, L. E. & W. R. Co. v. Atlantic Refining Co.*, 49 *Am. & Eng. R. Cas.* 131, 129 *N. Y.* 597, 29 *N. E. Rep.* 829, 42 *N. Y. S. R.* 346; reversing 36 *N. Y. S. R.* 658, 13 *N. Y. Supp.* 466.

6. "Ordinary care" defined.—"Ordinary care" is altogether a relative term, and the want of it means the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of each particular case. *Steamboat Farmer v. McCraw*, 26 *Ala.* 189. *Fletcher v. Boston & M. R. Co.*, 1 *Allen (Mass.)* 9. *Elmborg v. St. Paul City R. Co.*, 51 *Minn.* 70, 52 *N. W. Rep.* 969.

The terms "ordinary care" and "diligence," which railroad companies are bound

to exercise, when applied to the management of engines and cars in motion, must be understood to import all the care and circumspection, prudence and discretion, which the peculiar circumstances of the place or caution reasonably required of such company or its servants; and this will be increased or diminished according as the ordinary liability to danger to others is increased or diminished in the movement or operation of them. *Parvis v. Philadelphia, W. & B. R. Co.*, (Del.) 17 *Atl. Rep.* 702. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661. *Murphy v. Chicago, R. I. & P. R. Co.*, 38 *Iowa* 539.—DISTINGUISHED IN *Farley v. Chicago, R. I. & P. R. Co.*, 56 *Iowa* 337.—*Brand v. Schenectady & T. R. Co.*, 8 *Barb.* (N. Y.) 368.

Ordinary care is that degree of care which a person of ordinary prudence is presumed to use, under the particular circumstances, to avoid injury, and should be in proportion to the danger to be avoided and the fatal consequences involved in its neglect. *Toledo & W. R. Co. v. Goddard*, 25 *Ind.* 185. *Chicago & A. R. Co. v. Adler*, 39 *Am. & Eng. R. Cas.* 666, 129 *Ill.* 335, 21 *N. E. Rep.* 846; affirming 28 *Ill. App.* 102. *Tetherow v. St. Joseph & D. M. R. Co.*, 98 *Mo.* 74, 11 *S. W. Rep.* 310. *Stanley v. Union Depot R. Co.*, 114 *Mo.* 606, 21 *S. W. Rep.* 832.—QUOTING *Frick v. St. Louis, K. C. & N. R. Co.*, 75 *Mo.* 595.—*State v. Manchester & L. R. Co.*, 52 *N. H.* 528. *Lamline v. Houston, W. S. & P. F. R. Co.*, 14 *Daly (N. Y.)* 144. *Houston & T. R. Co. v. Oram*, 49 *Tex.* 341.—QUOTED IN *Texas & P. R. Co. v. Gorman*, 2 *Tex. Civ. App.* 144.—*Houston & G. N. R. Co. v. Parker*, 50 *Tex.* 330.—APPROVED IN *Ohio & M. R. Co. v. Thillman*, 143 *Ill.* 127.—*Norfolk & P. R. Co. v. Ormsby*, 27 *Gratt. (Va.)* 455, 17 *Am. Ry. Rep.* 321.*

It is going too far to require that degree of care which any of such persons would take of "his family" placed under like circumstances. *Louisville & N. R. Co. v. McCoy*, 15 *Am. & Eng. R. Cas.* 277, 81 *Ky.* 403.

But, as the nature of the subject of the required care and the danger to which it is exposed are the main considerations in determining ordinary or any other degree of

* See also *post*, 9.

care in a given case, it results that what would be ordinary care in one kind of business would be gross negligence in another. *Louisville & N. R. Co. v. McCoy*, 15 Am. & Eng. R. Cas. 277, 81 Ky. 403.

A charge of the court is erroneous which instructs the jury that ordinary care or prudence is "just such care as one of you similarly employed would have exercised under such circumstances" as those which surrounded plaintiff. Ordinary care is that degree of care which a man of ordinary prudence would have exercised; not that care which any particular man or set of men would have exercised. *Louisville & N. R. Co. v. Gower*, 31 Am. & Eng. R. Cas. 168, 85 Tenn. 465, 3 S. W. Rep. 824.

7. More than ordinary care and skill.—Persons having control of steamboats and locomotive engines must employ more than ordinary skill and diligence to prevent disasters. They are required to be skilled in their particular departments, but infallibility is not required of them. *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471.—FOLLOWING *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *South & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272.

8. Reasonable care and diligence.—Railroad companies are not placed under the same degree of obligation as to care and diligence to guard against injuries to strangers as they are to those with whom they have contract relations. To the former their obligation is, upon considerations of humanity and justice, to conform their conduct as to the rights of others, and, in the prosecution of their lawful business, to use every reasonable care and precaution to avoid injury. *O'Connor v. Illinois C. R. Co.*, 44 La. Ann. 339, 10 So. Rep. 678.—APPLYING *Hearn v. St. Charles St. R. Co.*, 34 La. Ann. 160; *Reary v. Louisville, N. O. & T. R. Co.*, 40 La. Ann. 32; *Snyder v. Natchez, R. R. & T. R. Co.*, 42 La. Ann. 302; *Lott v. New Orleans City & L. R. Co.*, 37 La. Ann. 337; *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293; *Cauley v. Pittsburg, C. & St. L. R. Co.*, 98 Pa. St. 498. DISTINGUISHING *Westerfield v. Levis*, 43 La. Ann. 67.—*Holmes v. Central R. & B. Co.*, 37 Ga. 593.—DISTINGUISHED IN *Georgia R. Co. v. Williams*, 74 Ga. 723; *Ransom v. Chicago, St. P., M. & O. R. Co.*, 19 Am. & Eng. R. Cas. 16, 62 Wis. 178, 51 Am. Rep. 718.

One who undertakes to do a thing,

whether for a reward or for his own purpose, must use reasonable care that no injury results to another from the manner of doing it. *Stein v. Union Depot Co.*, 11 Mo. App. 599.

The owner, lessee, or occupant of premises is bound to use reasonable care in conducting his business so as not to injure persons lawfully upon such premises. *Ingalls v. Adams Exp. Co.*, 44 Minn. 128, 46 N. W. Rep. 325.

N. H. Gen. St. ch. 264, § 14, makes no distinction between negligence and gross negligence, and does not require less than reasonable care on the part of the proprietors of a railroad, nor more than reasonable care in their servants. *State v. Boston & M. R. Co.*, 58 N. H. 408.

9. Such care as prudent men would use under like circumstances.*—Railway companies are required in moving their trains to use such care and diligence as ordinarily prudent men would use to prevent injury under the circumstances of the particular cases under investigation. *Gulf, C. & S. F. R. Co. v. Hodges*, 76 Tex. 90, 13 S. W. Rep. 64. *Parrot v. Wells*, 15 Wall. (U. S.) 524. *Ohio & M. R. Co. v. Shanefelt*, 47 Ill. 497. *Bannon v. Baltimore & O. R. Co.*, 24 Md. 108.—RECONCILED IN *Baltimore & O. R. Co. v. State*, 30 Md. 47.—*Northern C. R. Co. v. State*, 29 Md. 420. *Austin & N. W. R. Co. v. Beatty*, 73 Tex. 592, 11 S. W. Rep. 858.

They are only held to a high degree of care, and are not insurers of their passengers. *Sinms v. South Carolina R. Co.*, 30 Am. & Eng. R. Cas. 571, 27 So. Car. 268, 3 S. E. Rep. 301.—QUOTING *Renneker v. South Carolina R. Co.*, 20 So. Car. 219.—CRITICISED IN *Madden v. Port Royal & W. N. C. R. Co.*, 52 Am. & Eng. R. Cas. 286, 35 So. Car. 381.

Nor are they required to use every possible precaution to avoid injury, nor "extreme vigilance." *Schmidt v. Steinway & H. P. R. Co.*, 4 Silv. App. (N. Y.) 119.

A common carrier who employs steam as his motive power must bring to the service "that degree of diligence which very careful and prudent men take of their own affairs." *Grey v. Mobile Trade Co.*, 55 Ala. 387.—FOLLOWED IN *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621.—*Cook v. Central R. & B. Co.*, 67 Ala. 533. *Alabama G. S. R.*

* See also ante, 6.

Co. v. McAlpine, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.—FOLLOWING *Grey v. Mobile Trade Co.*, 55 Ala. 387; *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621; *Alabama G. S. R. Co. v. McAlpine*, 71 Ala. 545.

10. Extraordinary diligence.—The law requires those who use dangerous agencies in the prosecution of their business to observe the greatest care in the custody and use of them. *Pittsburg, C. & St. L. R. Co. v. Shields*, 44 Am. & Eng. R. Cas. 647, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. Rep. 658.

In the employment of steam as a motive power railroad companies are held to the exercise of extraordinary diligence—that degree of diligence which very careful and prudent men exercise in the conduct of their own affairs, and this requires that they shall employ very careful and prudent men, and that the persons employed by them shall exercise such care and diligence as very careful and prudent men exercise in the conduct of their own private interests and important enterprises. *Tanner v. Louisville & N. R. Co.*, 60 Ala. 621.—FOLLOWING *Grey v. Mobile Trade Co.*, 55 Ala. 387.—FOLLOWED IN *Mobile & M. R. Co. v. Blakely*, 59 Ala. 471; *Alabama G. S. R. Co. v. McAlpine*, 22 Am. & Eng. R. Cas. 602, 75 Ala. 113.

11. Utmost care and diligence.—A railroad company is bound to manage its road and machinery with the utmost care and vigilance; and the freedom from negligence which is required of a plaintiff is only that ordinary prudence and attention which sensible men are accustomed to give in similar cases. *Cook v. New York C. R. Co.*, 1 Abb. App. Dec. (N. Y.) 432, 3 Keyes 476.

The rights and liabilities of railroad companies in regard to accidental injuries to persons or property as they existed at common law have generally been merged in certain statutory regulations by which those rights and liabilities are clearly defined. They are held to just such an extraordinary degree of diligence as their capacity for mischief renders essential to the public protection, and for every accident which results in injury to an individual which might have been prevented by the utmost care and caution they are liable. *East Tenn. & G. R. Co. v. St. John*, 5 Sneed (Tenn.) 524.

The terms "the utmost care and diligence," and "the highest degree of care and diligence," are expressions to measure the care and diligence which a prudent man

would exert under like circumstances. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. Rep. 243.

12. Care required from engineer.—An engineer in charge of a running train should always be on the lookout for obstructions, and when an obstruction is discovered, no matter when or where, should promptly resort to all means within his power known to skillful engineers to avert the threatened injury or danger; less than this is not due diligence. *South & N. Ala. R. Co. v. Williams*, 65 Ala. 74. *Wabash, St. L. & P. R. Co. v. Krough*, 13 Ill. App. 431.

The law imposes upon a railroad engineer the exercise of judgment, skill, and diligence in running his engine, and though he may have the right of way on the track, he ought not to run his train as if no other train were on the road, nor to close his eyes to the hazards of delayed trains, open switches, and like matters incidental to the operation of railroads. *Smith v. Missouri Pac. R. Co.*, 113 Mo. 70, 20 S. W. Rep. 896.

If an engine, train, and appliances be in good condition, and the engineer in the discharge of his duty is suddenly confronted with difficulty and danger impossible to anticipate, he is only required to act with reference to what he sees and knows. The company is not liable for his failure in such emergency to exercise cool and unembarrassed judgment. If he does the best he can situated as he is, nothing more can be required. *Brookhaven L. & M. Co. v. Illinois C. R. Co.*, 68 Miss. 432, 10 So. Rep. 66.

13. Care required in streets and public places.—Railroad companies, owing to the dangerous character of the business they engage in, are held to greater care in the operation of their machinery and machines, especially in running through towns. *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350. *Indianapolis Union R. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. Rep. 551. *Galveston, H. & S. A. R. Co. v. Matula*, 79 Tex. 577, 15 S. W. Rep. 573.

And this whether running through the densely peopled portion of a town or its suburbs. *Hughes v. Galveston, H. & S. A. R. Co.*, 34 Am. & Eng. R. Cas. 66, 67 Tex. 595, 4 S. W. Rep. 219.

A person in the lawful use of a street is

*See also STREETS AND HIGHWAYS, 360-371.

entitled to protection as against any negligent act of a company operating cars on the street, and it is the duty of the company, in the exercise of its franchises, to use all necessary caution, care, and diligence to prevent injury to persons or property. *Maier v. Manhattan R. Co.*, 53 Hun 506, 26 N. Y. S. R. 742, 6 N. Y. Supp. 309.

14. Care due toward sick, weak, and infirm persons.—The duty of care and of abstaining from unlawfully injuring another applies to the sick, weak, and infirm as fully as to the strong and healthy. *Lapline v. Morgan's L. & T. R. & S. Co.*, 37 Am. & Eng. R. Cas. 348, 40 La. Ann. 661, 1 L. R. A. 378, 4 So. Rep. 875.—**DOUBTING** Pullman Palace Car Co. v. Barker, 4 Colo. 344.

15. Condition of tracks.—A company by accepting its charter assumes the obligation to keep its tracks in safe condition for the operation of trains. This is a duty it owes to all persons who are permitted by it to travel upon or operate trains over it. *Trinity & S. R. Co. v. Lane*, 79 Tex. 643, 15 S. W. Rep. 477.

The company, being the owner of the road as well as of the cars, is bound to the same care, diligence, and skill as to the condition and construction of the road as it is in regard to the cars. *Hanley v. Harlem R. Co.*, 1 Edm. Sel. Cas. (N. Y.) 359.

16. Adoption of best appliances.—It is the duty of railroad companies to adopt the best precautions against danger which are in use, and to procure and employ good and safe machinery and appliances, such as are most in use, and approved by the skillful and experienced in the operation of trains, and in the management of railroads; and the omission of this duty is at least evidence of negligence. *Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 48.—*Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92; *appeal dismissed* (?) 55 N. Y. 641, *mem.*

It is the duty of a company to supply wants and adopt improvements in its construction as such wants and improvements may be known and their importance become manifest. *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.

And the duty of a company to use all known improvements in its machinery is not confined to passenger trains. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92; *appeal dismissed* (?) 55 N. Y. 641,

mem.—**FOLLOWING** *Smith v. New York & H. R. Co.*, 19 N. Y. 127.

If they are obliged to have some brake, the public safety requires that it should be the best in use. They cannot use an old brake which will not stop a train in less than 1000 feet, when running ten miles per hour, when other companies use brakes that will stop a train in 500 feet, running at the same rate of speed. *Costello v. Syracuse, B. & N. Y. R. Co.*, 65 Barb. (N. Y.) 92; *appeal dismissed* (?) 55 N. Y. 641, *mem.*

17. Judgment and skill in selection and use of machinery.—Railroad companies must provide good and safe machinery, constructed of proper materials, and free, so far as known and well-recognized tests can determine, from defects; and must exercise care and vigilance in examining it, and keeping it in proper repair and safe condition; and must employ skillful and experienced servants. And they are responsible for injuries that result from a failure to exercise judgment and skill in the selection of material in the construction of their machinery, or in the use of it upon their roads. *Illinois C. R. Co. v. Phillips*, 49 Ill. 234.—**DISTINGUISHED IN** *Pennsylvania Co. v. Lynch*, 90 Ill. 333.—*Houston & T. C. R. Co. v. O'Hare*, 64 Tex. 600.

In an action against a railway company for an injury alleged to have been caused by its negligence in using machinery with a defect which should have been discovered, the question is whether, practically, and by the use of ordinary care, and not according to evidence of a scientific nature, the defect ought to have been observed. *Stokes v. Eastern Counties R. Co.*, 2 F. & F. 691.

18. Tests of due care and negligence.—What constitutes due care or, conversely, amounts to negligence depends in every case on the circumstances surrounding the party whose conduct is the subject of inquiry; and while he is required to make all reasonable efforts to ascertain his environments, he may then safely act on appearances, although the actual facts may be different. *Highland Ave. & B. R. Co. v. Donovan*, 52 Am. & Eng. R. Cas. 568, 94 Ala. 299, 10 So. Rep. 139. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—**FOLLOWED IN** *Vallance v. Boston & A. R. Co.*, 55 Fed. Rep. 364. **QUOTED IN** *Illinois C. R. Co. v. Foley*, 53 Fed. Rep. 459, 10 U. S. App. 537, 3 C. C. A. 589.—*Wheaton v. North Beach & M. R. Co.*, 36

Cal. 590. *Chicago, B. & Q. R. Co. v. Owen*, 21 *Ill. App.* 339. *Illinois C. R. Co. v. Beard*, 49 *Ill. App.* 232. *Philadelphia, W. & B. R. Co. v. Kerr*, 25 *Md.* 521. *Northern C. R. Co. v. State*, 29 *Md.* 420.—REVIEWING *Warren v. Fitchburg R. Co.*, 8 *Allen (Mass.)* 227; *McGrath v. Hudson River R. Co.*, 32 *Barb. (N. Y.)* 147.—*Baltimore & O. R. Co. v. Keedy*, 49 *Am. & Eng. R. Cas.* 124, 75 *Md.* 320, 23 *Atl. Rep.* 643.—QUOTING *Baltimore & O. R. Co. v. Fitzpatrick*, 35 *Md.* 32.—*Dickson v. Missouri Pac. R. Co.*, 104 *Mo.* 491, 16 *S. W. Rep.* 381. *Henry v. Grand Ave. R. Co.*, 113 *Mo.* 525, 21 *S. W. Rep.* 214. *New Jersey Exp. Co. v. Nichols*, 33 *N. J. L.* 434; *affirming* 32 *N. J. L.* 166. *Craven v. Philadelphia & R. R. Co.*, 19 *Phila. (Pa.)* 409. *Simkins v. Columbia & G. R. Co.*, 19 *Am. & Eng. R. Cas.* 467, 20 *So. Car.* 258. *Davis v. Columbia & G. R. Co.*, 28 *Am. & Eng. R. Cas.* 440, 21 *So. Car.* 93.

What is prudence and proper care under some circumstances may be negligence in others, and so negligence in danger under some circumstances may be regarded as prudence under others. Each case must depend largely on its own facts. *Wabash, St. L. & P. R. Co. v. Wallace*, 19 *Am. & Eng. R. Cas.* 359, 110 *Ill.* 114.

Negligence cannot be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man. *Chicago & E. I. R. Co. v. Hedges*, 25 *Am. & Eng. R. Cas.* 550, 105 *Ind.* 398, 7 *N. E. Rep.* 801.

The standard by which to test the question of negligence *vel non* is the common experience of mankind, and implies generally the want of that care and diligence which ordinarily prudent men would use to prevent injury under the circumstances of the particular case. *Southern C. P. & M. Co. v. Bradley*, 52 *Tex.* 587. *Gulf, C. & S. F. R. Co. v. Hodges*, 76 *Tex.* 90, 13 *S. W. Rep.* 64.—QUOTING *Southern C. P. & M. Co. v. Bradley*, 52 *Tex.* 599.

The question of negligence is to be determined by the consideration whether or not a party has guarded against those things which he might reasonably have cause to anticipate. *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 *Ohio St.* 116.—QUOTING *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 14.

The question what a reasonable man might foresee is of importance in determining the question of negligence; but when the act complained of is negligent

per se, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not. *Seileck v. Lake Shore & M. S. R. Co.*, 93 *Mich.* 375, 53 *N. W. Rep.* 556.

In order to impose a liability on a railroad company for the consequences resulting from the omission of an act by one of its employés, the test is not whether, had the act been done, the accident would not have occurred, but whether the act omitted was one which it was the duty of the employer to perform. *Frelsen v. Southern Pac. Co.*, 44 *Am. & Eng. R. Cas.* 319, 42 *La. Ann.* 673, 7 *So. Rep.* 800.

The rules regulating the rights and duties of persons, natural and artificial, to each other must be uniform; they cannot vary according to the years or degree of intellect of natural persons without producing an uncertainty in the law destructive of all principle. *Bannon v. Baltimore & O. R. Co.*, 24 *Md.* 108.

The terms ordinary and reasonable care are relative and dependent, and whether such care has been used can only be determined by considering the age and capacity of the person injured. *Baltimore & O. R. Co. v. State*, 30 *Md.* 47.

An injury arising from the careless and unskilful management of an animal or other personal chattel cannot be distinguished in an action for negligence from an injury resulting from the negligent management of fixed real property, unless, perhaps, in case of a nuisance. *Reedie v. London & N. W. R. Co.*, 6 *Railw. Cas.* 184, 4 *Ex.* 244, 13 *Jur.* 659, 20 *L. J. Ex.* 65.

19. Accidents that could not be foreseen—Unknown dangers or defects.—A person in control of premises is responsible for such defects in them as would be likely to injure any one properly using them, of which defects he had notice, or in the exercise of reasonable care would have had, but he is not insurer. The duty is to exercise reasonable care. *Chicago Con. Bottling Co. v. Milton*, 41 *Ill. App.* 154.—FOLLOWING *Borman v. Sandgren*, 37 *Ill. App.* 160.

An injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 *Fed. Rep.* 949.

Railroad companies are not liable for casualties which human sagacity cannot

foresee, and against which the utmost prudence cannot guard. *Kentucky C. R. Co. v. Thomas*, 79 Ky. 160.—QUOTING *Smith v. New York & N. H. R. Co.*, 19 N. Y. 127.—*Sellers v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654.—REVIEWING *Hardy v. North Carolina C. R. Co.*, 74 N. Car. 734; *Battle v. Wilmington & W. R. Co.*, 66 N. Car. 343.

A distinction should be observed in cases where defective conditions causing an injury are incident to the original construction, and those in which such conditions have arisen afterward. In a case of the first class notice of the dangerous condition is not required, while in a case of the other class a railroad company cannot be held negligent and liable unless it had reasonable time to discover the defect, or had been notified and failed to repair before the injury occurred. *Chicago, B. & Q. R. Co. v. Finch*, 42 Ill. App. 90.

If one be deaf or otherwise deficient in his faculties so as to render him unconscious of the impending danger, knowledge of that infirmity must be brought home to those in charge of the train before they or the railroad company can be made liable for a failure to check the train. *Johnson v. Louisville & N. R. Co.*, (Ky.) 13 Am. & Eng. R. Cas. 623.

A defendant cannot be held liable for the negligently unsafe condition of a scuttle-hole in a sidewalk unless he knows or might have known thereof. *Benjamin v. Metropolitan St. R. Co.*, 50 Mo. App. 602.

Where the agents of a railway company are not negligent and an accident is caused by the act of a trespasser, of which act the agents had no knowledge, the company is not liable, and the fact that a trespass has been so committed imposes no obligation on the company to anticipate a second or third trespass. *Ebright v. Mineral R. & M. Co.*, (Pa.) 15 Atl. Rep. 709.

2. What Acts Amount to Negligence.

20. In general.*—It is negligence as a matter of law for railway companies not

* Negligence in the use of wood as fuel in engines, see note, 38 AM. & ENG. R. CAS. 348.

Negligence of company in not extinguishing a fire, see 38 AM. & ENG. R. CAS. 372, *abstr.*

Not knowing of washouts and warning engineer, see 44 AM. & ENG. R. CAS. 505, *abstr.*

Running train without sufficient number of brakemen, see note, 15 AM. & ENG. R. CAS. 486.

to use the precautions for safety at public crossings definitely prescribed by statute or valid municipal ordinance. *Western & A. R. Co. v. Young*, 37 Am. & Eng. R. Cas. 489, 81 Ga. 397, 7 S. E. Rep. 912.

The Ga. Act of January 22, 1852, imposing fines for the non-performance of certain requirements in regard to blow posts, speed at crossings, etc., though penal, nevertheless is so far applicable to a civil suit for a personal injury in that it indicates what shall constitute negligence on the part of the road. *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75.

It is negligence for persons engaged in loading cars on a track to put a car in motion without making provision for stopping it, or examining to see whether the brakes are in order, or whether any person is on or about other cars on the same track; and if injury results to one who is guilty of no negligence himself, the parties putting the car in motion will be liable. *Noble v. Cunningham*, 74 Ill. 51.

It is negligence to run a train when, because of the coldness of the weather, all the employes on the train are upon the engine, and the only means used for checking or stopping the train are such as can be commanded and used by the engineer. *St. Louis & S. E. R. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381.

A detached car having been set in rapid motion on a down grade, it is as much the duty of some servant of the company to be in a position to give warning of its approach and to control its movements as if it had been attached to a train or an engine. *Shelby v. Cincinnati, N. O. & T. P. R. Co.*, 85 Ky. 224, 3 S. W. Rep. 157.

The negligence of the company as to the person in danger is imputable to the company with respect to one who attempts a rescue, and if the company is not guilty of negligence as to such person in danger, then it is only liable for negligence occurring with regard to the rescuer after the attempt to rescue began. *Donahoe v. Wabash, St. L. & P. R. Co.*, 83 Mo. 560, 53 Am. Rep. 594.—APPROVING *Eckert v. Long Island R. Co.*, 43 N. Y. 503; *Linnehan v. Sampson*, 126 Mass. 506; *Government St. R. Co. v. Hanlon*, 53 Ala. 70. EXPLAINING *Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

It is negligence on an engineer's part to back his train against wrecked cars, thereby injuring plaintiff, though he may not have

seen plaintiff's signals to stop nor have been intoxicated at the time. *Williams v. Missouri Pac. R. Co.*, 109 Mo. 475, 18 S. W. Rep. 1008.

The rule that every person violating an express statute is a wrong-doer, and as such is *ex necessitate* negligent in the eye of the law, and that every innocent person who is injured thereby is entitled to a civil remedy for such injury, notwithstanding any redress which the public may have also, applies to railroad companies that violate a statute in the manner of running cars on a street. *Jetter v. New York & H. R. Co.*, 2 Abb. App. Dec. (N. Y.) 458, 2 Keyes 154.—EXPLAINED IN *Beisegel v. New York C. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 29. QUOTED IN *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120.

It is culpable negligence in an engineer after seeing a person in a dangerous position on the track to back down upon him without looking again to see if he is out of the way. *German v. Suburban Rapid-Transit Co.*, 13 N. Y. Supp. 897; affirmed in 128 N. Y. 681, mem., 29 N. E. Rep. 149, mem.

For an engineer to sleep at his post when on a siding or otherwise is itself negligence. *Com. v. Griffin*, 7 Phila. (Pa.) 679.

Where a company provides a single track, and makes a rule that trains behind time must not leave a station without sending a flagman ahead and running slowly, a failure to send forward a flagman is sufficient negligence to render the company liable for an accident that results. *Texas & P. R. Co. v. Mallon*, 65 Tex. 115.

In an action against a railroad for a personal injury, an instruction that, if the company undertook to manage and conduct the running of its trains by telegraph, it was bound to have suitable lines and operators, or be liable for injuries occasioned thereby, is correct. *Grand Trunk R. Co. v. Walker*, 25 Law. Ed. (U. S.) 977.

21. Defects in track.—It is the duty of railroad companies to keep their works and all portions of their tracks in such repair and so watched and tended as to insure the safety of all who may lawfully be upon them, whether passengers or servants or others. And if they fail to do so, they will be held liable. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.—DISTINGUISHED IN *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32.

Companies are liable for all defects of

which they have knowledge, or which, by the use of reasonable care and diligence, they might ascertain. *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.

Where the evidence tends to show that an accident resulted from a defective track, and does show that the contraction and expansion of rails in extremes of heat and cold is from three fourths to one inch to the rail, and that defendant's were laid down with only one fourth of an inch between them, it is sufficient evidence of negligence to justify a jury in finding against the company. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493; reversed in 45 N. Y. 575.

Where an accident is the result of the derailment of an engine, and the evidence tends to show that there was a depression in the track which caused such a rocking and swaying of trains passing over it as to alarm the passengers, and that the defect had existed for at least three days, and that a conductor had called the attention of the section boss to it, it is sufficient evidence to support a verdict finding the company negligent. *Worden v. Humeston & S. R. Co.*, 76 Iowa 310, 41 N. W. Rep. 26.

An accident occurred, caused by the breaking of a rail on a curve. The evidence showed that the broken rail was inside the curve, and that it was old and very much worn and battered; that it was a "U" rail next to a "T," and that the train was going not over twenty miles an hour. Held, that the use of such rail was sufficient to show gross negligence on the part of the company, though it offered some evidence tending to show that the break was caused by a hidden defect in the rail. *Taylor v. Grand Trunk R. Co.*, 48 N. H. 304.

22. Obstructions on the track.—One company may be liable to another for negligently leaving cars on a side track so that cars cannot pass on the main track of the other company without causing a collision. *Montgomery & E. R. Co. v. Chambers*, 79 Ala. 338.

The presence of a freight car in the nighttime in the way of an approaching train, with no explanation except that it was moved from a side track by the force of the wind, is some evidence of the negligence of the railroad company. *Webster v. Rome, W. & O. R. Co.*, 115 N. Y. 112, 21 N. E. Rep. 725, 23 N. Y. S. R. 778; affirming 40 Hun 161.

23. Using defective engines or cars.—A company is liable in damages for injury to person or property caused by continuing to use a defective engine after the defect is known to its employes. The fact that the engine became out of repair or defective on the road where there were no repair shops or facilities for repairing it will afford no excuse if its use was persisted in, whereby injury resulted. It should be stopped at the first station or depot after the defect rendering its use dangerous is discovered. *Texas & P. R. Co. v. Tankersley*, 63 Tex. 57.

It is negligence on the part of a company in running accommodation trains through a city to a fair ground in the suburbs, where large numbers of people congregate around the station, to use an inferior locomotive, run by a fireman instead of a skilled engineer, and to run its trains at a dangerous speed in approaching the station. *Peyton v. Texas & P. R. Co.*, 41 Am. & Eng. R. Cas. 550, 41 La. Ann. 861, 6 So. Rep. 690.

If any certain and satisfactory test of the machinery used by a company in transportation is known which is within the reach of the company it should be applied, and it is negligence in the company to rely upon a test which is clearly insufficient. *Texas & P. R. Co. v. Hamilton*, 26 Am. & Eng. R. Cas. 182, 66 Tex. 92.

Permitting the use of a hand-car not supplied with the most efficient brakes will, where an injury proximately results therefrom, constitute ordinary negligence. *Johnson v. Gulf, C. & S. F. R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. Rep. 274.

A company was sued for injuring stock on the track, and the evidence tended to show that the train was running twenty-five miles per hour, and could not have been stopped in less than 120 yards, and that the headlight would not enable the engineer to see more than sixty yards ahead. *Held*, that it was negligence in the company not to use a headlight that would enable the engineer to see ahead the distance in which the train might be stopped. *Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 487.—FOLLOWED IN *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279.

24. Failure to give signals.*—It

* See also CROSSINGS, INJURIES, ETC., AT, **91-163**; STREETS AND HIGHWAYS, **332-335**. Negligence of company in not giving signals, see note, 49 AM. & ENG. R. CAS. 473.

is negligence on the part of an engineer running a train to omit to give warning by sounding the whistle at the distance required by the rules of the company. *Brown v. Texas & P. R. Co.*, 42 La. Ann. 350, 7 So. Rep. 682.—APPROVING *Continental Imp. Co. v. Stead*, 95 U. S. 161.

The failure to ring the bell is negligence *per se*. *Gratiot v. Missouri Pac. R. Co.*, 55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21 S. W. Rep. 1094.

Under Tex. Rev. St. 1879, art. 4232, imposing a penalty on railroad companies for failure to ring a bell or sound a whistle at road and street crossings, and making companies liable for all damages sustained by reason of a failure to comply with the statute, evidence of a failure to comply with these requirements, at a point where a person is injured, is *prima facie* evidence of negligence, and makes the company liable if the party injured was without fault. *Gulf, C. & S. F. R. Co. v. Breitting*, (Tex.) 12 S. W. Rep. 1121.

25. Inefficient lookout.*—The lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual. *Marcott v. Marquette, H. & O. R. Co.*, 4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53.

In Mississippi it seems that an engineer or others engaged in running a train are not required to keep a lookout to see if there is any one on the track except at public crossings, in incorporated cities or towns, and at stations. *Farve v. Louisville & N. R. Co.*, 42 Fed. Rep. 441.

Under Tenn. Code, § 1166, requiring every company to keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead, a trial court is justified in instructing the jury that "it is the duty of all who are engaged in running trains, in whatever department they may be employed, to give the entire energies of their bodies and minds to bring into requisition all means at their command to stop the train as soon as possible and prevent the accident." *Louisville & N. R. Co. v. Connor*, 9 Heisk. (Tenn.) 19, 19 Am. Ry. Rep. 368.

A slight increase of danger to passengers is no excuse for not following the positive

* See also CROSSINGS, INJURIES, ETC., AT, **164 167**; STREETS AND HIGHWAYS, **338**.

mandates of the statute. Nor will employees be heard to excuse themselves from obeying its positive requirements by a mere expression of opinion that to do so would endanger the passengers. The nature and extent of the danger must be clearly shown. *Louisville & N. R. Co. v. Connor*, 9 *Heisk. (Tenn.)* 19, 19 *Am. Ry. Rep.* 368.

26. Failure to use due care after discovery of impending danger.—Reasonable prudence on the part of the company after the discovery of impending danger will not relieve from liability, where it has contributed directly to bring about the danger by negligence. *Grand Rapids & I. R. Co. v. Ellison*, 39 *Am. & Eng. R. Cas.* 480, 117 *Ind.* 234, 20 *N. E. Rep.* 135.

In a suit for injury caused by the negligent running of a train—*held*, that if, after the impending danger became known to defendant, it failed to use such ordinary care as would have prevented the injury, and injury resulted as a consequence thereof, it was liable. This liability would be increased if, under such circumstances, the injury was inflicted wilfully and wantonly in a manner showing a reckless disregard of life or property. *Houston & T. C. R. Co. v. Smith*, 52 *Tex.* 178.

27. Running at excessive speed, generally.*—A company is liable for any casualty which may occur from running with greater speed than is prudent, or on account of collisions with obstructions which the engineer or conductor saw or might have seen, or which he might have avoided by the most skillful and prompt use of all the means in his power. *Nashville & C. R. Co. v. Messino*, 1 *Sneed (Tenn.)* 220.

A company is liable if an accident could have been avoided by the use of ordinary care had the engine been running at a lawful rate of speed. *Sullivan v. Missouri Pac. R. Co.*, 117 *Mo.* 214, 23 *S. W. Rep.* 149.

Where the evidence shows that a freight train was run at an excessive speed, the conclusion is justified that it was negligence, and the proximate cause of a collision with a hand-car running over the road in advance of the train. *Slette v. Great Northern R. Co.*, 53 *Minn.* 341, 55 *N. W. Rep.* 137.

* See also CROSSINGS, INJURIES, ETC., AT, 168-189.

Speed of trains as bearing on the subject of negligence, see note, 8 *AM. & ENG. R. CAS.* 381.

6 D. R. D.—50

It is negligence not to slacken the speed of a train so that it can be stopped if necessary, if the engineer has seen an object on the track a long way off, and cannot tell what it is. *Keyser v. Chicago & G. T. R. Co.*, 19 *Am. & Eng. R. Cas.* 91, 56 *Mich.* 559, 56 *Am. Rep.* 405, 23 *N. W. Rep.* 311.

A train, going much faster than its rules permitted on approaching a bridge, and failing to sound a whistle, as required, ran down a hand-car, injuring plaintiff. *Held*, that there was negligence, and that failure of the hand-car to send back a flagman was immaterial. *International & G. N. R. Co. v. Gray*, 27 *Am. & Eng. R. Cas.* 318, 65 *Tex.* 32.

It is gross and criminal negligence in a company to run a train through a village at night at a high rate of speed, without headlights or other signal of its approach. *Indianapolis & St. L. R. Co. v. Galbreath*, 63 *Ill.* 436, 7 *Am. Ry. Rep.* 128. — DISTINGUISHED IN *Illinois C. R. Co. v. Hetherington*, 83 *Ill.* 510.—*Becke v. Missouri Pac. R. Co.*, 45 *Am. & Eng. R. Cas.* 174, 102 *Mo.* 544, 13 *S. W. Rep.* 1053.

Under Miss. Code 1880, § 1047, limiting the rate of speed at which trains may run through incorporated places, a company is liable for an accident which results by running a locomotive at a greater rate of speed than the limit fixed, although it is checked just before the accident, and the collision occurs when the train is not exceeding the limit. *New Orleans, M. & T. R. Co. Toulmé*, 59 *Miss.* 284.

A railroad company may be chargeable with negligence in running its train through a city at a rate of speed greater than that permitted by a city ordinance, although before the passage of the ordinance the road was built on a grade and curve which render it impracticable to comply with the ordinance. *Neier v. Missouri Pac. R. Co.*, 12 *Mo. App.* 25.

A company was sued for causing an accident by improperly running a freight train past a station, and in defense gave evidence that the engineer attempted to stop the train on approaching the station by reversing the lever and shutting off the steam, but was temporarily disabled by a blow received from the lever, which slipped from its position and struck him. Expert evidence was given tending to show that such accident could not occur if the lever was properly reversed unless there was some

defect in the lever or appliances. *Held*, not sufficient to excuse the company from the charge of negligence. *Parsons v. New York C. & H. R. R. Co.*, 113 *N. Y.* 355, 31 *N. E. Rep.* 145, 22 *N. Y. S. R.* 697, 3 *L. R. A.* 683; *affirming* 48 *Hun* 615, 15 *N. Y. S. R.* 1016, *mem.*

28. — Irrespective of state or municipal regulation.*—It is the duty of a railroad company whose road runs through a city or village to run its trains therein at such a rate of speed as to have them under control, and be able to avoid injury to persons or property, though there is no ordinance of such village on the subject; and if it fail to do so, it is guilty of negligence. *Chicago & A. R. Co. v. Engle*, 84 *Ill.* 397, 16 *Am. Ry. Rep.* 490. *Barley v. Chicago & A. R. Co.*, 4 *Biss. (U. S.)* 430. *Elgin, J. & E. R. Co. v. Raymond*, 148 *Ill.* 241, 35 *N. E. Rep.* 729.

If ordinary care and prudence and due regard for the safety of third persons require engines and trains to be run at a less rate of speed than that limited by an ordinance of the city, the company must observe such care and prudence. *Shaber v. St. Paul, M. & M. R. Co.*, 2 *Am. & Eng. R. Cas.* 185, 28 *Minn.* 103, 9 *N. W. Rep.* 575.—DISTINGUISHED IN *Loucks v. Chicago, M. & St. P. R. Co.*, 19 *Am. & Eng. R. Cas.* 305, 31 *Minn.* 526.—*Chicago, B. & Q. R. Co. v. Dougherty*, 12 *Ill. App.* 181. *Chicago, St. L. & P. R. Co. v. Spilker*, 55 *Am. & Eng. R. Cas.* 200, 134 *Ind.* 380, 33 *N. E. Rep.* 280. *Alabama & V. R. Co. v. Phillips*, 70 *Miss.* 14, 11 *So. Rep.* 602.

Railway companies, in the absence of statute or ordinance, are bound by the rules of the common law to exercise their franchises with a due regard to the interests, welfare, and safety of the public. They are not at liberty to adopt the same rates of speed in a densely settled city as in the country. *Chicago & N. W. R. Co. v. Dunleavy*, 39 *Am. & Eng. R. Cas.* 381, 129 *Ill.* 132, 22 *N. E. Rep.* 15; *affirming* 27 *Ill. App.* 438. *Meyer v. Midland Pac. R. Co.*, 2 *Neb.* 319.

A railway company may not run its trains in a populous city at the same rapid rate of speed it may in the country and escape liability on the ground that it may run such trains at any rate it chooses. *Cleveland, C., C. & I. R. Co. v. Harrington*, 49 *Am. & Eng. R.*

Cas. 358, 131 *Ind.* 426, 30 *N. E. Rep.* 37. *Stapp v. Chicago, R. I. & P. R. Co.*, 85 *Mo.* 229.

Where a train is run through a populous city at an unusual hour, it is incumbent on its employes to take unusual precautions to avoid accidents, and a failure to do so will authorize a jury to infer negligence. *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 *Mo.* 476.—FOLLOWED IN *Bowman v. Chicago & A. R. Co.*, 85 *Mo.* 533. QUOTED IN *Stoneman v. Atlantic & P. R. Co.*, 58 *Mo.* 503; *Zimmerman v. Hannibal & St. J. R. Co.*, 2 *Am. & Eng. R. Cas.* 191, 71 *Mo.* 476.

Nothing will justify or excuse running a train at a high rate of speed when the track is known, or might, by the exercise of proper care, skill, and diligence, be known, to be in a dangerous condition. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 *Ill.* 67, 33 *N. E. Rep.* 960.

In the absence of any statute or ordinance regulating the speed of trains in villages, it cannot be said as a question of law that there is no law imposing a rule as to the rate of speed of trains. What is a proper rate of speed is for the jury, varying with the circumstances of each case. *McDonald v. International & G. N. R. Co.*, (*Tex. Civ. App.*) 20 *S. W. Rep.* 847.

What the limit is depends on circumstances very largely, such as the condition of the roadbed, the weight and strength of the rails, and the character and condition of the rolling stock. *Chicago, P. & St. L. R. Co. v. Lewis*, 48 *Ill. App.* 274.

A company should regulate its own rate of speed as regards others than passengers, and in so regulating it there must not only be a careful regard for passengers and trains, but also a proper regard for human life and property in running through towns and cities even where there are no public crossings. *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 *Mo.* 215.

29. Running at prohibited rate of speed within city limits is negligence per se.*—Running a train through the corporate limits of a city at a greater rate of speed than that prescribed by statute or the city ordinance, where the ordinance is not shown to be unreasonable, is *per se* culpable negligence. *South & N. Ala. R. Co. v. Donovan*, 36 *Am. & Eng. R. Cas.* 151, 84 *Ala.* 141, 4 *So. Rep.* 142.—FOLLOWING GOT-

* See also *post*, 42.

* See also *post*, 41.

hard v. Alabama G. S. R. Co., 67 Ala. 115.
—*Correll v. Burlington, C. R. & M. R. Co.*,
38 Iowa 120.—DISAPPROVING *Brown v.*
Buffalo & S. L. R. Co., 22 N. Y. 191. FOL-
LOWING *Dodge v. Burlington, C. R. & M. R.*
Co., 34 Iowa 276. QUOTING *Jetter v. New*
York & H. R. Co., 2 Keyes (N. Y.) 154.—
DISTINGUISHED IN *Lynch v. Metropolitan*
St. R. Co., 112 Mo. 420. QUOTED IN *Den-*
ver, T. & G. R. Co. v. Robbins, 2 Colo. App.
313.—*Keim v. Union R. & T. Co.*, 90 Mo.
314, 2 S. W. Rep. 427.—FOLLOWED IN *Eswin*
v. St. Louis, I. M. & S. R. Co., 35 Am. &
Eng. R. Cas. 390, 96 Mo. 290, 9 S. W. Rep.
577.—*Weber v. Kansas City Cable R. Co.*, 41
Am. & Eng. R. Cas. 117, 100 Mo. 194, 12 S.
W. Rep. 804, 13 S. W. Rep. 587, 7 L. R. A.
819. *Kelny v. Missouri Pac. R. Co.*, 43 Am.
& Eng. R. Cas. 186, 101 Mo. 67, 13 S. W.
Rep. 806. *Gratiot v. Missouri Pac. R. Co.*,
55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21
S. W. Rep. 1094. *Texas & P. R. Co. v.*
Cockrell, 2 Tex. App. (Civ. Cas.) 629. *Piper*
v. Chicago, M. & St. P. R. Co., 77 Wis.
247, 46 N. W. Rep. 165.

Where there are limitations by statute or
local ordinance, a rate of speed greater than
that prescribed is gross negligence. *Klanow-*
ski v. Grand Trunk R. Co., 21 Am. & Eng.
R. Cas. 648, 57 Mich. 525, 24 N. W. Rep. 801.
Chicago & A. R. Co. v. Becker, 84 Ill. 483.

And if any one is injured in consequence
of such negligence without being himself
guilty of contributory negligence, he may
recover damages. *Pennsylvania Co. v. Hor-*
ton, 132 Ind. 189, 31 N. E. Rep. 45.—FOL-
LOWING *St. Louis & S. E. R. Co. v. Mathias*,
50 Ind. 65; *Pennsylvania Co. v. Hensil*, 70
Ind. 569; *Pennsylvania Co. v. Stegemeier*,
118 Ind. 305.

And the negligence of the company will
be considered as the direct cause of the in-
jury. *Gratiot v. Missouri Pac. R. Co.*, (Mo.)
49 Am. & Eng. R. Cas. 398, 16 S. W. Rep.
384. *Schlereth v. Missouri Pac. R. Co.*, 96
Mo. 509, 10 S. W. Rep. 66.

It is negligence in a company to run its
trains in a city in violation of an ordinance
requiring light upon cars, etc., moving at
night, and regulating their speed. *Easley*
v. Missouri Pac. R. Co., 113 Mo. 236, 20 S.
W. Rep. 1073.

Whether the violation of a municipal or-
dinance regulating the rate of speed is, as
matter of law, negligence, *quære*. *Massoth*
v. Delaware & H. Canal Co., 64 N. Y. 524;
affirming 6 Hun 314.—OVERRULING *Brown*

v. Buffalo & S. L. R. Co., 22 N. Y. 191.
REVIEWING *Newson v. New York C. R. Co.*,
29 N. Y. 383; *Beisegel v. New York C. R.*
Co., 14 Abb. Pr. N. S. (N. Y.) 29; *McGrath*
v. New York C. & H. R. R. Co., 63 N. Y.
522.

**30. Running at unusual or pro-
hibited rate of speed is evidence of
negligence.**—Some authorities hold that
the running of trains within the limits of a
city at a speed greater than is allowed by
ordinance is negligence *per se*, but the better
and more generally accepted rule is that
such an act on the part of the company is
to be construed by the jury as a circum-
stance from which negligence may be in-
ferred. *Grand Trunk R. Co. v. Ives*, 144 U.
S. 408, 12 Sup. Ct. Rep. 679. *Chicago & N.*
W. R. Co. v. Dunleavy, 39 Am. & Eng. R.
Cas. 381, 129 Ill. 132, 22 N. E. Rep. 15; *af-*
firming 27 Ill. App. 438. *Artz v. Chicago*,
R. I. & P. R. Co., 44 Iowa 284.

Running an engine at a rate of speed
prohibited by ordinance is evidence of neg-
ligence. *Mahan v. Union Depot S. R. & T.*
Co., 34 Minn. 29, 24 N. W. Rep. 293. *Mc-*
Leod v. Ginther, 80 Ky. 399.—DISTIN-
GUISHED IN *Louisville & N. R. Co. v.*
Marriott, (Ky.) 19 Am. & Eng. R. Cas. 509.

The violation of a municipal ordinance
limiting the rate of speed is evidence of
negligence when the ordinance is not
pleaded, though in such case it does not
amount to negligence *per se*. *Windsor v.*
Hannibal & St. J. R. Co., 45 Mo. App. 123.
—APPLYING *Robertson v. Wabash, St. L.*
& P. R. Co., 84 Mo. 119.

While failure of a train to comply with
statutory requirements as to speed, etc.,
does not necessarily make the railroad liable
for an injury, yet it constitutes a *prima facie*
case. *Augusta & S. R. Co. v. McElmurry*,
24 Ga. 75.

It is some evidence of negligence to show
that a company ran its engine through the
streets of a city at a speed prohibited by a
city ordinance, although the ordinance pre-
scribes only a penalty for its violation.⁹
Beisegel v. New York C. R. Co., 14 Abb. Pr.
N. S. (N. Y.) 29.—EXPLAINING *Jetter v.*
New York & H. R. Co., 2 Keyes (N. Y.) 154.
OVERRULING *Brown v. Buffalo & S. L. R.*
Co., 22 N. Y. 191.—REVIEWED IN *Massoth*
v. Delaware & H. Canal Co., 64 N. Y. 524.

**31. Unusual, improper, or prohib-
ited rate of speed at crossings.**—When
no restriction by statute exists, an unusual

rate of speed at crossings must be held to impose upon the company increased vigilance as well as increased liability. *Klanowski v. Grand Trunk R. Co.*, 21 *Am. & Eng. R. Cas.* 648, 51 *Mich.* 525, 24 *N. W. Rep.* 801. —DISAPPROVING *McKonkey v. Chicago, B. & Q. R. Co.*, 40 *Iowa* 206. DISTINGUISHING *Grand Rapids & I. R. Co. v. Huntley*, 38 *Mich.* 540.

The giving of the signals required by law upon a train approaching a street crossing does not, under all circumstances, render the company free from negligence. Where the evidence tends to show that the train was being run at an undue, improper, and highly dangerous rate of speed through a city or village, the question of negligence is for the jury. *Thompson v. New York C. & H. R. R. Co.*, 110 *N. Y.* 636, 2 *Silv. App.* 82, 17 *N. E. Rep.* 690, 13 *Cent. Rep.* 240, 16 *N. Y. S. R.* 869; reversing 33 *Hun* 16. —APPLIED IN *Miller v. New York C. & H. R. R. Co.*, 20 *N. Y. Supp.* 163.

While running a train at a prohibited rate of speed without warning or signals over a public crossing may be only simple negligence, yet, if there is evidence that such train was run backward at a speed of twenty-five or thirty miles per hour without signal or warning over a street crossing much frequented by the public in a populous city, an ordinance of which prohibited trains from backing at a greater speed than four miles an hour, which circumstances were known to those in charge of the train, and injury resulted therefrom, it is properly submitted to the jury to decide whether such conduct is the equivalent of intentional wrong. *Louisville & N. R. Co. v. Webb*, 97 *Ala.* 308, 12 *So. Rep.* 374.

3. What Acts do Not Amount to Negligence.

32. In general.—A railroad company having the right to run its engines by steam is not liable for damages accruing in the exercise of its legal rights unless such damages are caused by the company's negligence, the burden of proving the negligence being on the plaintiff. *Bernard v. Richmond, F. & P. R. Co.*, 85 *Va.* 792, 8 *S. E. Rep.* 785. *Williams v. Michigan C. R. Co.*, 2 *Mich.* 259. —CRITICISING *Griffin v. Martin*, 7 *Barb. (N. Y.)* 297. FOLLOWING *Tonawanda R. Co. v. Munger*, 5 *Den. (N. Y.)* 255. —DISAPPROVED IN *Jackson v. Rutland & B. R. Co.*, 25 *Vt.* 150.

The use of appliances which are in universal and common use for the same purpose cannot be said to be negligence. *Werbowski v. Ft. Wayne & E. R. Co.*, 86 *Mich.* 236, 48 *N. W. Rep.* 1097. *Lafflin v. Buffalo & S. W. R. Co.*, 30 *Am. & Eng. R. Cas.* 596, 106 *N. Y.* 136, 7 *Cent. Rep.* 793, 12 *N. E. Rep.* 599, 8 *N. Y. S. R.* 596; reversing 36 *Hun* 638, *mem.*

The mere constructing of a railway in close proximity to a highway is not of itself an act of negligence. Such increase of danger is necessarily incident to and attendant upon this improved mode of transportation. *Beatty v. Central Iowa R. Co.*, 8 *Am. & Eng. R. Cas.* 210, 58 *Iowa* 242, 12 *N. W. Rep.* 332.

The reversal of an engine in switching and in making up trains is not negligence *per se*, and negligence is never presumed without proof, but in all cases must be proved. *Jackson v. Kansas City, L. & S. K. R. Co.*, 15 *Am. & Eng. R. Cas.* 178, 31 *Kan.* 761, 3 *Pac. Rep.* 501.

The mere act of running a train, after a severe storm, by the engineer and the deceased did not constitute negligence on their part. *Stoher v. St. Louis, I. M. & S. R. Co.*, 105 *Mo.* 192, 16 *S. W. Rep.* 591. —APPLYING *McPherson v. St. Louis, I. M. & S. R. Co.*, 97 *Mo.* 255.

It is not negligence *per se* for a railroad to have three freight trains reach a station at one time, at which station a passenger-train with right of way is about to pass, provided proper precautions are taken for the safety of the employes and passengers. *Smith v. Missouri Pac. R. Co.*, 113 *Mo.* 70, 20 *S. W. Rep.* 896.

The mere fact that a car of a railroad company in the city of New York is proceeding upon the left-hand track will not, of itself, charge the company with fault and subject it to damages resulting from an accident. *Altreuter v. Hudson River R. Co.*, 2 *E. D. Smith (N. Y.)* 151.

Where a company lays its tracks on its own land, it may decide on which one it will run trains, and running them on the track nearest the house of an adjacent owner is no evidence of negligence. *Flinn v. New York C. & H. R. R. Co.*, 34 *N. Y. S. R.* 451, 58 *Hun* 230, 12 *N. Y. Supp.* 341.

In an action for a personal injury based on the alleged negligence of the defendant in building a switch too near to a cattle-guard—*held*, that the mere fact that another

switch at the same station was farther from the cattle-guard did not tend to prove that there was negligence in building and maintaining the first one so near. *Robinson v. Chicago, R. I. & P. R. Co.*, 71 *Iowa* 102, 32 *N. W. Rep.* 193.

Where a freight train is obstructed by a snowstorm so that the conductor must leave a part of the cars, he is not chargeable with negligence, nor bound as a matter of law to take forward a car that he knows contains articles which will be injured by freezing rather than other cars of whose contents he is ignorant. *Sweetland v. Boston & A. R. Co.*, 102 *Mass.* 276.

33. Failure to use best methods of avoiding accidents.—If a railroad corporation in the administration of its affairs, conforms to the rules adopted or in general use by prudently conducted railroads, it is free from blame unless it violates or disregards some positive requirement of the law and thereby inflicts an injury. *Alabama G. S. R. Co. v. Arnold*, 35 *Am. & Eng. R. Cas.* 466, 84 *Ala.* 159, 4 *So. Rep.* 359, 5 *Am. St. Rep.* 354.—FOLLOWING *Louisville & N. R. Co. v. Allen*, 78 *Ala.* 494; *Georgia Pac. R. Co. v. Propst*, 83 *Ala.* 518. REVIEWING *Laffin v. Buffalo & S. W. R. Co.*, 106 *N. Y.* 136.

Omission of precautions against a casualty so improbable as to be beyond the range of reasonable apprehension is not actionable negligence. *Robinson v. Manhattan R. Co.*, 5 *Misc.* 209, 25 *N. Y. Supp.* 91, 54 *N. Y. S. R.* 792.

An inspection of a car may be insufficient to detect a particular defect therein, yet sufficient to discharge the duty which the company owes to those who are not passengers. *Schneider v. Second Ave. R. Co.*, 4 *Silo. App. (N. Y.)* 232.

Where a company is not charged with any other negligence except failing to block the joint of a switch, and the evidence tends to show that the blocking of switches is yet but an experiment, the trial court is not justified in instructing the jury in effect that such failure is in itself negligence. *Chicago, R. I. & P. R. Co. v. Lonergan*, 28 *Am. & Eng. R. Cas.* 491, 118 *Ill.* 41, 7 *N. E. Rep.* 55.

A company is not chargeable with negligence merely because it delays for any length of time to repair a broken car while it remains unused and not so situated as to create danger; nor merely because it moves

such car to its shops for repairs, and does not make such repairs at the place where the car was injured; nor merely because it puts such car in a train with others in order to take it to the repair shops. *Flanagan v. Chicago & N. W. R. Co.*, 45 *Wis.* 98, 18 *Am. Ry. Rep.* 73.

A company was sued for an injury resulting from a train stopping on a grade and then suddenly backing, due to a brake giving way and the slippery condition of the track. The company contended that the accident was the result of inevitable casualty, and that it was not chargeable with negligence. *Held*, that the fact that a skilled mechanic connected with the road afterwards devised a patent to prevent such accidents does not tend to show negligence on the part of the company unless by reasonable diligence it could have discovered the new device before the accident happened. *Carter v. Kansas City Cable R. Co.*, 42 *Fed. Rep.* 37.

34. Absence of, or defects in, brakes.—Where a company furnishes freight cars to be propelled by pushing, it is not negligence to fail to supply them with brakes or other means of controlling their movement. *Miller v. Union Pac. R. Co.*, 5 *McCrory (U. S.)* 300, 17 *Fed. Rep.* 67.

A car with defective brakes is not such an imminently dangerous instrument as to render the railroad company liable to one injured thereby, in the absence of any contractual or other relationship. *Roddy v. Missouri Pac. R. Co.*, 104 *Mo.* 234, 15 *S. W. Rep.* 1112.

35. Blowing whistle—Letting off steam.—Blowing a steam whistle and letting off steam are not *per se* acts of negligence or evidence of wrongful conduct on the part of those in charge of a train. But when those acts are done carelessly, heedlessly, and without any necessity therefor, they become acts of negligence, and the company will be responsible for injuries caused thereby. *Culp v. Atchison & N. R. Co.*, 17 *Kan.* 475.

Where it appears that the automatic safety valve is the best thing that has been devised for the safety of a locomotive and for the protection of life, it is not negligence to allow steam to escape in the legitimate use of such contrivance, since the law in conferring the right to use an element of danger does not accompany such right with a penalty; but an abuse of the right conferred

would be construed as negligence. *Louisville, N. A. & C. R. Co. v. Schmidt*, 55 *Am. & Eng. R. Cas.* 128, 134 *Ind.* 16, 33 *N. E. Rep.* 774.

36. Inefficient lookout.—The statute requiring "the engineer, fireman, or some other person upon the locomotive" of a moving train to be constantly on the lookout "ahead" has no application to the movement by impetus or gravitation of cars detached from the locomotive. But upon common law principles the company may be held for injury done by detached cars moving upon its track by impetus or gravitation where it fails in its duty to keep a proper lookout for persons upon the track in front of the cars, or to use all possible means to prevent accident upon discovery of the person. The statute is but a declaration of common law principles. The distinction between cases under the statute and at common law is that contributory negligence may defeat a recovery altogether in the latter, but can only mitigate the damages in the former. *Patton v. East Tenn., V. & G. R. Co.*, 48 *Am. & Eng. R. Cas.* 581, 89 *Tenn.* 370, 15 *S. W. Rep.* 919.

37. Failure to give signals.—Where at the time and place where the accident occurred there was no obligation on the part of the company to give signals, negligence cannot be imputed to the defendant if they were not given. *Northern C. R. Co. v. State*, 6 *Am. & Eng. R. Cas.* 66, 54 *Md.* 113.—DISTINGUISHED IN *Philadelphia, W. & B. R. Co. v. Fronk*, 32 *Am. & Eng. R. Cas.* 31, 67 *Md.* 339, 9 *Cent. Rep.* 64, 10 *Atl. Rep.* 307.

It is not unlawful for railway companies to propel cars by pushing them in advance of the locomotive by which they are propelled when the exigencies of their business require it. But if they do so under circumstances which increase the risk of injury to persons or property, they must give timely and suitable notice or warning, in some manner, of what they are doing. *Bokan v. Milwaukee, L. S. & W. R. Co.*, 15 *Am. & Eng. R. Cas.* 374, 58 *Wis.* 30, 15 *N. W. Rep.* 801.

38. Failure to stop train.—The evidence showed that plaintiff's intestate either fell or jumped from a train and lay near an adjoining track, but so that a train on that track might have passed without injuring him if he had not moved, but when the train was nearly past he threw his legs

under the wheels and received the injuries from which he died. *Held*, that evidence that the deceased was seen near the track is not sufficient to make the company guilty of negligence in not stopping the train. *McKenna v. New York C. & H. R. R. Co.*, 9 *Daly (N. Y.)* 262.—DISTINGUISHED IN *Mallard v. Ninth Ave. R. Co.*, 15 *Daly* 376, 7 *N. Y. Supp.* 666, 27 *N. Y. S. R.* 801.

39. Obstructing view of crossing.—It is not negligence *per se* for a company to leave cars upon a side track in the thickly settled portion of a city so as to obstruct the view of persons who have to cross the track; but where a jury finds that it was negligence, their finding will not be disturbed when supported by evidence. *Houston & T. C. R. Co. v. Stewart, (Tex.)* 17 *S. W. Rep.* 33.

40. Unavoidable or pure accident.*—If in the prosecution of a lawful act an accident, which is purely an accident, arises, no action can be maintained for an injury resulting therefrom. *Walsh v. Virginia & T. R. Co.*, 8 *Nev.* 110. *Mitchell v. Chicago & G. T. R. Co.*, 12 *Am. & Eng. R. Cas.* 163, 51 *Mich.* 236, 16 *N. W. Rep.* 388, 47 *Am. Rep.* 566.

An injury that is the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate cause, is an accident and is not actionable. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 *Fed. Rep.* 949, 12 *U. S. App.* 381, 5 *C. C. A.* 347.

The negligence charged against the driver of a street-car was in not stopping the horses before they ran over a child. There was no evidence which tended to show that at any time the child was at a place where the driver could have seen him, and then have managed the horses so that he would not have been knocked down; and it was consistent with the testimony that the child came in contact with the horses at the side, and so suddenly that the accident was unavoidable. *Held*, not sufficient to show negligence, and a nonsuit was properly ordered. *Cords v. Third Ave. R. Co.*, 24 *J. & S.* 319, 4 *N. Y. Supp.* 439, 21 *N. Y. S. R.* 461.

41. Rapid speed not negligence per se.†—A high rate of speed, if the conditions of the railway track and machinery will permit it without increasing the peril

* See also **STREETS AND HIGHWAYS, 373.**

† See also *ante*, 29.

to the passengers, will not be negligence. *Chicago, P. & St. L. R. Co. v. Lewis*, 145 Ill. 67, 33 N. E. Rep. 960.—APPLYING IN Indianapolis, B. & W. R. Co. v. Hall, 106 Ill. 371.—*Peoria, D. & E. R. Co. v. Aten*, 43 Ill. App. 68. *Grows v. Maine C. R. Co.*, 67 Me. 100, 16 Am. Ry. Rep. 326. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537.—DISTINGUISHED IN *Klanowski v. Grand Trunk R. Co.*, 57 Mich. 525.—*Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215.—FOLLOWING *Maher v. Atlantic & P. R. Co.*, 64 Mo. 267.—*Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594. *Barber v. Richmond & D. R. Co.*, 34 So. Car. 444; 13 S. E. Rep. 630.—APPLYING *Zeigler v. Northeastern R. Co.*, 7 So. Car. 402.

A train's mere speed of motion is not *per se* evidence of negligence, nor is the fact that the train is "behind time." *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241. *New York, P. & N. R. Co. v. Kellam*, 32 Am. & Eng. R. Cas. 114, 83 Va. 851, 3 S. E. Rep. 703.

Where the speed of railway trains is not regulated by statute unless in exceptional cases, the existence of a high rate of speed does not argue a fault on the part of the company. The reasonable rule is that the highest rate of speed consistent with the safety of the passengers is proper and legitimate. *Houston v. Vicksburg, S. & P. R. Co.*, 34 Am. & Eng. R. Cas. 76, 39 La. Ann. 796, 2 So. Rep. 562. *Chicago, R. I. & P. R. Co. v. Givens*, 18 Ill. App. 404. *McKonkey v. Chicago, B. & Q. R. Co.*, 40 Iowa 205, 8 Am. Ry. Rep. 406.—DISAPPROVED IN *Klanowski v. Grand Trunk R. Co.*, 57 Mich. 525.—*Maher v. Atlantic & P. R. Co.*, 64 Mo. 267.—FOLLOWED IN *Pryor v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 215. REVIEWED IN *Prewitt v. Eddy*, 115 Mo. 283.—*Powell v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 467, 76 Mo. 80.—FOLLOWED IN *Main v. Hannibal & St. J. R. Co.*, 18 Mo. App. 388.—*Young v. Hannibal & St. J. R. Co.*, 19 Am. & Eng. R. Cas. 512, 79 Mo. 336. *Lord v. Chicago, R. I. & P. R. Co.*, 82 Mo. 139. *Main v. Hannibal & St. J. R. Co.*, 18 Mo. App. 388.—FOLLOWING *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594.—*Potter v. Hannibal & St. J. R. Co.*, 18 Mo. App. 694. *Nutter v. Chicago, R. I. & P. R. Co.*, 22 Mo. App. 328.

The running of a train through the streets of a city at a speed prohibited under a penalty is not *per se* negligence. *Brown v. Buf-*

falo & S. L. R. Co., 22 N. Y. 191.—COMMENTED ON AND NOT FOLLOWED IN *Grey v. Mobile Trade Co.*, 55 Ala. 387. DISAPPROVED IN *Union Pac. R. Co. v. Rasmussen*, 25 Neb. 810, 41 N. W. Rep. 778; *Correll v. Burlington, C. R. & M. R. Co.*, 38 Iowa 120. OVERRULED IN *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 524; *Beisegel v. New York C. R. Co.*, 14 Abb. Pr. N. S. (N. Y.) 29. REVIEWED IN *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76.

Unless plaintiff shows that the injury would not have occurred but for the violation of the provision of the ordinance. *Philadelphia, W. & B. R. Co. v. Stebbing*, 19 Am. & Eng. R. Cas. 36, 62 Md. 504.

The mere running of a train at a greater rate of speed than that allowed by ordinance will not constitute an injury done to a person walking along the track an act of wanton or wilful negligence. (Walker and Dickey, JJ., dissenting.) *Illinois C. R. Co. v. Hetherington*, 83 Ill. 510.—QUOTED IN *Wabash, St. L. & P. R. Co. v. Weisbeck*, 14 Ill. App. 525.

Negligence will not always be presumed where a railroad violates an ordinance or statute by running at too great a rate of speed in a town or city; and especially where there is no evidence of such ordinance or statute, or where it is not shown that the accident occurred in a populous part of a city, or at a time when so many persons were walking on the track as to prevent one from readily seeing a moving train, where it is shown that the persons walking on the track could easily secure their safety by stepping aside. *Syme v. Richmond & D. R. Co.*, 113 N. Car. 558, 18 S. E. Rep. 114.

Except so far as limited by statute the whole matter of regulating the speed of trains is left to the sound discretion of the municipal authorities. *Lake View v. Tate*, 39 Am. & Eng. R. Cas. 703, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. Rep. 791.

The necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely, but the business cannot be done at all unless calculations are made upon the movements of trains. The risks attendant upon a disturbance of that regularity are risks of human life, and not mere business delays, and it would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather. *Hagan v. Chicago, D. & C.*

G. T. J. R. Co., 49 *Am. & Eng. R. Cas.* 670, 86 *Mich.* 615, 49 *N. W. Rep.* 509.

The engineer and fireman in managing a train are at liberty, and it is their duty, to run their train as nearly on time as possible, and in case of a way freight, whose length of stops at the stations is necessarily irregular, they are not to be considered negligent by reason of using natural and reasonable means to make time. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 *Am. & Eng. R. Cas.* 670, 86 *Mich.* 615, 49 *N. W. Rep.* 509.

It must be conceded that in operating a railroad it becomes necessary, at times, to make time between given points, and the running of a freight train at the rate of forty miles an hour for this purpose is not in itself negligence. *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 49 *Am. & Eng. R. Cas.* 670, 86 *Mich.* 615, 49 *N. W. Rep.* 509.

The running of a mail train at the rate of thirty or thirty-five miles per hour past a station is not of itself unlawful; nor can negligence be imputed to the railroad company from that fact alone so as to make it liable for an injury resulting from the throwing of a mail bag from such train. *Musterv. Chicago, M. & St. P. R. Co.*, 18 *Am. & Eng. R. Cas.* 113, 61 *Wis.* 325, 21 *N. W. Rep.* 223, 50 *Am. Rep.* 141.

Running a passenger train at the rate of thirty miles an hour on a straight track is not gross negligence within the Pub. St. ch. 112, § 212. *Merrill v. Eastern R. Co.*, 139 *Mass.* 238, 52 *Am. Rep.* 705, 1 *N. E. Rep.* 548.

The running of a train at the rate of twenty-five miles an hour in a village may be negligence, but not of itself enough to show a reckless or wanton disregard of the safety of the public or a wilful attempt to injure the plaintiff, especially where there is no ordinance prohibiting it. *Garland v. Chicago & N. W. R. Co.*, 8 *Ill. App.* 571.

Fifteen miles per hour is not reckless or dangerous speed for a train between stations outside of cities and towns. *Benson v. Central Pac. R. Co.*, 54 *Am. & Eng. R. Cas.* 126, 98 *Cal.* 45, 32 *Pac. Rep.* 809, 33 *Pac. Rep.* 206.

Approaching a stopping place on a railroad where two roads branch, and where a crowd of persons are waiting for the approaching train, at the rate of seven or eight miles an hour cannot be assumed to be reckless, when it is shown that the train was drawn

by a dummy engine, and could be stopped within fifteen or twenty feet. *Ensley R. Co. v. Chewning*, 50 *Am. & Eng. R. Cas.* 46, 93 *Ala.* 24, 9 *So. Rep.* 458.

Evidence that those in charge of a train discovered a wagon box and seat near the track shortly before reaching the deceased and his team does not tend to show that they knew some one was on the track ahead of them, or that they were guilty of gross negligence in proceeding at the usual rate of speed. *McDonald v. Chicago, M. & St. P. R. Co.*, 75 *Wis.* 121, 43 *N. W. Rep.* 744.

42. Company may adopt its own rate of speed unless restrained by statute or ordinance.*—A company has the right to run its trains at any speed deemed proper except it be in an incorporated city or town or when crossing a public street or highway. *Farve v. Louisville & N. R. Co.*, 42 *Fed. Rep.* 441.

Where the general law of the state imposes no restraint upon railway companies as to the rate of speed their trains may be run and they are not prohibited by municipal regulations, they may adopt such rate of speed as they may desire, provided always that it is reasonably safe to the passengers being transported. *Chicago, B. & Q. R. Co. v. Lee*, 68 *Ill.* 576.—QUOTED IN *Wabash, St. L. & P. R. Co. v. Hicks*, 13 *Ill. App.* 407; *Chicago, B. & Q. R. Co. v. Florens*, 32 *Ill. App.* 365. REVIEWED IN *Wabash, St. L. & P. R. Co. v. Neikirk*, 13 *Ill. App.* 387.—*Indianapolis, B. & W. R. Co. v. Hall*, 12 *Am. & Eng. R. Cas.* 146, 106 *Ill.* 371.—APPLIED IN *Chicago, P. & St. L. R. Co. v. Lewis*, 145 *Ill.* 67. NOT FOLLOWED IN *Louisville, N. A. & C. R. Co. v. Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551.—*Wabash, St. L. & P. R. Co. v. Neikirk*, 13 *Ill. App.* 387.—REVIEWING *Chicago, B. & Q. R. Co. v. Lee*, 68 *Ill.* 576.—*Wabash, St. L. & P. R. Co. v. Neikirk*, 15 *Ill. App.* 172.

Such companies may run their trains at such speed as, under all the circumstances, shall comport with the rule of law which requires them to exercise a high degree of care for the safety of passengers, and whether a given rate of speed is dangerous or not is to be determined by the surrounding circumstances, such as condition of the track, fencing of right of way, etc. *Indianapolis, B. & W. R. Co. v. Hall*, 12 *Am. & Eng. R. Cas.* 146, 106 *Ill.* 371.

* See also *ante*, 28.

4. Proximate Cause.

43. Defendant's negligence must be the proximate cause of the injury.*—The mere concurrence of negligence and injury does not make defendant liable unless the negligence was the proximate cause of the injury.

Reed v. Missouri Pac. R. Co., 50 Mo. App. 504. *Nashville, C. & St. L. R. Co. v. Hembree*, 38 Am. & Eng. R. Cas. 300, 85 Ala. 481, 5 So. Rep. 173. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fl. 1, 9 So. Rep. 661. *MacVeagh v. Atchison, T. & S. F. R. Co.*, 18 Am. & Eng. R. Cas. 651, 3 N. Mex. 205, 5 Pac. Rep. 457. — APPROVING *Hoadley v. Northern Transp. Co.*, 115 Mass. 304; *Memphis & C. R. Co. v. Reeves*, 10 Wall. (U. S.) 176. — *Mitchell v. Chicago & G. T. R. Co.*, 12 Am. & Eng. R. Cas. 163, 51 Mich. 236, 16 N. W. Rep. 388, 47 Am. Rep. 566. *Harlan v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 22. — DISTINGUISHING *Hicks v. Pacific R. Co.*, 64 Mo. 430. — *Stevv v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229. *Hicks v. Missouri Pac. R. Co.*, 46 Mo. App. 304. *Williams v. Delaware, L. & W. R. Co.*, 39 Hun (N. Y.) 430. — APPLYING *Mott v. Hudson River R. Co.*, 1 Robt. (N. Y.) 586; *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Hofnagle v. New York C. & H. R. R. Co.*, 55 N. Y. 609; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249; *Selleck v. Lake Shore & M. S. R. Co.*, 58 Mich. 195. — DISTINGUISHED IN *Eades v. Clark*, 23 J. & S. (N. Y.) 132. QUOTED IN *Mars v. Delaware & H. Canal Co.*, 54 Hun 625. — *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. Rep. 655. — DISTINGUISHING *West Mahanoy Tp. v. Watson*, 116 Pa. St. 344, 9 Atl. Rep. 430; *South Side Pass. R. Co. v. Trich*, 117 Pa. St. 390, 11 Atl. Rep. 627. QUOTING *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293; *Milwaukee & St. F. R. Co. v. Kellogg*, 94 U. S. 469; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. Rep. 764. — *Glenn v. Columbia & G. R. Co.*, 21 So. Car. 466.

A person is answerable for his negligence only so far as it is the natural and proximate

cause of the injury, and not when the consequences arise from a conjunction of his fault with circumstances of an extraordinary nature. *Moore v. Edison Elec. Illuminating Co.*, 43 La. Ann. 792, 9 So. Rep. 433.

Failure of the engineer to blow on brakes will not render the railroad company liable for an injury which is not the result of such failure. *Adkins v. Atlanta & C. A. L. R. Co.*, 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849.

Violations by a railroad train of a city ordinance as to the rate of speed, headlights, and bell ringing, although amounting to negligence *per se*, do not render the company liable for damages not caused thereby. *Karle v. Kansas City, St. J. & C. B. R. Co.*, 55 Mo. 476. — REVIEWED IN *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Wilburn v. St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 203. — *Lake Shore & M. S. R. Co. v. Parker*, 41 Am. & Eng. R. Cas. 339, 131 Ill. 557, 23 N. E. Rep. 237; affirming 33 Ill. App. 405. *Evans & H. Fire Brick Co. v. St. Louis & S. F. R. Co.*, 17 Mo. App. 624.

If negligence be the proximate cause of the injury, it is of no consequence whether it be omission or commission. *Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11, 12 N. E. Rep. 451. — FOLLOWING *Davis v. Chicago & N. W. R. Co.*, 58 Wis. 646.

Where the act of negligence complained of as causing the injury is at most but the remote cause, there can be no recovery therefor. *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. Rep. 832. *Meyer v. Midland Pac. R. Co.*, 2 Neb. 319.

The complaint in an action for negligence must show that the plaintiff's injury was caused or occasioned by the negligence alleged. It is not enough to charge the defendant with a negligent act or omission; it must also be shown with reasonable certainty that such act or omission was the direct or proximate cause of the injury, or the complaint will be bad on demurrer. *Ohio & M. R. Co. v. Engrer*, 4 Ind. App. 261, 30 N. E. Rep. 924.

A demurrer to the complaint is properly sustained where it shows on its face that the negligence complained of was not the proximate cause of the injury. *Kistner v. Indianapolis*, 100 Ind. 210.

Where a person claims damages from a railroad company for injuries received

* Proximate and not remote cause to be regarded in determining liability for negligence, see note, 7 L. R. A. 131.

Proximate and remote cause in cases involving wrongful acts, see note, 36 Am. ST. REP. 808.

Proximate and remote cause as applied to personal injuries, see notes, 47 Am. Rep. 381; 8 L. R. A. 82; 13 Id. 733.

through alleged negligence, the burden is upon him, not only to show negligence on the part of the company, but also that such negligence produced the injury complained of. *Kelsey v. Jewett*, 28 Hun (N. Y.) 51.—APPLYING *Lamb v. Camden & A. R. & T. Co.*, 46 N. Y. 271. FOLLOWING *Held v. New York C. & H. R. R. Co.*, 12 N. Y. Wkly. Dig. 163.—*Haff v. Minneapolis & St. L. R. Co.*, 4 McCrary (U. S.) 622, 14 Fed. Rep. 558. *Coy v. Utica & S. R. Co.*, 23 Barb. (N. Y.) 643. *Chrystal v. Troy & B. R. Co.*, 12 N. Y. 519, 26 N. E. Rep. 1103; *former appeal*, 105 N. Y. 164, 11 N. E. Rep. 380, 36 N. Y. S. R. 699; *reversing* 52 Hun 55, 22 N. Y. S. R. 384. *Adkins v. Atlanta & C. A. L. R. Co.*, 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849.—REVIEWING *Glenn v. Columbia & G. R. Co.*, 21 So. Car. 466.

Mere surmise and conjecture that the negligence was the proximate cause of the injury are insufficient. *Larson v. St. Paul & D. R. Co.*, 43 Minn. 488, 45 N. W. Rep. 1096.

The instinct of self-preservation on plaintiff's part cannot supply the place of proof; yet, where there is any evidence from which the jury might legally infer a causal connection between the negligence and the injury, the question should be submitted to them. *Bromley v. Birmingham Mineral R. Co.*, 95 Ala. 397, 11 So. Rep. 341.

44. Whether the negligent act must be the sole cause of injury.—The injury must be solely caused by the negligence of the defendant. It is not enough that it should be essentially so caused. *Louisville & N. R. Co. v. Yniestra*, 29 Am. & Eng. R. Cas. 297, 21 Fla. 700. *Grippen v. New York C. R. Co.*, 40 N. Y. 34.

Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. *Houston & T. C. R. Co. v. McDonough*, 1 Tex. App. (Civ. Cas.) 354. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

Where a physical injury is the natural result of the negligence of a defendant, although it proceeds from and is the result of a mental shock caused directly by the negligent act, the defendant is liable if the jury find from the evidence that the shock caused the injury. *Mitchell v. Rochester R. Co.*, 25 N. Y. Supp. 744, 4 Misc. 575, 30 Abb. N. Cas. 362; *affirmed in* 77 Hun 607, *mem.*

—REVIEWING *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 1 N. E. Rep. 608.

45. Negligence in absence of which injury would not have resulted.—When one is injured by an act of negligence, that act proximately contributes to the injury when without it the injury would not have been inflicted. *International & G. N. R. Co. v. Ormond*, 27 Am. & Eng. R. Cas. 139, 64 Tex. 485.—QUOTED IN *Murray v. Gulf, C. & S. F. R. Co.*, 38 Am. & Eng. R. Cas. 177, 73 Tex. 2, 11 S. W. Rep. 125.

When the act of God is the cause of a loss, it is not enough to show that defendant has been guilty of negligence. The case must go further and show that such negligence was an active agent in bringing about the loss, without which agency the loss would not have occurred. *Coleman v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 476.—QUOTING *Baltimore & O. R. Co. v. Sulphur Spring I. S. Dist.*, 96 Pa. St. 65. REVIEWING *Rogers v. Central Pac. R. Co.*, 67 Cal. 607.

It is not necessary in order to charge a common carrier with a liability that it be guilty of great negligence. It is enough if the accident be caused solely by any negligence on its part, however slight, if by the exercise of the strictest care or precaution reasonably within its power the injury would not have been sustained. *Potts v. Chicago City R. Co.*, 33 Fed. Rep. 610.

46. Injury which is the natural and probable consequence of defendant's negligence.—To render the defendant liable the injury must be the natural and probable consequence of the negligence, such as under the circumstances ought to have been foreseen by the wrong-doer as the natural consequence of his act. *Sellers v. Richmond & D. R. Co.*, 25 Am. & Eng. R. Cas. 451, 94 N. Car. 654. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.—APPROVING *Kean v. Baltimore & O. R. Co.*, 61 Md. 154; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Miller v. St. Louis, I. M. & S. R. Co.*, 90 Mo. 389; *Kellogg v. Chicago & N. W. R. Co.*, 26 Wis. 223; *Smith v. London & S. W. R. Co.*, L. R. 6 C. P. 21.—*Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293. *Baltimore & O. R. Co. v. Sulphur Spring I. S. Dist.*, 2 Am. & Eng. R. Cas. 166, 96 Pa. St. 65, 42 Am. Rep. 529.—FOLLOWING *Pittsburg, Ft. W. & C.*

R. Co. v. Gilleland, 56 Pa. St. 445.—QUOTED IN *Coleman v. Kansas City, St. J. & C. B. R. Co.*, 36 Mo. App. 476.—*West Mahanoy Tp. v. Watson*, 116 Pa. St. 344, 9 *Atl. Rep.* 430. *Mack v. Lombard & S. St. Pass. R. Co.*, 20 Phila. (Pa.) 207. *Seale v. Gulf, C. & S. F. R. Co.*, 65 Tex. 274, 57 *Am. Rep.* 602. *Johnson v. Gulf, C. & S. F. R. Co.*, 2 Tex. *Civ. App.* 139, 21 *S. W. Rep.* 274.—QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475.—*In re Merrill*, 11 *Am. & Eng. R. Cas.* 680, 54 *Vt.* 200. *Atkinson v. Goodrich Transp. Co.*, 60 *Wis.* 141, 18 *N. W. Rep.* 764.—DISTINGUISHING *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 *Ill.* 572.—QUOTED IN *Boss v. Northern Pac. R. Co.*, 2 *N. Dak.* 128.

It is not necessary to a defendant's liability, after his negligence has been established, to show in addition thereto that the consequences of his negligence could have been foreseen by him; it is sufficient if the injuries are the natural, though not the necessary or inevitable, result of the negligent fault—such injuries as are likely in ordinary circumstances to ensue from the act or omission in question. *Miller v. St. Louis, I. M. & S. R. Co.*, 29 *Am. & Eng. R. Cas.* 254, 90 *Mo.* 389, 2 *S. W. Rep.* 439.—APPROVED IN *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242.

Where an employé sues for an injury, and the evidence wholly fails to show that the injury was the natural or probable consequence of defendant's omission to employ a sufficient number of brakemen, as charged, or that the accident would not have happened but for such omission, plaintiff cannot recover. *Williams v. Delaware, L. & W. R. Co.*, 39 *Hun (N. Y.)* 430.

47. Rule where there are two or more concurrent proximate causes.—If the injury is the result of the negligence of the defendant and that of a third person; or of the defendant, and an inevitable accident; or an inanimate thing has contributed, with the negligence of the defendant, to cause the injury, the plaintiff may recover, if the negligence of the defendant was an efficient cause of the injury. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285. *Lapleigne v. Morgan's L. & T. R. & S. Co.*, 37 *Am. & Eng. R. Cas.* 348, 40 *La. Ann.* 661, 1 *L. R. A.* 378, 4 *So. Rep.* 875. *Brehm v. Great Western R. Co.*, 34 *Barb. (N. Y.)* 256.—REVIEWING *Chapman v. New Haven R. Co.*, 19 *N. Y.* 341.—*Phillips v.*

New York C. & H. R. R. Co., 127 *N. Y.* 657, 3 *Silv. App.* 467, 27 *N. E. Rep.* 978, 38 *N. Y. S. R.* 675; affirming 53 *Hun* 634, *mem.*, 25 *N. Y. S. R.* 91, 3 *Silv. Sup. Ct.* 5, 6 *N. Y. Supp.* 621. *East Tenn., V. & G. R. Co. v. Fain*, 19 *Am. & Eng. R. Cas.* 102, 12 *Lea (Tenn.)* 35.—APPROVING *Nashville & C. R. Co. v. Carroll*, 6 *Heisk. (Tenn.)* 347.—FOLLOWED IN *East Tenn., V. & G. R. Co. v. Gurley*, 17 *Am. & Eng. R. Cas.* 568, 12 *Lea* 46.

Where the negligence of two independent persons results in injury to a third, and neither is sufficient in itself, both will be treated in combination as the proximate cause of the injury. *Pullman Palace Car Co. v. Laack*, 143 *Ill.* 242, 32 *N. E. Rep.* 285.

The negligence of one for whose acts the plaintiff is not responsible, however much it may have contributed to the injury for which the plaintiff sues, is no defense in behalf of a defendant whose negligence is the proximate cause of such injury. The fact that both the defendant and such stranger are each, on account of his own negligence, liable to the plaintiff is no defense to either such defendant or stranger. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 *Am. & Eng. R. Cas.* 603, 27 *Fla.* 1, 9 *So. Rep.* 661.

Where two causes combine to produce an injury, both of which causes are proximate in their character, the one being the result of culpable negligence and the other an occurrence to which neither party is at fault, the negligent party is liable, provided that the injury would not have been sustained but for such negligence. *Grimes v. Louisville, N. A. & C. R. Co.*, 3 *Ind. App.* 573, 30 *N. E. Rep.* 200. *Johnson v. Northwestern Tel. Exch. Co.*, 48 *Minn.* 433, 51 *N. W. Rep.* 225. *Boggs v. Missouri Pac. R. Co.*, 18 *Mo. App.* 274.—QUOTING *Nagel v. Missouri Pac. R. Co.*, 75 *Mo.* 653.—REVIEWED IN *Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 *Mo. App.* 418.—*Houston & T. C. R. Co. v. McDonough*, 1 *Tex. App. (Civ. Cas.)* 354.

The innocent or culpable act of a third person may be the immediate cause of the injury, and still an earlier wrongful act may have contributed so effectually to it as to be regarded as the efficient act, or at least the concurrent and responsible cause. And while it is true, generally, that where the wrongful act of one party affords only the occasion for the wrongful act of another it is too remote as to the first wrong-doer, yet

this rule is always subject to the qualification unless the injury thus ensuing was such as was likely, according to the general experience, to happen from such conduct, or where the misconduct offering such opportunity consists in the omission of some precaution it was the defendant's duty to take against such loss as has occurred. *Morrison v. Kansas City, St. J. & C. B. R. Co.*, 27 Mo. App. 418.—QUOTING *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653. REVIEWING *Boggs v. Missouri Pac. R. Co.*, 18 Mo. App. 274.

Where, in an action to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, it appears that there were two or more possible causes of the injury, for one or more of which the defendant was not responsible, the plaintiff in order to recover must show by evidence that the injury was wholly or partly the result of a cause for which the defendant is responsible. If the evidence leaves it just as probable that the injury was the result of one cause as of the other, the plaintiff cannot recover. *Grant v. Pennsylvania & N. Y. C. & R. Co.*, 133 N. Y. 657, 31 N. E. Rep. 220, 45 N. Y. S. R. 305; reversing 59 Hun 616, mem., 35 N. Y. S. R. 999, 14 N. Y. Supp. 948.

Plaintiff was crossing a street when defendant's horse became frightened at a passing elevated train and shied against plaintiff, producing the injury complained of. The evidence tended to show negligence in the manner of driving the horse. *Held*, that if the passing train and the driver's negligence were concurrent causes, equally efficient in producing the result, the accident was attributed to both or either, and it was for the jury to determine which was the proximate cause. *Van Houten v. Fleischmann*, 20 N. Y. Supp. 643, 1 Misc. 130, 48 N. Y. S. R. 763; affirmed in 142 N. Y. 624, 37 N. E. Rep. 565, 60 N. Y. S. R. 867.

48. Effect of an intervening cause of injury.*—In determining what is the proximate cause of an injury one of the most valuable of the criteria is to ascertain whether any new cause has intervened between the facts accomplished and the alleged cause. *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. Rep. 261.—QUOTING *Milwaukee & St. P. R. Co. v.*

Kellogg, 94 U. S. 470. REVIEWING *Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166.—*West Mahanoy Tp. v. Watson*, 112 Pa. St. 574, 9 Atl. Rep. 430.—DISTINGUISHED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128.—*Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31.

To entitle a party to recover damages of a railroad company on account of the negligence of its agents, it should appear that the negligence was the natural and proximate cause of the injury; for should it appear that the negligence of the railroad company would not have damaged the party complaining but for the interposition of a separate independent agency, over which the railroad company neither had nor exercised control, then the party complaining cannot recover. *Perry v. Central R. Co.*, 66 Ga. 746.—DISTINGUISHED IN *Georgia R. & B. Co. v. Friddell*, 79 Ga. 489.—*Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 Fed. Rep. 949. *Wright v. Chicago & N. W. R. Co.*, 27 Ill. App. 200. *Clark v. Wilmington & W. R. Co.*, 48 Am. & Eng. R. Cas. 546, 109 N. Car. 430, 14 S. E. Rep. 43. *Seale v. Gulf, C. & S. F. R. Co.*, 65 Tex. 274, 57 Am. Rep. 602.

An intervening sufficient cause is a new and independent force, which breaks the causal connection between the original wrong and the injury, and it becomes the direct and immediate—i. e., the proximate—cause of the injury. The test is, was it a new and independent force, acting in and of itself in causing the injury, and superseding the original wrong so as to make it remote in the chain of causation? *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.

Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. *Wright v. Chicago & N. W. R. Co.*, 27 Ill. App. 200.—QUOTING *Atchison, T. & S. F. R. Co. v. Stanford*, 12 Kan. 354.—*Pullman Palace Car Co. v. Laack*, 41 Ill. App. 34.—QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469.—*Harriman v. Pittsburgh, C. & St. L. R. Co.*, 32 Am. & Eng. R. Cas. 37, 45 Ohio St. 11, 12 N. E. Rep. 451.—FOLLOWING *Lynch v. Nurdin*, 1 Q. B. 29.—

* Liability for negligence where there is an intervening cause, see note, 8 L. R. A. 84.

Seale v. Gulf, C. & S. F. R. Co., 65 Tex. 274, 57 Am. Rep. 602.

In an action for damages resulting from negligence there must be a direct connection between the negligent act and the injury. Furthermore, there must be such nearness in the connection that it must be the primary cause. And if there be the concurrence of some other immediate agency in producing the injury, "that event must have been the effect of the act complained of, or within the range of probable occurrences to persons of ordinary comprehension while engaged in the act." *Gilliland v. Chicago & A. R. Co.*, 19 Mo. App. 411.

The rule that the causal connection between the negligent act and the injury may be broken by the interposition of a responsible human agency will not be applied to relieve one of liability for a negligent act by interposing another also committed by himself. *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 20 S. W. Rep. 439.

The direct or proximate consequences of a wrongful act are those which occur without any intervening independent cause; and the fact that the injuries chiefly complained of were caused immediately by the act of plaintiffs in walking from the place where they left the cars to the next station will not relieve defendant from liability therefor where it appears that the plaintiffs' act in so walking was rendered apparently necessary by defendant's wrongful act, and was not negligent. *Brown v. Chicago, M. & St. P. R. Co.*, 3 Am. & Eng. R. Cas. 444, 54 Wis. 342, 11 N. W. Rep. 356, 911, 41 Am. Rep. 41.—DISAPPROVING *Pullman Palace Car Co. v. Barker*, 4 Colo. 344. QUOTING *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475. REVIEWING *Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7.—FOLLOWED IN *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141.

Where the evidence tends strongly to show that the injury complained of was the result, not of defendant's negligence, but of an ordinary cut, aggravated by a depraved condition of plaintiff's system, the court properly instructed that plaintiff could not recover if the jury found that plaintiff's injury occurred by reason of the impurity of his blood. *Kitteringham v. Sioux City & P. R. Co.*, 18 Am. & Eng. R. Cas. 14, 62 Iowa 285, 17 N. W. Rep. 585.

Plaintiff was navigating a boat down a

river in charge of a heavy tow on a strong current. As he neared defendant's railroad bridge he signaled the draw to open, which was not obeyed, and when near the bridge he attempted to swing the boat and tie to the shore before reaching the bridge, but a chain broke and the boat drifted against the bridge and was injured. *Held*, that even if the breaking of the chain was the immediate cause of the injury, still the company was liable if its negligence in failing to open the draw was the cause of its breaking by reason of a stronger pressure on it in trying to swing the boat against the current. *King v. Ohio & M. R. Co.*, 25 Fed. Rep. 799.—FOLLOWING *King v. Ohio & M. R. Co.*, 24 Fed. Rep. 335.

49. What will be deemed to be the proximate cause of an injury.*—A proximate cause is that which stands next in causation to the effect, not necessarily in time and space, but in causal relation. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285. *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988, 12 U. S. App. 541, 6 C. C. A. 205.—QUOTING *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 Fed. Rep. 949; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469.

If the negligence of a defendant puts in motion the destructive agency, and the result is directly attributable thereto, and there is no intervention of a new force or power of itself sufficient to stand as the cause of the mischief, the negligence of the defendant must be considered as the proximate cause of the injury. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.

An act is the proximate cause of an injury when the injury is the natural and probable consequence of the negligence or wrongful act, and which, in the light of attending circumstances, should have been foreseen. *Eames v. Texas & N. O. R. Co.*, 22 Am. & Eng. R. Cas. 540, 63 Tex. 660. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661.—FOLLOWING *Fent v. Toledo, P. & W. R. Co.*, 59 Ill. 349.—*Handelun v. Burlington, C. R. & N. R. Co.*, 72 Iowa 709, 32 N. W. Rep. 4.—FOL-

* What is and what is not proximate cause, see note, 8 AM. & ENG. R. CAS. 62.

Various illustrations of doctrine of proximate and remote cause, see notes, 50 AM. REP. 569; 7 L. R. A. 132.

LOWING *Crowley v. Burlington, C. R. & N. R. Co.*, 65 Iowa 658.—*Baltimore City Pass. R. Co. v. McDonnell*, 43 Md. 534, 14 Am. Ry. Rep. 272.

If an injury results from a negligent act of a defendant, such act will be deemed the proximate cause unless the consequences are so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 21 N. E. Rep. 968.

A proximate cause is therefore a probable cause, and a remote cause an improbable cause. *Jackson v. Nashville, C. & St. L. R. Co.*, 19 Am. & Eng. R. Cas. 433, 13 Lea (Tenn.) 491, 49 Am. Rep. 663.

Where plaintiff was struck and injured while walking along a path by the side of a railroad track by a cow which was thrown from the track by the engine, and which fell against plaintiff after striking the ground, the injury is the proximate consequence of the engine striking the cow. *Alabama G. S. R. Co. v. Chapman*, 31 Am. & Eng. R. Cas. 394, 80 Ala. 615, 2 So. Rep. 738; further appeal, 83 Ala. 453, 3 So. Rep. 813.

The failure of an engineer to use the means possessed at the time and adequate to prevent an injury is the proximate cause of an accident. *Bell v. Hannibal & St. J. R. Co.*, 86 Mo. 599.

The fact of a plate of a frog being out of repair having caused an employé to stumble, the defective plate must be regarded as the proximate cause of the injury. *Waldhier v. Hannibal & St. J. R. Co.*, 87 Mo. 37.

If one who enters upon the track of a railway when no train is in sight should, from providential cause, become insensible while there, and in that condition be run over and injured by a train while lying in open view, the company would be liable in damages on account of that negligence on the part of its agents in not discovering the helpless man which was the proximate cause of the injury. *Houston & T. C. R. Co. v. Symphkins*, 6 Am. & Eng. R. Cas. 11, 54 Tex. 615.

A town is liable to one who is injured while attempting to extricate his horse that had broken through a bridge that the town was required to keep in repair. The cause of the injury is sufficiently proximate. *Stickney v. Maidstone*, 30 Vt. 738.—DISTINGUISHED IN *Pike v. Grand Trunk R. Co.*, 38 Am. & Eng. R. Cas. 336, 39 Fed. Rep. 255.

Plaintiff was riding with others on an elevated train, when a blockade prevented the train reaching a station, and, at the invitation of the conductor, they got out to walk on the boards at the side of the track. Before reaching the station the train moved up, and in the general panic that ensued plaintiff fell to the street below. The company contended that the fall was caused by other passengers, who were entering at the station, who pushed or jostled plaintiff. Held, that if the accident was caused as the company claimed there could be no recovery; but it was for the jury to determine, under the evidence, what was the proximate cause of the injury. *McCabe v. Manhattan El. R. Co.*, 25 N. Y. S. R. 631, 53 Hun 636, 3 Silv. Sup. Ct. 324, 6 N. Y. Supp. 418.

50. What causes of injury are too remote.*—Negligence in starting a train without giving a signal does not make the company liable to one who is injured by stumbling and falling in the way of the train, as such falling is the immediate cause of the injury. *Barkley v. Missouri Pac. R. Co.*, 96 Mo. 367, 9 S. W. Rep. 793.

Negligence of a railway company that causes separation of the cars of a moving train is not the proximate cause of an injury sustained by a person who subsequently came upon the track in front of, and was struck by, the detached cars, which were moving by impetus and gravitation. *Patton v. East Tenn., V. & G. R. Co.*, 48 Am. & Eng. R. Cas. 581, 89 Tenn. 370, 15 S. W. Rep. 919.

Defendant left a "live" engine on a side track two tracks from the main track in charge of an employé, but during the night he left it, and some one unknown pushed it to the main track and started it at full speed without any light, and it ran into an incoming train, producing the injury sued for. Held, that the act of the company in leaving the engine where it did was not the proximate cause of the injury, as such a result could not be reasonably expected to occur or be foreseen by ordinary forecast. *Mars v. Delaware & H. Canal Co.*, 54 Hun 625, 28 N. Y. S. R. 228, 8 N. Y. Supp. 107.—APPLYING *Ryan v. New York C. R. Co.*, 35 N. Y. 210; *Lowery v. Manhattan R. Co.*, 99 N. Y. 158; *Pollett v. Long*, 56 N. Y. 200;

* Various illustrations of the doctrine of "proximate and remote cause" as applied to causes of injury and damages in case of negligence, see notes, 52 AM. REP. 157; 7 L. R. A. 133.

Hofnagle v. New York C. & H. R. R. Co., 55 N. Y. 608. QUOTING **Williams v. Delaware, L. & W. R. Co.**, 39 Hun 434.

A company left a car on its track very near a street-car track, but so that street-cars could pass with safety when driven in the usual manner. A street-car was being driven at an unusual rate of speed, causing it to sway more than when properly driven; it collided with the car and injured a passenger. *Held*, that leaving the car so near the track was only the remote cause of the injury, and the railroad company was not liable to the passenger. *Texas & P. R. Co. v. Doherty*, 4 *Tex. App. (Civ. Cas.)* 231, 15 *S. W. Rep.* 44.

II. QUESTIONS OF LAW AND FACT.

1. Questions of Law for the Court.

51. In general.*—What amounts to negligence is a question of law. *Herring v. Wilmington & R. R. Co.*, 10 *Ired. (N. Car.)* 402.—REVIEWED IN *Doggett v. Richmond & D. R. Co.*, 81 *N. Car.* 459.—*Pleasants v. Raleigh & A. A. L. R. Co.*, 95 *N. Car.* 195.

The existence of negligence, upon a given state of facts, is generally to be ascertained and declared by the court; but cases may occur where facts are so inseparably mixed in giving a complexion to the result as to require submission to the jury. *Sellers v. Richmond & D. R. Co.*, 25 *Am. & Eng. R. Cas.* 451, 94 *N. Car.* 654.

Whether there is any evidence tending to establish the negligence charged is a question of law for the court. *O'Malley v. Missouri Pac. R. Co.*, 53 *Am. & Eng. R. Cas.* 280, 113 *Mo.* 319, 20 *S. W. Rep.* 1079.

There are cases where the question of negligence may be properly one of law for the court; but such cases always present some prominent and decisive act, not dependent upon surrounding circumstances for its quality, and in regard to the effect and character of which no room is left for ordinary minds to differ. *Baltimore & O. R. Co. v. Fitzpatrick*, 35 *Md.* 32.—QUOTED IN *Baltimore & O. R. Co. v. Keedy*, 75 *Md.* 320.

Where there has been an omission of some act of duty, or where there is some act of imprudence which no reasonably careful

man would commit, if any accident is caused thereby, the court as matter of law declares the party in default as negligent and denies him a recovery. But in ordinary cases the question of negligence must be decided by the jury. *Baltimore & O. R. Co. v. Owings*, 28 *Am. & Eng. R. Cas.* 639, 65 *Md.* 502, 5 *Atl. Rep.* 329.—QUOTING *Cumberland Valley R. Co. v. Maugans*, 61 *Md.* 53.

The question of negligence is to be decided by all the evidence in the case; and it is not proper to separate a few facts from others, and ask the court to instruct the jury, as a conclusion of law, that they would constitute negligence. *Baltimore & O. R. Co. v. Boteler*, 38 *Md.* 568, 10 *Am. Ry. Rep.* 506.

Unless there is something in the proof, taken as a whole, which, if believed by the jury, would establish a failure to perform a legal duty, or to use reasonable care and prudence in what is done, the question of negligence should not be submitted to them. *Heaney v. Long Island R. Co.*, 37 *Am. & Eng. R. Cas.* 529, 112 *N. Y.* 122, 19 *N. E. Rep.* 422, 20 *N. Y. S. R.* 296; *reversing* 9 *N. Y. S. R.* 707.—QUOTING *Grippen v. New York C. R. Co.*, 40 *N. Y.* 34.—DISTINGUISHED IN *McNamara v. New York C. & H. R. R. Co.*, 136 *N. Y.* 650.

52. Standard of duty fixed by law.—The conception of negligence involves the idea of a duty to act in a certain way towards others and a violation of that duty by acting otherwise. It involves the existence of a standard with which the given conduct is to be compared and by which it is to be judged. Where this standard is fixed by law, the question whether the conduct in violation of it is negligence is a question of law. And where the standard is fixed by the general agreement of men's judgments, the court will recognize and apply the standard for itself. *Farrell v. Waterbury Horse R. Co.*, 46 *Am. & Eng. R. Cas.* 207, 60 *Conn.* 239, 21 *Atl. Rep.* 675, 22 *Atl. Rep.* 544.

While negligence is always a question of fact when the law is silent touching the specific act done or left undone, yet where a statute expressly enjoins an act, the act is then within all degrees of diligence, even the very lowest, and its omission is negligence as matter of law. *Central R. & B. Co. v. Smith*, 34 *Am. & Eng. R. Cas.* 1, 78 *Conn.* 694, 3 *S. E. Rep.* 397. *Empire Transp.*

* Functions of court and of jury in negligence cases, see note, 15 *L. R. A.* 332.

Co. v. Wamsutta O. R. & M. Co., 63 Pa. St. 14. *Pittsburgh, O. & E. L. Pass. R. Co. v. Kane*, (Pa.) 6 Atl. Rep. 845.

So when there is such an obvious disregard of duty and safety as amounts to misconduct; but where the measure of duty varies, and both the duty and extent of its performance are to be ascertained from facts, the jury alone can ascertain whether the negligence has been proved. *Chicago & E. I. R. Co. v. Tilton*, 29 Ill. App. 95; *denying rehearing from 26 Ill. App. 362*.

53. Facts uncontroverted and only one inference to be drawn.—When, on the undisputed evidence, aided by the legitimate inferences which may reasonably be drawn from it, the injury to the plaintiff was caused by his own negligence, or by accident without fault on the part of the defendant, the court is not required to submit the question of negligence to the jury, but may give the general affirmative charge in favor of the defendant. *Smith v. Georgia Pac. R. Co.*, 41 Am. & Eng. R. Cas. 143, 88 Ala. 538, 7 So. Rep. 119. *Flemming v. Western Pac. R. Co.*, 49 Cal. 253, 7 Am. Ry. Rep. 265. — FOLLOWED IN *Fernandes v. Sacramento City R. Co.*, 52 Cal. 45. REVIEWED IN *Bunting v. Central Pac. R. Co.*, 14 Nev. 351. — *Colorado C. R. Co. v. Holmes*, 8 Am. & Eng. R. Cas. 410, 5 Colo. 197; see 5 Colo. 516. *Louisville & N. R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. Rep. 580. *Kansas Pac. R. Co. v. Butts*, 7 Kan. 308, 2 Am. Ry. Rep. 477. *Louisville & P. Canal Co. v. Murphy*, 9 Bush (Ky.) 522. *Baltimore & P. R. Co. v. State*, 54 Md. 648. *Underhill v. Chicago & G. T. R. Co.*, 81 Mich. 43, 45 N. W. Rep. 508. *Fletcher v. Atlantic & P. R. Co.*, 64 Mo. 484, 17 Am. Ry. Rep. 303. *State v. Grand Trunk R. Co.*, 65 N. H. 663, 23 Atl. Rep. 525. *Gonzales v. New York & H. R. Co.*, 38 N. Y. 440; reversing 39 How. Pr. 407, 6 Robt. 93, 297; affirming 1 Sweeny 506. — DISTINGUISHED IN *Gillespie v. Newburgh*, 54 N. Y. 468; *Boss v. Providence & W. R. Co.*, 15 R. I. 149. — *Biles v. Holmes*, 11 Ired. (N. Car.) 16. — QUOTED IN *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589. — *Smith v. Richmond & D. R. Co.*, 34 Am. & Eng. R. Cas. 557, 99 N. Car. 241, 5 S. E. Rep. 896. — QUOTING *Tuff v. Warman*, 5 C. B. N. S. 573; *Turrentine v. Richmond & D. R. Co.*, 92 N. Car. 638; *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502. — *Swift v. Newbury*, 36 Vt. 355. — QUOTING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18. — *Wool-*

wine v. Chesapeake & O. R. Co., 36 W. Va. 329, 15 S. E. Rep. 81. *Delaney v. Milwaukee & St. P. R. Co.*, 33 Wis. 67. — QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106. — *Goldstein v. Chicago, M. & St. P. R. Co.*, 46 Wis. 404, 21 Am. Ry. Rep. 391.

Where the case made by the evidence is such that reasonable men unaffected by bias or prejudice would be agreed concerning the presence or absence of due care, the court would be justified in saying that the law deduced the conclusion accordingly; if the facts are unambiguous, and there is no room for two honest and apparently reasonable conclusions, the court should not be compelled to submit the question of negligence to the jury as one in dispute. *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570. *Northwestern Fuel Co. v. Danielson*, 57 Fed. Rep. 915. *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20; affirming 31 Ill. App. 314. *Lake Shore & M. S. R. Co. v. Pinchin*, 31 Am. & Eng. R. Cas. 428, 112 Ind. 592, 11 West Rep. 247, 13 N. E. Rep. 677. *Dewald v. Kansas City, Ft. S. & G. R. Co.*, 47 Am. & Eng. R. Cas. 557, 44 Kan. 586, 24 Pac. Rep. 1101. *Sadowski v. Michigan Car Co.*, 84 Mich. 100, 47 N. W. Rep. 598. *Tetherow v. St. Joseph & D. M. R. Co.*, 98 Mo. 74, 11 S. W. Rep. 310. *Becke v. Missouri Pac. R. Co.*, 45 Am. & Eng. R. Cas. 174, 102 Mo. 544, 13 S. W. Rep. 1053. — QUOTING *Tabler v. Hannibal & St. J. R. Co.*, 93 Mo. 79; *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62. — *O'Mellia v. Kansas City, St. J. & C. B. R. Co.*, 115 Mo. 205, 21 S. W. Rep. 503. *Worthington v. Central Vt. R. Co.*, 52 Am. & Eng. R. Cas. 384, 64 Vt. 107, 23 Atl. Rep. 590, 15 L. R. A. 326. — APPROVING *Filer v. New York C. R. Co.*, 49 N. Y. 47. REVIEWING *Hunter v. Cooperstown & S. V. R. Co.*, 112 N. Y. 371; *Morrison v. Erie R. Co.*, 56 N. Y. 302; *Solomon v. Manhattan R. Co.*, 103 N. Y. 437; *Gavett v. Manchester & L. R. Co.*, 16 Gray (Mass.) 501; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20; *Seefeld v. Chicago, M. & St. P. R. Co.*, 70 Wis. 216. — FOLLOWED IN *Germond v. Central Vt. R. Co.*, 65 Vt. 126.

So also where the jury have agreed upon and returned a special verdict setting forth the principal contested facts, it is the province of the court to settle the question of negligence as a question of law. *Conner v. Citizens' St. R. Co.*, 26 Am. & Eng. R.

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102 *Mo.*, 544.

3 *Tabler v.*

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And so where the facts are admitted by the pleadings, the question, Is the plaintiff entitled to any recovery? is submitted to the court. *Dun v. Seaboard & R. R. Co.*, 16 *Am. & Eng. R. Cas.* 363, 78 *Va.* 645, 49 *Am. Rep.* 388.

Still, unless an act or combination of acts are denounced by statute as negligence, courts have rarely felt authorized to withdraw from the jury the decision of the entire facts whether they constitute negligence. *Texas & P. R. Co. v. Hill*, 71 *Tex.* 451, 9 *S. W. Rep.* 351.

54. Evidence, on the whole, clearly establishing negligence.—The question of negligence *vel non* is a question of law for the decision of the court "only when the case is so free from doubt that the inference of negligence to be drawn from the facts is clear and certain"; in all other cases it is a question of fact for the determination of the jury. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 *Am. & Eng. R. Cas.* 480, 74 *Ala.* 150.

Even if there be controversy in the evidence as to some facts, yet, if those that are uncontroverted clearly and indisputably establish negligence, it is still a question of law for the court. *Abbott v. Chicago, M. & St. P. R. Co.*, 30 *Minn.* 482, 16 *N. W. Rep.* 266.—APPROVED AND QUOTED IN *Mares v. Northern Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 620, 3 *Dak.* 336. FOLLOWED IN *Rogstad v. St. Paul, M. & M. R. Co.*, 14 *Am. & Eng. R. Cas.* 648, 31 *Minn.* 208; *Bennett v. Syndicate Ins. Co.*, 39 *Minn.* 254, 39 *N. W. Rep.* 488; *Giermann v. St. Paul, M. & M. R. Co.*, 42 *Minn.* 5.—*Dun v. Seaboard & R. R. Co.*, 16 *Am. & Eng. R. Cas.* 363, 78 *Va.* 645, 49 *Am. Rep.* 388.

55. Plaintiff's evidence equally consistent with absence as with existence of negligence.—It is not enough to send a case to a jury to show that by some possibility the injury might have been caused by defendant's negligence. It must be shown that defendant committed some negligent act or omitted some duty, and that such act or omission caused the injury. Where the facts are as consistent with due care as with want of it, no recovery can be had. *McCaffrey v. Twenty-third St. R. Co.*, 47 *Hun* 404, 14 *N. Y. S. R.* 521.—APPLYING *Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356; *French v. Buffalo & E. R. Co.*, 6 *D. R. D.*—51

2 *Abb. App. Dec.* 196.—*Baulec v. New York & H. R. Co.*, 59 *N. Y.* 356, 48 *How. Pr.* 399, 7 *Am. Ry. Rep.* 114; *affirming* 62 *Barb.* 623.—QUOTING *Toomey v. London, B. & S. C. R. Co.*, 3 *C. B. N. S.* 146.

56. Where verdict for plaintiff would be set aside as against evidence.—If the evidence is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be bound to set aside a verdict returned in opposition to it, it is his duty to direct a verdict for the proper party. *Northwestern Fuel Co. v. Danielson*, 57 *Fed. Rep.* 915. *Schierhold v. North Beach & M. R. Co.*, 40 *Cal.* 447.—REVIEWED IN *Solen v. Virginia & T. R. Co.*, 13 *Nev.* 106.—*Chicago & A. R. Co. v. Adler*, 39 *Am. & Eng. R. Cas.* 666, 129 *Ill.* 335, 21 *N. E. Rep.* 846; *affirming* 28 *Ill. App.* 102. *Filer v. New York C. R. Co.*, 49 *N. Y.* 47, 3 *Am. Ry. Rep.* 466.—APPLIED IN *Morrison v. Erie R. Co.*, 56 *N. Y.* 302. APPROVED IN *Worthington v. Central Vt. R. Co.*, 64 *Vt.* 107. DISTINGUISHED IN *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 *Ohio St.* 222. QUOTED IN *St. Louis, I. M. & S. R. Co. v. Rosenberry*, 45 *Ark.* 256.

57. Mere surmise, or scintilla of evidence.—Where the proof of negligence on the part of the defendant is so slight and inconclusive in its nature as to demand from the court an instruction as to its legal insufficiency to prove negligence, such instruction may be given in order to prevent the jury from indulging in wild speculation or irrational conjecture. *Baltimore & O. R. Co. v. Shipley*, 31 *Md.* 368.

In such a case it is not only the right but the duty of the court, when appealed to for that purpose, to instruct the jury that there is no evidence before them to warrant their finding the fact so sought to be established. *Lewis v. Baltimore & O. R. Co.*, 38 *Md.* 588, 10 *Am. Ry. Rep.* 521.

It is not enough to authorize the submission of the question to a jury that there is some evidence of negligence. A scintilla of evidence or a mere surmise that there may have been negligence on the part of defendant will not justify the court in leaving the case to the jury. *Powers v. New York C. & H. R. R. Co.*, 60 *Hun* 19, 38 *N. Y. S. R.* 558, 14 *N. Y. Supp.* 408; *affirmed* in 128 *N. Y.* 659, *mem.*, 29 *N. E. Rep.* 148, *mem.*, 40 *N. Y. S. R.* 979.—APPLYING *Sutton v. New York C. & H. R. R. Co.*, 66 *N. Y.* 243. QUOTING *Baulec v. New York & H. R. Co.*,

59 N. Y. 356; *Toomey v. London*, B. & S. C. R. Co., 3 C. B. N. S. 146; *Hyatt v. Johnston*, 91 Pa. St. 200.—*Baltimore & O. R. Co. v. State*, 71 Md. 590, 18 Atl. Rep. 969. *Galveston, H. & S. A. R. Co. v. Faber*, 77 Tex. 153, 8 S. W. Rep. 64.—QUOTING *Toomey v. London*, B. & S. C. R. Co., 3 C. B. N. S. 146.

58. Proximate and remote cause.—When the facts are not in dispute, it is for the court to determine whether or not an injury was the natural and proximate consequence of the negligence complained of, a consequence likely to flow from the negligent act. *Bunting v. Hogsett*, 48 Am. & Eng. R. Cas. 87, 139 Pa. St. 363, 21 Atl. Rep. 31. *Henry v. St. Louis, K. C. & N. R. Co.*, 12 Am. & Eng. R. Cas. 136, 76 Mo. 288, 43 Am. Rep. 762.

When the fact is undisputed in the evidence that the injury received was inflicted by an intervening agency over which the defendant had no control, the question of remote or proximate cause must be determined by the court and the jury instructed accordingly. *South Side Pass. R. Co. v. Trich*, 34 Am. & Eng. R. Cas. 549, 117 Pa. St. 390, 10 Cent. Rep. 367, 11 Atl. Rep. 627, 20 W. N. C. 324.—DISTINGUISHED IN *Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128.

59. When the court may direct a verdict.*—If from the evidence no reasonable inference of negligence on the part of the defendant causing the injury can be drawn, or there is but one reasonable inference, to the effect that the plaintiff's negligence contributed to the injury, then it is the duty of the court, on request, to direct the jury to return a verdict in favor of the defendant. *Rush v. Coal Bluff Min. Co.*, 131 Ind. 135, 30 N. E. Rep. 904. *Goshorn v. Smith*, 92 Pa. St. 435.

It is reversible error to submit a case to the jury where the evidence fails to establish negligence on the part of the defendant company. *Schmidt v. Steinway & H. P. R. Co.*, 4 Silv. App. (N. Y.) 119.

But the court cannot take the case from the jury unless it is prepared to say, as a matter of law, that the company was not guilty of negligence. *Ridings v. Hannibal & St. J. R. Co.*, 33 Mo. App. 527.

60. Various applications of the rule.—Plaintiff was riding on defendant's

street-car when a brake chain broke, and the car ran down a grade and collided with another car, which caused the injury sued for. *Held*, that it was error to submit the question of the driver's negligence to the jury where there was no evidence tending, even remotely, to show a want of care or skill in the management of the car, but where, on the contrary, the evidence was overwhelming and uncontradicted that the driver did everything that one could do to prevent the accident from the time the chain broke. *Wynn v. Central Park, N. & E. R. R. Co.*, 133 N. Y. 575, mem., 4 Silv. App. 214, 44 N. Y. S. R. 673, 30 N. E. Rep. 721; reversing 14 N. Y. Supp. 172, 38 N. Y. S. R. 181.

Plaintiff was trying to start a balky horse attached to a street passenger-car. There were two tracks on the street. Defendant was driving on the clear track, and when passing the balky horse, the latter suddenly started, and the plaintiff, in stepping back to avoid injury, was struck by defendant's wagon and injured. The only question in dispute was the speed of the wagon. *Held*, that there was no evidence of negligence by defendant, and the case should not have been submitted to the jury; the speed of the wagon was not a factor in the case, as the action of plaintiff would have resulted in injury had the wagon been going with less speed. *Goshorn v. Smith*, 92 Pa. St. 435.

The rule as to when signal posts, fences, and other structures placed in dangerous proximity to the track constitute negligence as a matter of law and fact stated. *Murphy v. Wabash R. Co.*, 115 Mo. 111, 21 S. W. Rep. 862.—REVIEWING *McKee v. Chicago, R. I. & P. R. Co.*, 83 Iowa 616, 50 N. W. Rep. 209; *Johnson v. St. Paul, M. & M. R. Co.*, 41 Am. & Eng. R. Cas. 293, 43 Minn. 53; *Hall v. Union Pac. R. Co.*, 16 Fed. Rep. 744; *Chicago & I. R. Co. v. Russell*, 91 Ill. 300; *Georgia Pac. R. Co. v. Davis*, 92 Ala. 300, 9 So. Rep. 252. REVIEWING AND DISTINGUISHING *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404.

2. Questions of Fact for the Jury.

61. The general rule.*—If there is any evidence from which negligence or con-

* When question of negligence should be left to jury, see note, 13 L. R. A. 728. See also 53 AM. & ENG. R. CAS. 106, *abstr.*

When negligence and contributory negligence are for the jury, see 37 AM. & ENG. R. CAS. 93, *abstr.*

* Right of court to direct a verdict in actions based upon negligence, see note, 4 L. R. A. 778.

tributory negligence is legally inferable, the cause must be submitted to the jury for the determination of those questions. *Clay v. Chicago & A. R. Co.*, 24 Mo. App. 39. *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351. *McNamara v. North. Pac. R. Co.*, 50 Cal. 581, 12 Am. Ry. Rep. 190. *Marsh v. South Carolina R. Co.*, 56 Ga. 274. *Georgia R. & B. Co. v. Neely*, 56 Ga. 540.—FOLLOWED IN *Lavier v. Central R. Co.*, 71 Ga. 222.—*Killian v. Augusta & K. R. Co.*, 79 Ga. 234, 4 S. E. Rep. 165. *Myers v. Indianapolis & St. L. R. Co.*, 113 Ill. 386, 1 N. E. Rep. 899. *Peoria, D. & E. R. Co. v. Reed*, 17 Ill. App. 413. *Chicago & N. W. R. Co. v. Traves*, 33 Ill. App. 307.—QUOTING *Galena & C. U. R. Co. v. Yarwood*, 17 Ill. 509; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162.—*Chicago City R. Co. v. Van Vleck*, 40 Ill. App. 367. *Cincinnati, W. & M. R. Co. v. Peters*, 6 Am. & Eng. R. Cas. 126, 80 Ind. 168. *Pittsburgh, C. & St. L. R. Co. v. Wright*, 6 Am. & Eng. R. Cas. 114, 80 Ind. 236. *Marquette v. Chicago & N. W. R. Co.*, 33 Iowa 562. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520. *Cumberland & P. R. Co. v. State*, 44 Md. 283, 45 Md. 229. *State v. Philadelphia, W. & B. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253. *Baltimore & P. R. Co. v. State*, 54 Md. 648. *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99.—QUOTED IN *Atchison & N. R. Co. v. Bailey*, 10 Am. & Eng. R. Cas. 742, 11 Neb. 332; *Boss v. Providence & W. R. Co.*, 21 Am. & Eng. R. Cas. 364, 15 R. I. 149. REVIEWED IN *Williams v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas. 421, 3 Dak. 168.—*Hassenyer v. Michigan C. R. Co.*, 6 Am. & Eng. R. Cas. 59, 48 Mich. 205, 12 N. W. Rep. 155, 42 Am. Rep. 470. *Thomas v. Chicago & G. T. R. Co.*, 86 Mich. 496, 49 N. W. Rep. 547. *Kennedy v. North Mo. R. Co.*, 36 Mo. 351. *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 22. *Union Pac. R. Co. v. Mertes*, 35 Neb. 204, 52 N. W. Rep. 1099. *Union Pac. R. Co. v. Porter*, 58 Am. & Eng. R. Cas. 289, 38 Neb. 226, 56 N. W. Rep. 808. *Paine v. Grand Trunk R. Co.*, 63 N. H. 623, 3 Atl. Rep. 634. *Pendril v. Second Ave. R. Co.*, 43 How. Pr. (N. Y.) 399. *Matteson v. New York C. R. Co.*, 62 Barb. (N. Y.) 364. *Armstrong v. New York C. & H. R. R. Co.*, 66 Barb. (N. Y.) 437; affirmed in 64 N. Y. 635, mem. *Crissey v. Hestonville, M. & F. Pass. R. Co.*, 75 Pa. St. 83. *Mutvey v. Rhode Island Locomotive Works*, 14 R. I. 204. *Rogers v.*

Florence R. Co., 39 Am. & Eng. R. Cas. 348, 31 So. Car. 378, 9 S. E. Rep. 1059. *Riley v. West Virginia C. & P. R. Co.*, 27 W. Va. 145.—QUOTING *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190.—*Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477, 18 Am. Ky. Rep. 58.—QUOTING *Ewen v. Chicago & N. W. R. Co.*, 38 Wis. 613.—*Townley v. Chicago, M. & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 562, 53 Wis. 626, 11 N. W. Rep. 55. *Nelson v. Chicago, M. & St. P. R. Co.*, 22 Am. & Eng. R. Cas. 391, 60 Wis. 320, 19 N. W. Rep. 52.

Whether there was negligence or want of care, in whatever degree, in either of the parties is a question of fact, to be determined by the jury; and whether the circumstances attending the transaction constitute such negligence or want of care will not, though admitted, be decided by the court, as matter of law, but will be left to the jury, as evidence for them to pass upon. *Beers v. Housatonic R. Co.*, 19 Conn. 566.—QUOTED IN *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351. REVIEWED IN *Alger v. Mississippi & M. R. Co.*, 10 Iowa 268; *Zemp v. Wilmington & M. R. Co.*, 9 Rich. (So. Car.) 84.

Questions as to negligence and reasonable skill and care, in every description of business, are necessarily questions of fact, and belong to the jury; the court can do nothing more than give the rule by which they are to be tried. *Saltonstall v. Stockton, Taney (U. S.)* 11. *Baltimore & O. R. Co. v. Shipley*, 31 Md. 368.

Negligence in one sense is a quality dependent upon, and arising out of, the duties and relations of the parties concerned, and is as much a fact to be found by the jury as the alleged acts to which it attaches by virtue of said duties and relations. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.—QUOTED IN *Townley v. Chicago, M. & St. P. R. Co.*, 4 Am. & Eng. R. Cas. 562, 53 Wis. 626.—*Rowland v. Murphy*, 66 Tex. 534, 1 S. W. Rep. 658.—QUOTING *Texas & P. R. Co. v. Murphy*, 46 Tex. 366.

In an action based upon alleged negligence of the defendant, it is not allowable to prove by a witness that the act complained of was not negligent nor objectionable. It is for the jury to say, from all the facts and circumstances, whether an act constitutes negligence. *Pennsylvania Co. v. Stoelke*, 8 Am. & Eng. R. Cas. 523, 104 Ill. 201.

Whether a street-car company is negligent in allowing its car to lurch from the track and strike a bridge so as to throw down and injure a passenger is a question of fact for the jury. *Griffith v. Utica & M. R. Co.*, 43 N. Y. S. R. 835, 63 Hun 626, 17 N. Y. Supp. 692; affirmed in 137 N. Y. 566, mem., 33 N. E. Rep. 339, mem., 50 N. Y. S. R. 933.—QUOTING *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 381; *Lehr v. Steinway & H. P. R. Co.*, 118 N. Y. 556, 30 N. Y. S. R. 1.

Plaintiff, a boy of thirteen, caught on to the forward end of the caboose of a moving freight train, from which he fell, causing one knee to be crushed under a wheel. Plaintiff's evidence tended to prove that his fall was caused by an employé throwing water in his face. *Held*, that it was a question for the jury whether the act of the employé caused the injury. *Clark v. New York, L. E. & W. R. Co.*, 2 N. Y. S. R. 249; affirmed in 113 N. Y. 670, mem., 21 N. E. Rep. 1116, mem., 23 N. Y. S. R. 994.

62. Sufficiency of evidence to establish negligence.—Where the facts and circumstances in evidence tend to establish the negligence complained of, the testimony should be submitted to the jury, who are the sole judges of its sufficiency. *Sheldon v. Flint & P. M. R. Co.*, 59 Mich. 172, 26 N. W. Rep. 507. *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush (Ky.) 235.—QUOTED IN *Needham v. Louisville & L. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797; *Paducah & E. R. Co. v. Letcher*, (Ky.) 12 Am. & Eng. R. Cas. 61.—*Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 20 S. W. Rep. 439. *O'Malley v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 280, 113 Mo. 319, 20 S. W. Rep. 1079. *Maloy v. New York C. R. Co.*, 58 Barb. (N. Y.) 182.—QUOTED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

Negligence in injuries inflicted by railroad trains upon individuals is a question that depends upon the circumstances, and can rarely, if ever, be absolutely defined as matter of law; and in determining whether there has been negligence all the circumstances must be considered together. *Marcott v. Marquette, H. & O. R. Co.*, 4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53.—EXPLAINING *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433.—FOLLOWED IN *Keyser v. Chicago & G. T. R. Co.*, 56 Mich. 559.

The questions of negligence and contributory negligence are for the jury, where

there is any evidence tending to show either. *Fitts v. Cream City R. Co.*, 15 Am. & Eng. R. Cas. 462, 59 Wis. 323, 18 N. W. Rep. 186. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 8 Am. Ry. Rep. 115. *Gerke v. California Steam Nav. Co.*, 9 Cal. 251.—QUOTING *Huyett v. Philadelphia & R. R. Co.*, 23 Pa. St. 373.

Though the evidence of negligence in a given case be slight, and though it may affect the court differently from the way in which it affected the jury, still the court will not be at liberty to say that there was not sufficient evidence to go to the jury. *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437.

Where it is conceded that a party charged with negligence has failed to perform a legal duty, or if it be conceded that the plaintiff did not exercise that degree of care and caution which ordinarily cautious and prudent men would observe under like circumstances, the court will be required to state, as a matter of law, that the party failing to perform his legal duty, or failing to observe such degree of care, has been guilty of negligence. But so long as the question remains whether the party has performed the legal duty, or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. *Chicago, St. L. & P. R. Co. v. Hutchinson*, 32 Am. & Eng. R. Cas. 82, 120 Ill. 587, 11 N. E. Rep. 855.

63. Right of court to charge what facts, if found, will amount to negligence.—It is error to charge the jury that certain facts, if proved, constitute negligence. *Montgomery & W. P. R. Co. v. Boring*, 51 Ga. 582. *Pennsylvania Co. v. Frana*, 112 Ill. 398. *Pennsylvania Co. v. Hensil*, 6 Am. & Eng. R. Cas. 79, 70 Ind. 569, 36 Am. Rep. 188.—FOLLOWED IN *Pennsylvania Co. v. Horton*, 132 Ind. 189.—*Huelsenkamp v. Citizens' R. Co.*, 34 Mo. 45.—DISAPPROVED IN *Barton v. St. Louis & I. M. R. Co.*, 52 Mo. 253.—*White v. Augusta & K. R. Co.*, 30 So. Car. 218, 9 S. E. Rep. 96. *Calhoun v. Gulf, C. & S. F. R. Co.*, 84 Tex. 226, 19 S. W. Rep. 341. *Gulf, C. & S. F. R. Co. v. Bagley*, 3 Tex. Civ. App. 207, 22 S. W. Rep. 68.—FOLLOWING *Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230.

The only exception to this rule is where the law makes a thing negligence in express

terms, in which case the court may instruct the jury that its omission is negligence. *Central R. Co. v. Thompson*, 76 Ga. 770. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.—FOLLOWED IN *Houston & G. N. R. Co. v. Parker*, 50 Tex. 330. QUOTED IN *Rowland v. Murphy*, 66 Tex. 534; *Houston & G. N. R. Co. v. Miller*, 51 Tex. 270; *Dillingham v. Parker*, 80 Tex. 572.—*Houston & G. N. R. Co. v. Parker*, 50 Tex. 330.—FOLLOWING *Texas & P. R. Co. v. Murphy*, 46 Tex. 356.—*Houston & G. N. R. Co. v. Miller*, 51 Tex. 270.—QUOTING *Texas & P. R. Co. v. Murphy*, 46 Tex. 356.—*Galveston, H. & S. A. R. Co. v. Porfieri*, 37 Am. & Eng. R. Cas. 540, 72 Tex. 344, 10 S. W. Rep. 207. *Dillingham v. Parker*, 80 Tex. 572, 16 S. W. Rep. 335.—FOLLOWING *Gulf, C. & S. F. R. Co. v. Greenlee*, 70 Tex. 553. QUOTING *Texas & P. R. Co. v. Murphy*, 46 Tex. 356.—*Garteiser v. Galveston, H. & S. A. R. Co.*, 2 Tex. Civ. App. 230, 21 S. W. Rep. 631.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Bagley*, 3 Tex. Civ. App. 207. An instruction is properly refused which tells the jury, as a matter of law, that certain facts *per se* constitute negligence. By this it is not meant that the definition of negligence is one of fact, to be determined by the jury. *Pennsylvania Co. v. Conlan*, 6 Am. & Eng. R. Cas. 243, 101 Ill. 93. *Chicago & N. W. R. Co. v. Bouck*, 33 Ill. App. 123. *Aigen v. Boston & M. R. Co.*, 6 Am. & Eng. R. Cas. 426, 132 Mass. 423. *International & G. N. R. Co. v. Eckford*, 71 Tex. 274, 8 S. W. Rep. 679.

It is only when the conclusion of negligence necessarily results from the statement of fact that the court may be called upon to say to the jury that a fact establishes negligence as a matter of law. *Chicago City R. Co. v. Robinson*, 36 Am. & Eng. R. Cas. 66, 127 Ill. 9, 4 L. R. A. 126, 18 N. E. Rep. 772; *affirming* 27 Ill. App. 26. *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 9 N. E. Rep. 263; *affirming* 19 Ill. App. 591.—DISTINGUISHING *Lake Shore & M. S. R. Co. v. Hart*, 87 Ill. 534.—QUOTED IN *Terre Haute & I. R. Co. v. Voelker*, 39 Am. & Eng. R. Cas. 615, 129 Ill. 540, 22 N. E. Rep. 20.—*Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; *affirming* 30 Ill. App. 437. *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. Rep. 406; *affirming* 38 Ill. App. 33.

The existence of negligence should be proved and passed upon by the jury as any

other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most the jury should be duly instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence. *Missouri Pac. R. Co. v. Baier*, 37 Neb. 235, 55 N. W. Rep. 913.

What is negligence and what is reasonable diligence are, when the facts are ascertained, questions of law, to be declared by the court. When the facts are involved in conflicting evidence, the court should submit the testimony to the jury, with instructions that if they found a state of facts to be true, it was in law negligence or *vice versa*. *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589, 14 S. E. Rep. 352.—DISTINGUISHING *Farmer v. Wilmington & W. R. Co.*, 88 N. Car. 564; *Gunter v. Wicker*, 85 N. Car. 310; *Turrentine v. Richmond & D. R. Co.*, 92 N. Car. 638; *Owens v. Richmond & D. R. Co.*, 88 N. Car. 502; *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321; *Troy v. Cape Fear & Y. V. R. Co.*, 99 N. Car. 298; *McAdoo v. Richmond & D. R. Co.*, 105 N. Car. 140; *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 689. QUOTING *Biles v. Holmes*, 11 Ired. 16; *Heathcock v. Pennington*, 11 Ired. 640; *Woodward v. Hancock*, 7 Jones 384; *Smith v. North Carolina R. Co.*, 64 N. Car. 235.—*Tarwater v. Hannibal & St. J. R. Co.*, 42 Mo. 193. *Yarnall v. St. Louis, K. C. & N. R. Co.*, 10 Am. & Eng. R. Cas. 726, 75 Mo. 575.—REVIEWED IN *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29.—*Goodwin v. Chicago, R. I. & P. R. Co.*, 11 Am. & Eng. R. Cas. 460, 75 Mo. 73.—REVIEWED IN *Scaling v. Pullman Palace Car Co.*, 24 Mo. App. 29.—*Ravenscraft v. Missouri Pac. R. Co.*, 27 Mo. App. 617. *Knight v. Albemarle & R. R. Co.*, 110 N. Car. 58, 14 S. E. Rep. 650. *Weil v. Express Co.*, 7 Phila. (Pa.) 245.—QUOTING *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Toomey v. London, B. & S. C. R. Co.*, 3 C. B. N. S. 150; *Wheelton v. Hardisty*, 8 El. & Bl. 262.

It is improper for a court, by an instruction, to inform the jury that it is not a want of ordinary care for a train of cars to approach a highway crossing at its usual speed, although there is a team approaching, negligence being a question for the jury. So

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an instruction that the engineer had a right to presume that a team approaching the crossing would stop is properly refused. *Illinois C. R. Co. v. Slater*, 139 Ill. 190, 28 N. E. Rep. 830; *affirming* 39 Ill. App. 69.

It is a well-settled rule of law that the absence of any particular precaution in the management of trains, not required by law, is not necessarily negligence of itself, and it is error to charge the jury to the contrary. *Wright v. Third Ave. R. Co.*, 27 N. Y. S. R. 523, 5 N. Y. Supp. 707.

In a case where a question of negligence as to the conduct of an employé of a railroad company, and as to the conduct of an engineer having the supervision of said employé, is in dispute, it would not be proper for a court, taking certain of the facts apart from the others and the surrounding circumstances, such facts not having in law any conclusive and definite effect, to say to a jury that they did constitute negligence. *Jenkins v. Little Miami R. Co.*, 2 Disney (Ohio) 49.

When, by statute, a specific duty is imposed on a railway company in regard to the running and management of its train, a breach of such duty by which one receives personal injury may be declared, in a charge of the court, as matter of law, to be wrongful or negligent. *Texas & P. R. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.—QUOTED IN *Kansas & G. S. L. R. Co. v. Dorrough*, 72 Tex. 103, 10 S. W. Rep. 711.

A court may properly declare the use of cars negligence when the facts stated in plaintiff's petition in reference to their defects, their use, and the wreck caused thereby are admitted by defendant. *East Line & R. R. Co. v. Smith*, 65 Tex. 167.

When the court instructs a jury that the omission to do an act which may constitute negligence is or is not sufficient to establish it, it necessarily passes upon the weight to be given to the fact that the omission occurred when it might have been avoided. Such a charge is violative of the statute. *Costley v. Galveston City R. Co.*, 70 Tex. 112, 8 S. W. Rep. 114.

The neglect by a railway company of a statutory duty whereby injury results to another is negligence as matter of law, and it is proper that a court should so charge; but it is improper to charge upon the effect of isolated facts in evidence as constituting negligence or not. Concerning these the jury determine from a consideration of all

the surrounding circumstances in evidence before them. *International & G. N. R. Co. v. Kuehn*, 35 Am. & Eng. R. Cas. 421, 70 Tex. 582, 8 S. W. Rep. 484.

64. Where the evidence of negligence is of a doubtful character.—Where the evidence on a question of negligence is doubtful and presents qualifying circumstances, and the inferences to be drawn from the facts are uncertain, it is the province of the jury to decide. *Kansas Pac. R. Co. v. Richardson*, 6 Am. & Eng. R. Cas. 96, 25 Kan. 391. *Hathaway v. East Tenn., V. & G. R. Co.*, 29 Fed. Rep. 489. *Barton v. St. Louis & I. M. R. Co.*, 52 Mo. 253.—DISAPPROVING *Huelsenkamp v. Citizens' R. Co.*, 34 Mo. 54. DISTINGUISHING *Devitt v. Pacific R. Co.*, 50 Mo. 302. QUOTING *Keller v. New York C. R. Co.*, 24 How. Pr. (N. Y.) 172. REVIEWING *Pittsburgh & C. R. Co. v. McClurg*, 56 Pa. St. 300.—QUOTED IN *Behrens v. Kansas Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 Colo. 400.—*Keller v. New York C. R. Co.*, 2 Abb. App. Dec. (N. Y.) 480, 24 How. Pr. 172; *affirming* 17 How. Pr. 102. *Thurber v. Harlem Bridge, M. & F. R. Co.*, 60 N. Y. 326, 10 Am. Ry. Rep. 126.—FOLLOWING *Bernhard v. Rensselaer & S. R. Co.*, 1 Abb. App. Dec. 131; *Belton v. Baxter*, 58 N. Y. 411; *Hackford v. New York C. & H. R. R. Co.*, 53 N. Y. 654.—DISTINGUISHED IN *Scott v. Third Ave. R. Co.*, 36 N. Y. S. R. 838, 59 Hun 456, 13 N. Y. Supp. 344. QUOTED IN *Atwater v. Veteran*, 26 N. Y. S. R. 945; *Mallard v. Ninth Ave. R. Co.*, 15 Daly 376, 7 N. Y. Supp. 666, 27 N. Y. S. R. 801.—*McGrath v. Hudson River R. Co.*, 19 How. Pr. (N. Y.) 211, 32 Barb. 144. *Anderson v. North Pac. Lumber Co.*, 21 Oreg. 281, 28 Pac. Rep. 5.

If the conclusion of negligence under the facts stated may or may not result, or shall depend on other circumstances, the question is one of fact for the jury. *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; *affirming* 30 Ill. App. 437.

Though all the witnesses may testify that there was no negligence on the part of the defendant, the jury may nevertheless find that there was negligence if the physical facts of the case and the manner of the injury raise a necessary inference to that effect. *Hunt v. Missouri R. Co.*, 14 Mo. App. 160; *reversed on other grounds* in 89 Mo. 607.

Notwithstanding that the damage charged as the result of defendant's negligence may

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be complicated with other causes for which defendant would not be liable, and that it would be difficult for the jury to separate the different causes of injury, yet it is a question that must be submitted to the judgment of the jury. *Jones v. Chicago & A. R. Co.*, 28 Mo. App. 28.—QUOTING *Sturgeon v. St. Louis, K. C. & N. R. Co.*, 65 Mo. 569.

Whether certain precautions taken were sufficient under the evidence, or whether under it there were ever promulgated or established any precautions designed to meet the exigency and dangers of the situation, as well as the care exercised by the plaintiff at the time of the injury, are questions of fact for the jury to determine under all the circumstances of the case. *Wild v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 159, 27 Pac. Rep. 954.

Where the plaintiff in an action for personal injuries gives evidence of negligence on the part of the defendant, and also evidence which may or may not be considered as amounting to contributory negligence, the case should be left to the jury. *Brown v. Great Western R. Co.*, 52 L. T. 622.

65. Cases where the standard of duty is not fixed.—In a case where the law furnishes no definite rule as to what a party should do in particular circumstances, and the general rule of law is alone applicable, the law necessarily leaves the two questions, What would a man of ordinary prudence have done in the circumstances? and, Was the conduct of the party that of such a man? to the decision of the triers. And if the facts upon which their decision is based are properly found, the decision is final and cannot be reviewed by the court. *Andrews v. New York & N. E. R. Co.*, 60 Conn. 293, 22 Atl. Rep. 566.—FOLLOWING *Farrell v. Waterbury Horse R. Co.*, 60 Conn. 239.—*Farrell v. Waterbury Horse R. Co.*, 46 Am. & Eng. R. Cas. 207, 60 Conn. 239, 21 Atl. Rep. 675, 22 Atl. Rep. 544. *Pennsylvania R. Co. v. Peters*, 30 Am. & Eng. R. Cas. 607, 116 Pa. St. 206, 8 Cent. Rep. 408, 9 Atl. Rep. 317, 19 W. N. C. 418.—FOLLOWING *Schum v. Pennsylvania R. Co.*, 107 Pa. St. 8; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *Pennsylvania R. Co. v. White*, 88 Pa. St. 327.—*Dargan v. Pullman Palace Car Co.*, (Tex.) 26 Am. & Eng. R. Cas. 149. *Barber v. Essex*, 27 Vt. 62.

66. Cases of conflicting testimony.—Although in many cases where the facts

from which negligence is to be inferred are undisputed the question of negligence is one of law, to be passed upon by the court, yet, if the facts are disputed and the evidence conflicting, the question should always be left to the jury. *Owens v. Hannibal & St. J. R. Co.*, 58 Mo. 386, 9 Am. Ry. Rep. 19. *Chicago City R. Co. v. Brady*, 35 Ill. App. 460. *Reed v. Chicago, St. P., M. & O. R. Co.*, 74 Iowa 188, 37 N. W. Rep. 149. *Theissen v. Belle Plaine*, 81 Iowa 118, 46 N. W. Rep. 854. *Louisville & N. R. Co. v. Collins*, 2 Div. (Ky.) 114.—FOLLOWED IN *Louisville & N. R. Co. v. Sheets*, (Ky.) 41 Am. & Eng. R. Cas. 470, 13 S. W. Rep. 248. QUOTED IN *Needham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797; *Paducah & E. R. Co. v. Letcher*, (Ky.) 12 Am. & Eng. R. Cas. 61.—*Baltimore & O. R. Co. v. State*, 36 Md. 366.—DISTINGUISHING *Baltimore City Pass. R. Co. v. Wilkinson*, 30 Md. 226. REVIEWING *Baltimore & O. R. Co. v. Fitzpatrick*, 35 Md. 32.—*O'Hare v. Chicago & A. R. Co.*, 95 Mo. 662, 15 West. Rep. 427, 9 S. W. Rep. 23. *Foster v. New York C. & H. R. Co.*, 2 How. Pr. N. S. (N. Y.) 416. *Brown v. Seventy-third St. R. Co.*, 21 N. Y. S. R. 475, 4 N. Y. Supp. 192, 24 J. & S. 356; affirmed in 121 N. Y. 667, mem., 24 N. E. Rep. 1094, mem. *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60.—DISTINGUISHED IN *Behrens v. Kansas' Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 Colo. 400; *Ormsbee v. Boston & P. R. Co.*, 14 R. I. 102, 51 Am. Rep. 354. REVIEWED IN *Beisiegel v. New York C. R. Co.*, 34 N. Y. 622; *Ernst v. Hudson River R. Co.*, 35 N. Y. 9, 32 How. Pr. 61.—*Texas & P. R. Co. v. Levi*, 13 Am. & Eng. R. Cas. 464, 59 Tex. 674. *St. Louis & S. F. R. Co. v. McClain*, 80 Tex. 85, 15 S. W. Rep. 789.

Where there is great discrepancy in the evidence, the question whether plaintiff's injury was inflicted by the negligent acts charged is for the jury. *Totten v. Pennsylvania R. Co.*, 11 Fed. Rep. 564.

It is the province of the jury, when the evidence of negligence is circumstantial, to determine the facts and all proper inferences from them; and the verdict will not be set aside unless, in the judgment of reasonable men, no such deduction as that expressed therein could be properly drawn from the evidence. *McDermott v. San Francisco & N. P. R. Co.*, 68 Cal. 33, 8 Pac. Rep. 519.

Where on a question of fact the evidence is conflicting, the jury must decide, no matter what may be the opinion of the judge as to the value of the evidence. *Dublin, W. & W. R. Co. v. Slattery, L. R. 3 App. Cas. 1155, 27 W. R. 191, 39 L. T. 365.*

The evidence being conflicting, it is proper to instruct the jury that the court leaves it to them "as a question of fact whether there was negligence in the plaintiff that invited or contributed to the injury complained of." *Louisville, N. A. & C. R. Co. v. Richardson, 66 Ind. 43.*

It is the province of the jury, where there is conflicting evidence, to determine whether an engineer, keeping a proper lookout, could have stopped his train or so slackened its speed as to diminish the dangers of a collision. *Hinkle v. Richmond & D. R. Co., 109 N. Car. 472, 13 S. E. Rep. 884.*

Where it appeared that plaintiff, upon approaching the crossing, stood up in the wagon and listened about a minute for approaching trains, and then, driving ahead, was injured by a train, and that no bell or whistle was sounded—this latter fact, however, being contradicted by the defendant—held, that the question of negligence on the part of the company was for the jury. *Smith v. Rio Grande Western R. Co., 9 Utah 141, 33 Pac. Rep. 626.*

Plaintiff while crossing a track at night was struck by a train of gravel cars pushed in front of the locomotive. There was no light on the foremost car, but there was a strong headlight on the locomotive. He testified that before starting to cross he looked up and down the track, but did not see the train nor the headlight. Held, that the question of the company's negligence was for the jury. *Bohan v. Milwaukee, L. S. & W. R. Co., 15 Am. & Eng. R. Cas. 374, 58 Wis. 30, 15 N. W. Rep. 801.*

67. Where the facts are in dispute and more than one inference may be drawn.—Where the facts are disputed, negligence is a question of fact for the jury; where the facts are undisputed, and but one deduction is to be drawn from them, it presents a question of law for the court; but where the facts are undisputed, but are of such a nature that different minds will draw different conclusions from them as to the reasonableness and care of a party's conduct, it is a proper question for the determination of a jury. *Kansas Pac. R. Co. v. Pointer, 14 Kan. 37. Grand Trunk R. Co. v. Ives,*

144 U. S. 408, 12 Sup. Ct. Rep. 679. O'Neill v. Chicago & N. W. R. Co., 1 McCrary (U. S.) 505.—REFERRED TO IN Lockhart v. Little Rock & M. R. Co., 40 Fed. Rep. 631.—Louisville & N. R. Co. v. Allen, 28 Am. & Eng. R. Cas. 514, 78 Ala. 494. Benson v. Central Pac. R. Co., 54 Am. & Eng. R. Cas. 126, 98 Cal. 45, 32 Pac. Rep. 809, 33 Pac. Rep. 206.—ADOPTING Wilbon v. Southern Pac. R. Co., 62 Cal. 172.—Lake Shore & M. S. R. Co. v. Johnsen, 135 Ill. 641, 26 N. E. Rep. 510; affirming 35 Ill. App. 430. Ohio & M. R. Co. v. Collarn, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134.—QUOTING Sioux City & P. R. Co. v. Stout, 17 Wall. (U. S.) 657.—Baltimore & O. & C. R. Co. v. Walborn, 127 Ind. 142, 26 N. E. Rep. 207.—REVIEWING Sioux City & P. R. Co. v. Stout, 17 Wall. (U. S.) 657.—Rush v. Coal Bluff Min. Co., 131 Ind. 135, 30 N. E. Rep. 904. De Pauw v. Stubblefield, 132 Ind. 182, 31 N. E. Rep. 796. Whitsett v. Chicago, R. I. & P. R. Co., 22 Am. & Eng. R. Cas. 336, 67 Iowa 150, 25 N. W. Rep. 104. Rebelsky v. Chicago & N. W. R. Co., 79 Iowa 55, 44 N. W. Rep. 536. State v. Baltimore & O. R. Co., 35 Am. & Eng. R. Cas. 412, 69 Md. 339, 14 Atl. Rep. 688, 12 Cent. Rep. 890. Crosby v. Detroit, G. H. & M. R. Co., 58 Mich. 458, 25 N. W. Rep. 463. Ashman v. Flint & P. M. R. Co., 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645. Bennett v. Syndicate Ins. Co., 39 Minn. 254, 39 N. W. Rep. 488.—FOLLOWING Abbott v. Chicago, M. & St. P. R. Co., 30 Minn. 482.—Mississippi C. R. Co. v. Mason, 51 Miss. 234. Bell v. Hannibal & St. J. R. Co., 4 Am. & Eng. R. Cas. 580, 72 Mo. 50. Barry v. Hannibal & St. J. R. Co., 98 Mo. 62, 11 S. W. Rep. 308.—QUOTED IN Becke v. Missouri Pac. R. Co., 102 Mo. 544.—Huhn v. Missouri Pac. R. Co., 31 Am. & Eng. R. Cas. 221, 92 Mo. 440, 10 West. Rep. 405, 4 S. W. Rep. 937. Tabler v. Hannibal & St. J. R. Co., 31 Am. & Eng. R. Cas. 185, 93 Mo. 79, 11 West. Rep. 458, 5 S. W. Rep. 810.—QUOTED IN Becke v. Missouri Pac. R. Co., 102 Mo. 544.—Lynch v. Metropolitan St. R. Co., 112 Mo. 420, 20 S. W. Rep. 642. O'Mellia v. Kansas City, St. J. & C. B. R. Co., 115 Mo. 205, 21 S. W. Rep. 503.—QUOTING Grand Trunk R. Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. Rep. 679.—Gratiot v. Missouri Pac. R. Co., 55 Am. & Eng. R. Cas. 108, 116 Mo. 450, 21 S. W. Rep. 1094. Fusili v. Missouri Pac. R. Co., 45 Mo. App. 535. Wilburn v. St. Louis, I. M. & S. R. Co., 48

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But this rule is subject to the qualification that the inference of negligence must be a reasonable one; where it is impossible to infer negligence from the established facts without reasoning irrationally, and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant. (Maxwell, C.J., dissenting.) *Chicago, B. & Q. R. Co. v. Landauer*, 54 Am. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

68. Whether there was gross negligence. — Whether the defendant was guilty of gross neglect is a question for the jury. *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. Rep. 357.

Gross negligence does not, in construction of law, amount to fraud, but is evidence to be left to the jury, from which they may infer fraud or the want of *bona fides*. *Wilson v. York & M. L. R. Co.*, 11 Gill & I. (Md.) 58.

69. Question of safety or unsafety. — Whether proper care has been used in the construction of a railroad is, in general, a question of fact, and the sudden giving away of part of its structure is, if unexplained, some evidence of negligence in its construction. *Stoher v. St. Louis, I. M. & S. R. Co.*, 31 Am. & Eng. R. Cas. 229, 91 Mo. 509, 10 West. Rep. 54, 4 S. W. Rep. 389.

Where the question whether or not a railroad company has been negligent depends

upon the distinction between that which is reasonably safe and that which is not so, it is a question exclusively for the jury, and the court will not disturb their finding on the ground that there was no evidence of negligence. *Leishmann v. London, B. & S. C. R. Co.*, 23 L. T. 712, 19 W. R. 106.

70. Whether given rate of speed is excessive. — Whether the rate of speed at which a train was running constituted an element of negligence is a question of fact for the jury under all the circumstances of the case, and not a question of law for the court. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 Ind. 35, 25 N. E. Rep. 863.

Whether the speed of the train in question was usual and proper under the circumstances is for the jury to determine from the evidence. *Beems v. Chicago, R. I. & P. R. Co.*, 67 Iowa 435, 25 N. W. Rep. 693. *Taylor v. St. Louis, I. M. & S. R. Co.*, 83 Mo. 386. *Miller v. New York C. & H. R. R. Co.*, 20 N. Y. Supp. 163, 65 Hun 623, mem., 48 N. Y. S. R. 23. —APPLYING *Salter v. Utica & B. R. R. Co.*, 88 N. Y. 42; *Thompson v. New York C. & H. R. R. Co.*, 110 N. Y. 636, 17 N. E. Rep. 690; *Coleman v. New York C. & H. R. R. Co.*, 17 N. Y. Supp. 596. —*Morse v. Rutland & B. R. Co.*, 27 Vt. 49.

But their finding must not be without evidence, nor so palpably against the evidence as to evince passion, or prejudice, or to show that they have been misled and done manifest injustice. *Wabash, St. L. & P. R. Co. v. Hicks*, 13 Ill. App. 407. —QUOTING *Chicago, B. & Q. R. Co. v. Lee*, 68 Ill. 582; *Peoria, D. & E. R. Co. v. Miller*, 11 Ill. App. 375.

The law not having fixed the rate of speed at which cars may be run upon a railroad in and across the streets of a city, it is generally a question of fact in each case whether the actual rate is excessive or dangerous. Whether it is so or not will depend to some extent upon the safeguards which are adopted to prevent accidents. *Wilds v. Hudson River R. Co.*, 29 N. Y. 315. —CRITICISED IN *Cleveland, C., C. & I. R. Co. v. Newell*, 8 Am. & Eng. R. Cas. 377, 75 Ind. 542. —*Grant v. Union Pac. R. Co.*, 45 Fed. Rep. 673. *Frick v. St. Louis, K. C. & N. R. Co.*, 8 Am. & Eng. R. Cas. 280, 75 Mo. 595. *Louisville & N. R. Co. v. Milam*, 13 Am. & Eng. R. Cas. 507, 9 Lea (Tenn.) 223. —QUOTING *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 531.

It is not correct to say that in every case where a fault in this respect is alleged the question must be submitted to the jury. If it be clearly shown that on the occasion in question the velocity was not greater than that which had been usually practised before with the tacit consent of the community and without accident, it should not be considered an open question whether running at that rate was negligent and unlawful. *Wilds v. Hudson River R. Co.*, 29 N. Y. 315.—CRITICISED IN *Cleveland, C., C. & I. R. Co. v. Newell*, 8 Am. & Eng. R. Cas. 377, 75 Ind. 542. DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.—*Lockwood v. Chicago & N. W. R. Co.*, 6 Am. & Eng. R. Cas. 151, 55 Wis. 50, 12 N. W. Rep. 401.

Negligence is a question for the jury alone; and for the judge to instruct them that if the law provides that the trains shall run at a certain speed, and they were running above that speed, it was negligence, is error. *Western & A. R. Co. v. King*, 19 Am. & Eng. R. Cas. 255, 70 Ga. 261.—FOLLOWING *Wright v. Georgia R. & B. Co.*, 34 Ga. 337.

Whether there was not a want of ordinary care on the part of the defendant in running a freight train backward within the city limits at the rate of seven or eight miles an hour, with many pedestrians passing along the side of its track, with a beam projecting a foot and a half beyond the side of the car, without brakemen, lookout, or signal to give warning, was a question properly submitted to the jury. *Kansas Pac. R. Co. v. Ward*, 4 Colo. 30.

The question of the negligence of a railroad company in running a passenger-train at too high a rate of speed over a defective track is for the jury. *Andrews v. Chicago, M. & St. P. R. Co.*, 52 Am. & Eng. R. Cas. 252, 86 Iowa 677, 53 N. W. Rep. 399.

A jury, having all the facts as to the condition of the track before them, are the proper judges as to whether any rate of speed is dangerous. *Meloy v. Chicago & N. W. R. Co.*, (Iowa) 33 Am. & Eng. R. Cas. 358, 37 N. W. Rep. 335.

It is a question for the jury whether a special train can be run without negligence at such a speed as to make it difficult to check its speed within a reasonable time and distance. *Marcott v. Marquette, H. & O. R. Co.*, 4 Am. & Eng. R. Cas. 548, 47 Mich. 1, 10 N. W. Rep. 53.

Whether it is negligence on the part of a company to run a regular train rapidly over a track between an apparent station and an excursion train which has stopped temporarily to allow the regular train to pass, without giving warning to the excursionists, is a question of fact for the jury. *Wandell v. Corbin*, 38 Hun (N. Y.) 391.

Where an injury results from a train colliding with plaintiff's buggy on the street of a city, the question whether the train was running at an improper rate of speed is properly left to the jury. *Richardson v. New York C. & H. R. R. Co.*, 15 N. Y. Supp. 868, 61 Hun 624, mem., 40 N. Y. S. R. 616; affirmed in 133 N. Y. 563, mem., 30 N. E. Rep. 1148, mem.

Where an injury results from a street-car colliding with a wagon, the question whether the car, under the circumstances, was driven too fast is for the jury. *White v. Milwaukee City R. Co.*, 18 Am. & Eng. R. Cas. 213, 61 Wis. 536, 21 N. W. Rep. 524, 50 Am. Rep. 154.

Plaintiff was injured by being struck by an engine in a city where an ordinance limited its speed to eight miles an hour. The testimony as to the speed of the engine gave varied estimates of from four to fifteen miles per hour. Held, that whether the engine was going faster than eight miles an hour or not, it was for the jury to say whether, under the circumstances, it was going at an improper speed. *Finklestein v. New York C. & H. R. R. Co.*, 41 Hun 34, 2 N. Y. S. R. 680.

71. Whether the presumption of negligence has been rebutted.—Whether or not the presumption of negligence, which section 3033 of the Ga. Code provides shall in all cases be against a railroad company, has been removed is a question of fact for the jury, and not one of law to be determined by the court. *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. Rep. 1020.—FOLLOWED IN *Savannah & W. R. Co. v. Phillips*, 90 Ga. 829.—*Savannah & W. R. Co. v. Phillips*, 90 Ga. 829, 17 S. E. Rep. 82.—FOLLOWING *Central R. Co. v. Hubbard*, 86 Ga. 623.

72. Proximate and remote cause.—Ordinarily the question of what was the proximate cause of an injury is one for the jury, and not for the court. *Denver, T. & G. R. Co. v. Robbins*, 2 Colo. App. 313, 30 Pac. Rep. 261.—FOLLOWING *Blythe v. Denver & R. G. R. Co.*, 15 Colo. 333. QUOTING *Le-*

high Valley R. Co. v. McKeen, 90 Pa. St. 122.—*Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. Rep. 285.—DISAPPROVING Ryan v. New York C. R. Co., 35 N. Y. 210. FOLLOWING Fent v. Toledo, P. & W. R. Co., 59 Ill. 349; Toledo, P. & W. R. Co. v. Pindar, 53 Ill. 451; Toledo, W. & W. R. Co. v. Muthersbaugh, 71 Ill. 572.—*Adams v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 105, 100 Mo. 555, 12 S. W. Rep. 637, 13 S. W. Rep. 509. *Ebright v. Mineral R. & M. Co.*, (Pa.) 15 Atl. Rep. 709. *Vallo v. United States Exp. Co.*, 147 Pa. St. 404, 23 Atl. Rep. 594. *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. Rep. 764.—APPROVING Perley v. Eastern R. Co., 98 Mass. 414; Fent v. Toledo, P. & W. R. Co., 59 Ill. 349; Annapolis & E. R. Co. v. Gantt, 39 Md. 115; Vaughan v. Taff Vale R. Co., 3 H. & N. 743; Smith v. London & S. W. R. Co., L. R. 5 C. P. 98; Collins v. Middle Level Com'rs, L. R. 4 C. P. 279; Sneesby v. Lancashire & Y. R. Co., L. R. 9 Q. B. 263. DISAPPROVING Ryan v. New York C. R. Co., 35 N. Y. 210; Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353. FOLLOWING Kellogg v. Chicago & N. W. R. Co., 26 Wis. 223; Brown v. Chicago, M. & St. P. R. Co., 54 Wis. 342. QUOTING Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 169.

And must be submitted to the jury under proper instructions from the court. *Pielke v. Chicago, M. & St. P. R. Co.*, 38 Am. & Eng. R. Cas. 349, 5 Dak. 444, 41 N. W. Rep. 669.—APPLYING Doggett v. Richmond & D. R. Co., 78 N. Car. 305.

Where the character of the facts are such that different conclusions may be drawn from them. *Dunn v. Cass Ave. & F. G. R. Co.*, 21 Mo. App. 188.

But where the facts are undisputed, and the intervening agency is manifest, it is not error for the court to withhold the evidence from the jury. *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St. 293, 18 Am. Ry. Rep. 405.—EXPLAINING Pennsylvania R. Co. v. Hope, 80 Pa. St. 373; Raydure v. Knight, 2 W. N. C. (Pa.) 713.—APPLIED IN O'Connor v. Illinois C. R. Co., 44 La. Ann. 339. DISAPPROVED IN Kuhn v. Jewett, 32 N. J. Eq. 647. EXPLAINED IN Lehigh Valley R. Co. v. McKeen, 90 Pa. St. 122. QUOTED IN Boss v. Northern Pac. R. Co., 2 N. Dak. 128.—*West Mahanoy Tp. v. Watson*, 116 Pa. St. 344, 9 Atl. Rep. 430.

Where a company interferes with a turnpike in constructing its road, and the law

requires it to restore it to its required width, if it fails to do so, or operates its road without a screen between the two roads, or other precautions necessary to prevent frightening teams, it is liable for any injury that results; but whether the company has been negligent in constructing its road too near the turnpike, or in failing to provide such screens, and whether such negligence was the proximate cause of an injury, are questions for the jury or the referee, as the case may be. *Moskier v. Utica & S. R. Co.*, 8 Barb. (N. Y.) 427.

73. Due diligence, or due care.—What constitutes due diligence is a question for the jury, and the burden of proof is on the plaintiff to show negligence. *Haff v. Minneapolis & St. L. R. Co.*, 4 McCrary (U. S.) 622, 14 Fed. Rep. 558. *Chicago & A. R. Co. v. Adler*, 39 Am. & Eng. R. Cas. 666, 129 Ill. 335, 21 N. E. Rep. 846; affirming 28 Ill. App. 102. *Baltimore & O. R. Co. v. Mulligan*, 45 Md. 486. *Lestinsky v. Great Western Dispatch*, 13 Mo. App. 575. *Merrill v. American Exp. Co.*, 62 N. H. 514.

It is a question for the jury to determine what facts constitute due care, the want of which is culpable negligence. This must depend upon the circumstances of the case, an important item of which is the susceptibility to injury of the property exposed. The danger and probable extent of injury, in case it should occur, regulate or fix the degree of care that is required. *King v. American Transp. Co.*, 1 Flipp. (U. S.) 1.

Even though the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was exercised or whether negligence appears whenever, upon the facts in evidence, different minds might honestly draw different conclusions from such evidence. *Williams v. Northern Pac. R. Co.*, 11 Am. & Eng. R. Cas. 421, 3 Dak. 168, 14 N. W. Rep. 97.—REVIEWING Mangam v. Brooklyn R. Co., 38 N. Y. 455; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

But courts are bound to see that the fact when found by the jury rests upon evidence. *Illinois C. R. Co. v. Brookshire*, 3 Ill. App. 225.

And it is for the court to determine whether the proof is sufficient to authorize the jury to find due care. *Wormell v. Maine C. R. Co.*, 31 Am. & Eng. R. Cas. 272, 79 Me. 397, 4 N. Eng. Rep. 692, 10 Atl. Rep. 49.

Though an injured person may have been guilty of negligence, still the question whether the defendant might have prevented the injury by the exercise of reasonable care and diligence is for the jury. *O'Flaherty v. Union R. Co.*, 45 Mo. 70.

74. Various applications of the rule.—The question as to whether, in any given case, there has been negligence on the part of the owner of property in the maintenance thereon of dangerous machinery is a question of fact for the jury, to be decided in view of the situation of the property and the attendant circumstances. *Barrett v. Southern Pac. Co.*, 48 Am. & Eng. R. Cas. 532, 91 Cal. 296, 27 Pac. Rep. 666.

A railroad company is only bound to man its trains with brakemen to meet the ordinary demands of the road, unless they have reason to believe that an unusual exigency will arise that will require more than are usually necessary, and, it being the province of the jury to determine the question of negligence, it is a question for them to determine whether there were brakemen enough on a train for ordinary purposes. *Schmidt v. Chicago & N. W. R. Co.*, 83 Ill. 405.

Whether it is negligence to detach cars from a train and to permit them to proceed along the track and over a highway crossing without an engine attached must depend upon the circumstances of the particular case. The facts may be of such a character, shown by undisputed evidence, that the conduct of the company may be said to be negligent *per se*, but usually it will be a question for the jury under proper instructions. *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108, 31 N. E. Rep. 836. —QUOTING *Pennsylvania Co. v. State*, 61 Md. 108; *Illinois C. R. Co. v. Baches*, 55 Ill. 379; *Illinois C. R. Co. v. Hammer*, 72 Ill. 347. REVIEWING *Ferguson v. Wisconsin C. R. Co.*, 19 Am. & Eng. R. Cas. 285, 63 Wis. 145; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269; *Howard v. St. Paul, M. & M. R. Co.*, 19 Am. & Eng. R. Cas. 283, 32 Minn. 214.

Knowledge on the part of a servant of a defect in a railroad track which caused the injuries for which he sues is a matter for the jury where different conclusions might be drawn from the evidence on such question. *Mahaney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. Rep. 895.

It is the duty of a party who receives a

personal injury to take proper care of the injured member, and not aggravate the injury by improper remedies; but the jury are the judges of what are proper and what improper remedies. *Maloy v. New York C. R. Co.*, 40 How. Pr. (N. Y.) 274, 58 Barb. 182.

The negligence of a person having charge of an infant at the time it is injured, and of a company injuring it, are questions for the jury. *Akerslout v. Second Ave. R. Co.*, 27 J. & S. (N. Y.) 555; affirmed in 133 N. Y. 676, mem., 31 N. E. Rep. 626, mem.

Where the action is by an employé to recover for personal injuries, it is error to submit the case to the jury to find a verdict for the plaintiff on the sole ground that the injury was caused by a failure to block a guard rail. *Ireland v. Gardner*, 4 Sib. Sup. Ct. 119, 26 N. Y. S. R. 895, 7 N. Y. Supp. 609.—FOLLOWING *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550.

Whether it was negligence on the part of a railroad company to construct or permit the continuance of its roadbed with an open ditch under its track is a question of fact for the jury. So also is the question whether a plaintiff, having been injured by such ditch, contributed to the injury by his negligence. *Houston & G. N. R. Co. v. Randall*, 50 Tex. 254.

The question of the negligence of the railroad company in not keeping a proper lookout in the direction in which the train was moving is ordinarily to be submitted to the jury. *Johnson v. Chicago & N. W. R. Co.*, 56 Wis. 274, 14 N. W. Rep. 181.

Evidence that a rescuing engine with a snow plow attached approached a stalled engine during a snowstorm, without checking its speed, and ran into the train and killed a person, is sufficient to go to the jury on the question of gross negligence of the company's employés. *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 30 N. W. Rep. 282, 58 Am. Rep. 848.

A railroad company left a loaded car, coupled with two empty cars, standing on a switch which inclined towards their main track, the same being secured by their brakes and a railroad tie placed under the wheels of the loaded car; the cars got upon the main track, and thereby an accident occurred, the plaintiff being injured. *Held*, the company was not irresponsible, as a matter of law, even though the cars could

not have got on the main track but for the wrongful act of a stranger. *Smith v. New York, S. & W. R. Co.*, 18 Am. & Eng. R. Cas. 399, 46 N. J. L. 7.

Plaintiff's intestate was killed on a stormy morning by a passing engine while shoveling snow from defendant's track. Plaintiff's evidence tended to show that the engineer in charge had on various previous occasions run engines across the street without notice, which was known to the superintendent and train dispatcher, and was known, or ought to have been known, to the other officers of the company. *Held*, that it was proper to submit the case to the jury. *Wall v. Delaware, L. & W. R. Co.*, 28 N. Y. S. R. 132, 7 N. Y. Supp. 709, 54 Hun 454; *affirmed* in 125 N. Y. 727, *mem.*, 26 N. E. Rep. 757, *mem.*

There was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff, then attempting to cross, was injured. *Held*, evidence of negligence to go to the jury. *Levoy v. Midland R. Co.*, 15 Am. & Eng. R. Cas. 478, 3 Ont. 623.—QUOTING *Stokes v. Eastern Counties R. Co.*, 2 F. & F. 691.

3. Mixed Questions of Law and Fact.

75. Relative functions of court and jury.—The question of negligence is a mixed question of law and fact, including two questions: (1) Whether a particular act has been performed or omitted, and (2) whether the performance or omission of this act was the breach of a legal duty. The first of these is a pure question of fact, the second a pure question of law. *Baltimore & O. R. Co. v. McKensie*, 24 Am. & Eng. R. Cas. 395, 81 Va. 71. *Chicago & A. R. Co. v. Dillon*, 17 Ill. App. 355.

When the facts are not disputed, and the deductions or inferences to be drawn from them are indisputable, or when the standard and measure of duty are fixed and defined by law, and the same under all circumstances, the question is for the decision of the court; but if the facts are disputed, or, if not disputed, if the existence of negligence is an inference which, as mere matter of discretion and judgment, may or may not be drawn from them, the question must be submitted to the jury. *Alabama G. S. R. Co. v. Jones*, 15 Am. & Eng. R. Cas. 549, 71 Ala. 487.—FOLLOWING *Memphis & C.*

R. Co. v. Lyon, 62 Ala. 71.—*Wilson v. Louisville & N. R. Co.*, 85 Ala. 269, 4 So. Rep. 701. *Mau v. Morse*, 3 Colo. App. 359. *Nolan v. New York, N. H. & H. R. Co.*, 25 Am. & Eng. R. Cas. 342, 53 Conn. 461, 4 Atl. Rep. 106. *Gagg v. Vetter*, 41 Ind. 228. *Chicago & E. I. R. Co. v. Ostrander*, 32 Am. & Eng. R. Cas. 361, 116 Ind. 259, 12 West Rep. 718, 15 N. E. Rep. 227, 19 N. E. Rep. 110. *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.—REVIEWING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 22.—FOLLOWED IN *Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52.—*Greenleaf v. Dubuque & S. C. R. Co.*, 33 Iowa 52.—FOLLOWING *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14.—*Louisville & P. Canal Co. v. Murphy*, 9 Bush (Ky.) 522.—REVIEWED IN *Louisville, C. & L. R. Co. v. Case*, 9 Bush 728.—*Needham v. Louisville & N. R. Co.*, 85 Ky. 423, 3 S. W. Rep. 797, 11 S. W. Rep. 306.—QUOTING *Louisville & N. R. Co. v. Collins*, 2 Duv. 115; *Louisville, C. & L. R. Co. v. Mahony*, 7 Bush 237; *Claxton v. Lexington & B. S. R. Co.*, 13 Bush 642.—*Newport News & M. V. Co. v. Dentsel*, 91 Ky. 42, 14 S. W. Rep. 958. *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, 5 Am. Ry. Rep. 478.—DISTINGUISHING *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich. 99. REVIEWING *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.—*Minor v. Clark*, 5 Silv. Supp. Ct. 358, 28 N. Y. S. R. 184, 8 N. Y. Supp. 616. *Jenkins v. Little Miami R. Co.*, 2 Disney (Ohio) 49. *Dun v. Seaboard & R. R. Co.*, 16 Am. & Eng. R. Cas. 363, 78 Va. 645, 49 Am. Rep. 388. *Nash v. Richmond & F. R. Co.*, 82 Va. 55. *Johnson v. Baltimore & O. R. Co.*, 25 W. Va. 570.—QUOTING *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190.—*Pool v. Chicago, M. & St. P. R. Co.*, 8 Am. & Eng. R. Cas. 360, 56 Wis. 227, 14 N. W. Rep. 46. *Hogan v. Chicago, M. & St. P. R. Co.*, 15 Am. & Eng. R. Cas. 439, 59 Wis. 139, 17 N. W. Rep. 632.

It is the duty of the jury to determine whether negligence exists in a given case; but it is the duty of the court first to determine whether there is sufficient evidence to justify a submission to the jury, and a mere scintilla of evidence will not justify such submission. *Powers v. New York C. & H. R. R. Co.*, 14 N. Y. Supp. 408, 60 Hun 19, 38 N. Y. S. R. 558; *affirmed* in 128 N. Y. 659, *mem.*, 29 N. E. Rep. 148, *mem.*, 40 N. Y. S. R. 979, *mem.*—QUOTING *Baulec v. New*

York & H. R. Co., 59 N. Y. 356; Toomey v. London, B. & S. C. R. Co., 3 C. B. N. S. 146.—*Union Pac. R. Co. v. Rollins*, 5 Kan. 167. *Latremouille v. Bennington & R. R. Co.*, 48 Am. & Eng. R. Cas. 265, 63 Vt. 336, 22 Atl. Rep. 656. *Quibell v. Union Pac. R. Co.*, 7 Utah 122, 25 Pac. Rep. 734. *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193, 4; L. J. C. P. 303, 37 L. T. 679, 26 W. R. 175; reversing L. R. 10 C. P. 49. L. R. 2 C. P. D. 125, 46 L. J. C. P. 376, 36 L. T. 485, 25 W. R. 661.

Where the negligence charged is a failure to perform a statutory duty, the only question for the jury is whether there has been such failure; and when the jury finds that there has been a failure, negligence must be declared by the court. *St. Louis, A. & T. H. R. Co. v. Huggins*, 20 Ill. App. 639.

It is not reversible error to submit the question of negligence to the jury when the facts are undisputed, if the jury decides the law correctly. Besides, there is no absolute rule as to what constitutes negligence. When the question involves both law and facts, it should be left to the jury. *Patten v. Chicago & N. W. R. Co.*, 32 Wis. 524.—REVIEWED IN *Duffy v. Chicago & N. W. R. Co.*, 34 Wis. 188.

76. The question is for the jury subject to instructions as to the law.—Where the facts and inferences therefrom are not disputed, the question of negligence is one of law; but where the facts are disputed, the question is one of mixed law and fact, to be submitted to the jury under instructions from the court. *Pittsburgh, C. & St. L. R. Co. v. Spencer*, 21 Am. & Eng. R. Cas. 478, 98 Ind. 186. *Terre Haute & I. R. Co. v. Jenuine*, 16 Ill. App. 209. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466. *Smith v. North Carolina R. Co.*, 64 N. Car. 235.—APPLIED IN *Wallace v. Western N. C. R. Co.*, 98 N. Car. 494. QUOTED IN *Emry v. Raleigh & G. R. Co.*, 109 N. Car. 589.—*Pittsburgh, C. & St. L. R. Co. v. Fleming*, 30 Ohio St. 480. *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172. *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66. *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.*, 32 Ohio St. 116. *Bamberg v. South Carolina R. Co.*, 9 So. Car. 61. *Bowers v. Union Pac. R. Co.*, 4 Utah 215, 7 Pac. Rep. 251. *East Tenn., V. & G. R. Co. v. Fain*, 19 Am. & Eng. R. Cas. 102, 12 Lea (Tenn.) 35. *Trow v. Vermont*

C. R. Co., 24 Vt. 487. *Langhoff v. Milwaukee & P. du C. R. Co.*, 19 Wis. 489.—FOLLOWED IN *Sioux City & P. R. Co. v. Stout*, 17 Wall. (U. S.) 657.

Whether it is negligence for an engineer to run his train at a stated number of miles per hour is generally a mixed question of law and fact, dependent upon many controlling circumstances, such as the condition and structure of the road, its grade, straightness or curvature, the character and capacity of the brakes, etc.; and when there is no evidence as to any of these controlling facts, it is properly left to the jury to decide whether he was guilty of negligence in running his train at the rate of thirty-five or forty miles per hour at the time of the accident. *East Tenn., V. & G. R. Co. v. Bayliss*, 19 Am. & Eng. R. Cas. 480, 74 Ala. 150.

77. What the jury should be told to consider.—The question of negligence is a mixed one of law and fact, in the determination of which it is to be considered whether an act has been done or omitted, and also whether the doing or omission of it was a breach of legal duty. *Little Rock & Ft. S. R. Co. v. Duffey*, 4 Am. & Eng. R. Cas. 637, 35 Ark. 602.

In deciding whether any party has been negligent, if there is any conflict in the testimony, and ordinarily when there is not, all the facts and circumstances of the case should be submitted to the jury with instructions that, in deciding whether the party was in the exercise of ordinary care, or was grossly negligent, they are to consider the position of the party, his business, his duties and responsibilities, and that the same act or omission which under some circumstances would not show any degree of negligence might under others show want of ordinary care, and under still different circumstances might show gross negligence; and the question should be settled by the jury as a question of fact, not by the court as a question of law. *State v. Manchester & L. R. Co.*, 52 N. H. 528.

If the evidence upon an issue of negligence is direct, leaving nothing to inference, and, if believed, establishes the fact sought to be proved, the judge may instruct the jury that if they believe the witness they are to find for the plaintiff or defendant, as the case may be; but where the testimony is in conflict and capable of different interpretations, it should be submitted to the jury with appropriate instructions to con-

sider all the circumstances in arriving at a verdict. *McQuay v. Richmond & D. R. Co.*, 109 N. Car. 585, 13 S. E. Rep. 944.

78. Binding instructions.—What constitutes negligence usually is a mixed question of law and fact, and sometimes negligence is of a character so gross on the part of a plaintiff that a judge may well instruct a jury that he is not entitled to recover. *Mills v. Orange, A. & M. R. Co.*, 2 MacArth. (D. C.) 314.

III. ACTIONS FOR NEGLIGENCE.

1. Right of Action—Parties—Defenses.

79. The right of action.*—An injury that is the natural and probable consequence of an act of negligence is actionable. *Chicago, St. P., M. & O. R. Co. v. Elliott*, 55 Fed. Rep. 949, 12 U. S. App. 381, 5 C. C. A. 347.—QUOTED IN *Union Pac. R. Co. v. Callaghan*, 56 Fed. Rep. 988.

Where the party inflicting the injury, by proper care, might have avoided the consequences of the negligence of the party injured, or where the latter could not avoid the consequences of the former's negligence, an action will lie. *Northern C. R. Co. v. State*, 31 Md. 357.

A plaintiff who, by reason of his and the defendant's negligence, has been compelled to pay damages to another may recover indemnity, although but for his own negligence the injury would not have happened, if at the time it occurred he could not, and the defendant could, have prevented it by ordinary care. *Nashua I. & S. Co. v. Worcester & N. R. Co.*, 62 N. H. 159.

Every person who violates an express statute is a wrong-doer, and as such is *ex necessitate* negligent, and if he has done the wrong with respect to an innocent person the latter has his remedy for full indemnity. *Graham v. Delaware & H. Canal Co.*, 46 Hun 386, 12 N. Y. S. R. 390.

Bare negligence unproductive of damage to another will not give a right of action; negligence causing damage will do so. *Gulf, C. & S. F. R. Co. v. Levy*, 12 Am. & Eng. R. Cas. 90, 96, 59 Tex. 542, 46 Am. Rep. 269.—REVIEWING *New Orleans, J. & G. N. R. Co. v. Hurst*, 36 Miss. 667.

Where, in an action against a railroad company for injuries received by the plaintiff from the alleged carelessness of one of

the defendant's employes, the evidence discloses no omission of duty or wrongful act on the part of the servant whereby such injuries resulted, the company cannot be held liable, the plaintiff alone being in fault. *Chicago & A. R. Co. v. McLaughlin*, 47 Ill. 265.

The fact that the plaintiff was hurt without his own fault or negligence does not of itself entitle him to recover, as it must further appear that the defendant is legally chargeable with the injury. *Henry v. Lake Shore & M. S. R. Co.*, 8 Am. & Eng. R. Cas. 110, 49 Mich. 495, 13 N. W. Rep. 832.

No action can be maintained for injuries resulting to individuals from acts done by persons in the execution of a public trust and for the public benefit, acting with due skill and caution, and within the scope of their authority; but this principle does not apply to a private corporation authorized by the legislature to construct works of public improvement by private capital for private emolument. *Tinsman v. Belvidere Del. R. Co.*, 26 N. J. L. 148.—DISTINGUISHED IN *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504. QUOTED IN *McAndrews v. Collier*, 42 N. J. L. 189.

80. Who may sue.—Where an act of negligence is eminently dangerous, the negligent party is liable to any person who is injured thereby whether any privity exists between them or not; but where the act is not eminently dangerous, the negligent party is only liable to parties with whom he sustains some contract relation. *Burke v. De-Castro & D. Sugar Refining Co.*, 11 Hun (N. Y.) 354.

81. Who is liable and may be made defendant.—Where a person is bound to perform an act as a duty, he intrusts its performance to another at his peril, and upon failure of such person to perform it, whether he stood in the relation of contractor or of servant, the person on whom the duty rests is liable for such failure or neglect. *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.—DISTINGUISHED IN *Atlanta & F. R. Co. v. Kimberly*, 87 Ga. 161. QUOTED IN *Cunningham v. International R. Co.*, 51 Tex. 503.

Artificial, like natural, persons are liable in damages for acts of negligence imputable to them whereby injuries result to third persons. A corporation acts through its officers and employes, who, in the exercise of their respective functions, and to that

* Liability for injuries caused by negligence, see note, 8 L. R. A. 82.

extent, represent the corporation. *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. Rep. 142.

When injury results from the negligence or unlawful operation of a railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable. *Pennsylvania Co. v. Ellett*, 42 Am. & Eng. R. Cas. 64, 132 Ill. 654, 24 N. E. Rep. 559.

There is no good reason why a company operating trains upon a road owned by another company should not be liable for negligence in running its trains. The protection of the public requires that such company should be liable the same as the one that owns the road. *Leonard v. New York C. & H. R. R. Co.*, 10 J. & S. (N. Y.) 225.—FOLLOWING *McGrath v. New York C. & H. R. R. Co.*, 63 N. Y. 522.—FOLLOWED IN *Leonard v. New York C. & H. R. R. Co.*, 12 J. & S. 575.

Defendants will be liable for any injury sustained by third persons in consequence of negligence in drifting a raft, where it is shown that they had purchased and paid for the raft, and that it had been delivered to their agent. Nor will proof that their agent took upon himself the risk of its safe transportation exonerate them as owners from liability to third persons. *Taylor v. Mexican Gulf R. Co.*, 2 La. Ann. 654.

Plaintiff was injured by the breaking of the rope of a derrick while assisting in discharging ore from his boat to the defendant's cars. It did not appear that the derricks were used for defendant's benefit, that its officers had any control over them, or that it furnished the rope. It appeared that for a long time the derrick was under the control of M. & Co., who employed the men who discharged the cargo. Held, that defendant was not liable. *Derrenbacher v. Lehigh Valley R. Co.*, 4 Am. & Eng. R. Cas. 624, 87 N. Y. 636, mem.; reversing 21 Hun 612, 59 How. Pr. 283.—DISTINGUISHING *King v. New York C. & H. R. R. Co.*, 72 N. Y. 607, mem.

82. Joint and several liability.—

Where the negligence of two is in combination the proximate cause of an injury, either or both may be held responsible for the consequences resulting from their combined negligence. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 33 N. E. Rep. 285.—

APPLYING *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 364; *Union R. & T. Co. v. Shacklet*, 119 Ill. 232.—*Quill v. New York C. & H. R. R. Co.*, 16 Daly 313, 32 N. Y. S. R. 612, 11 N. Y. Supp. 80; affirmed in 126 N. Y. 629, mem., 36 N. Y. S. R. 1012, mem.—APPROVING *Booth v. Boston & A. R. Co.*, 73 N. Y. 38; *Webster v. Hudson River R. Co.*, 38 N. Y. 260.—*Schmidt v. Steinway & H. P. R. Co.*, 55 Hun 496, 29 N. Y. S. R. 201, 8 N. Y. Supp. 664, 9 N. Y. Supp. 939.—APPLYING *Colegrove v. New York & N. H. R. Co.*, 20 N. Y. 492.—*Boss v. Northern Pac. R. Co.*, 2 N. Dak. 128, 49 N. W. Rep. 655.—APPROVING *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299.

While joint tortfeasors are severally liable for the injuries inflicted, yet to hold them jointly liable they either must have acted in concert or the act of one must have been of such a character as to have naturally resulted in causing the act of the other. *Stanley v. Union Depot R. Co.*, 114 Mo. 606, 21 S. W. Rep. 832.

Persons who act separately, each causing a separate injury, cannot be made jointly liable, even though the injuries thus committed are all inflicted at one time, and precisely similar in character. *Mooney v. Third Ave. R. Co.*, 2 City Ct. (N. Y.) 366.—QUOTING *Marble v. Worcester*, 4 Gray (Mass.) 395.

Where two companies operate parallel roads, but there is no connection between them in the ownership or use of the respective tracks, they cannot be made jointly liable because their flagmen each watched the movements of the other, which brought about an accident. *Chicago & E. I. R. Co. v. Conners*, 30 Ill. App. 307.

83. Joinder of defendants.—If an injury is caused by the combined acts of negligence of two corporations, a joint action may be maintained for the entire injury against both. *Bryant v. Bigelow Carpet Co.*, 7 Am. & Eng. R. Cas. 72, 131 Mass. 491. *Starts v. Pennsylvania & N. Y. C. & R. Co.*, 42 N. Y. S. R. 457, 16 N. Y. Supp. 810; affirmed in 136 N. Y. 639, mem., 32 N. E. Rep. 1014, mem., 49 N. Y. S. R. 914, mem.

84. Defenses, generally.—If a defendant, having acquired by contract with plaintiff the right to the possession and use of a side track for its own purposes, employs a third person to unload its cars, and the injury is caused by the negligence of

such third person or his servants in the performance of the work, this does not relieve the defendant of liability. *Montgomery Gas-Light Co. v. Montgomery & E. R. Co.*, 86 Ala. 372, 5 So. Rep. 735.

When the evidence shows negligence gross and reckless on the part of a railroad, resulting in serious injury to plaintiff, proof that plaintiff, while under the influence of great pain and his mind confused, if not unsettled, by the injury, said that no one was to blame will not excuse the company. Even if the declaration was made deliberately and the whole evidence shows that plaintiff was mistaken, it will not relieve the company. *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167.

Notwithstanding the negligence of an injured party, a defendant company is liable for injuring him if ordinary care was not exercised by its employes after they knew of such negligence; and the fact that the injured party's foot was caught between the rails so that he could not get off the track would not affect the company's liability if its cars were negligently run on him after his position was known. *Beems v. Chicago, R. I. & P. R. Co.*, 10 Am. & Eng. R. Cas. 658, 6 Am. & Eng. R. Cas. 222, 58 Iowa 150, 12 N. W. Rep. 222.

The fact that the accident was one of frequent occurrence on railroads affords no excuse, but, on the contrary, demands additional care and foresight to guard against it. *Oliver v. New York & E. R. Co.*, 1 Edm. Sel. Cas. (N. Y.) 589.

One who is injured by the negligence of another is bound to use ordinary care to effect his cure and restoration; but he is not responsible for a mistake, and when he acts in good faith and under the advice of a competent physician, even if it is erroneous, the error will not shield the wrong-doer. *Lyons v. Erie R. Co.*, 57 N. Y. 489, 7 Am. Ry. Rep. 63.—FOLLOWED IN *Sauter v. New York C. & H. R. R. Co.*, 66 N. Y. 50, 23 Am. Rep. 18.

Therefore where, in an action to recover damages for injuries alleged to have been sustained by defendant's negligence, defendant had given evidence tending to show that exercise taken by plaintiff might have tended to retard recovery, and that quiet would have been better—*held*, that evidence that plaintiff was advised by his physician that it was right and beneficial to exercise

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was proper. *Lyons v. Erie R. Co.*, 57 N. Y. 489, 7 Am. Ry. Rep. 63.

The fact that plaintiff at the time she was injured was picking up coals in a street not fully opened and occupied for public travel, but which had been actually improved and used to some extent, will not prevent her recovery against a railroad company for negligence. *Pennsylvania Co. v. Allen*, 3 Pennyp. (Pa.) 170.

In an action against a corporation to recover damages occasioned by the negligence of its employes, it is no defense to show that the act from which the injury resulted was not authorized by the charter, if the corporation in any clear and explicit manner recognized the act as done in its business, as by employing agents to superintend it or receiving the profits arising from it. *Hutchinson v. Western & A. R. Co.*, 6 Heisk. (Tenn.) 634, 12 Am. Ry. Rep. 16.—QUOTING AND DISTINGUISHING *Pearce v. Madison & I. R. Co.*, 21 How. (U. S.) 444.—FOLLOWED IN *New York, L. E. & W. R. Co. v. Haring*, 21 Am. & Eng. R. Cas. 436, 47 N. J. L. 137.

The consent given to the construction of a road does not relieve the railroad company from the duties touching inclosures prescribed by the statute granting it a right of way. *Houston & G. N. R. Co. v. Meador*, 50 Tex. 77.

It is doubtful whether in any case in which, in the absence of a contract expressed or implied, negligence, as an element, is the foundation of a right, custom may be set up for the purpose of showing that negligence does or does not exist. It would seem that whether negligence did or did not exist must be determined in the very case in which its existence is charged. *Gulf, C. & S. F. R. Co. v. Evansich*, 61 Tex. 3.

When one by accident or misadventure falls upon a railway track without fault on his part, and is then, through the negligence of the company's agents who manage the train, injured, the negligence of the company is not excused. *International & G. N. R. Co. v. Ormond*, 27 Am. & Eng. R. Cas. 139, 64 Tex. 485.

The statute 14 Geo. III, c. 78, § 86, which is an extension of 6 Anne, c. 31, §§ 6 and 7, is in force in the province of Ontario as part of the law of England introduced by the Constitutional Act 31 Geo. III, c. 31, but has no application to protect a party from legal liability as a consequence of negli-

gence. *Canada Southern R. Co. v. Phelps*, 35 *Am. & Eng. R. Cas.* 207, 14 *Can. Sup. Ct.* 132.

The court refused to charge at defendant's request "that proof had been given that the notice required by the General Railroad Act was posted in the car in which the accident to plaintiff happened, and that plaintiff was riding upon the front platform and was upon the step of the car when injured." *Held*, no error, as defendant had not pleaded the facts which would entitle it to the exemption which it claims that the act in question allows. *Weymouth v. Broadway & S. A. R. Co.*, 51 *N. Y. S. R.* 612, 22 *N. Y. Supp.* 1047, 2 *Misc.* 506; *affirmed in* 142 *N. Y.* 681, *mem.*, 37 *N. E. Rep.* 825, *mem.*

85. Unforeseen or inevitable accident.—A company is not liable for an accident which happens by reason of a latent defect in appliances used, and which could not have been discovered by any degree of skill or care. *Anthony v. Louisville & N. R. Co.*, 27 *Fed. Rep.* 724.

Where an unforeseen event concurrent in point of time with an act of negligence cooperates with the latter to produce an injury, it will not excuse the negligence. *McDermott v. Hannibal & St. J. R. Co.*, 28 *Am. & Eng. R. Cas.* 528, 87 *Mo.* 285.

A company cannot excuse itself as for inevitable accident by showing that the cars were thrown off the track by accidentally running over a man, if it also appears that the man was a drover attending to cattle on the train, and that he fell off because no proper place was provided for such attendants, and he was compelled to stand on the bumpers, and this, though the man fell off by his own carelessness, the company having no right to put him in such a position. *Goldey v. Pennsylvania R. Co.*, 30 *Pa. St.* 242.

86. Concurrent negligence of another.—If an accident occurs from two causes, both due to negligence of different persons, but together the efficient cause, then all the persons whose acts contribute to the accident are liable for an injury resulting, and the negligence of one furnishes no excuse for the negligence of the other. *Gulf, C. & S. F. R. Co. v. McWhirter*, 77 *Tex.* 356, 14 *S. W. Rep.* 26. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 *Ind.* 583, 21 *N. E. Rep.* 968. *Atkinson v. Goodrich Transp. Co.*, 60 *Wis.* 141, 18 *N. W. Rep.* 764.

If a result happens jointly from two causes, and the defendant is chargeable with

one of the causes, but not with the other, he is not liable for an injury which results, if it would have occurred without the cause for which he is liable. *Murlough v. New York C. & H. R. R. Co.*, 49 *Hun (N. Y.)* 456.—*QUOTING* *Ring v. Cohoes*, 77 *N. Y.* 83. *REVIEWING* *Cone v. Delaware, L. & W. R. Co.*, 81 *N. Y.* 206; *Searles v. Manhattan R. Co.*, 101 *N. Y.* 661.

2. Pleading.

87. Negligence must be averred.

In all common law actions the basis of which is the negligence of the defendant, negligence or its equivalent must be directly averred, or such facts must be stated that a *prima facie* presumption of negligence arises. *Pennsylvania Co. v. Marion*, 27 *Am. & Eng. R. Cas.* 132, 104 *Ind.* 239, 3 *N. E. Rep.* 874.—*DISTINGUISHED IN* *Hammond v. Schweitzer*, 112 *Ind.* 246, 11 *West Rep.* 661, 13 *N. E. Rep.* 869.

The complaint must not only charge the defendant with the negligent acts, whether of omission or commission, but must also show, with reasonable certainty, that such acts were the direct or proximate cause of the injury. *Pittsburgh, C. & St. L. R. Co. v. Conn.*, 104 *Ind.* 64, 3 *N. E. Rep.* 636.

A declaration in an action for injury sustained by plaintiff through the negligence of the defendant which does not show that the negligence contributed in some degree to the injury complained of is bad on demurrer. *McGanahan v. East St. Louis & C. R. Co.*, 72 *Ill.* 557.

A complaint to recover damages for an injury should proceed upon a definite theory, either for a wilful injury or for one caused by negligence, and it will be judged from its general scope and tenor. *Gregory v. Cleveland, C. & I. R. Co.*, 31 *Am. & Eng. R. Cas.* 440, 112 *Ind.* 385, 14 *N. E. Rep.* 228.

The question of negligence and its degree must depend generally upon the facts of the case, and if it consists of an omission to perform a duty which devolves on the person charged with negligence, it must be considered with reference to the character of business in which such person is engaged. It is not necessary to allege that certain facts pleaded constitute negligence if the conclusion of negligence may be drawn from them. *San Antonio St. R. Co. v. Cailloutte*, 79 *Tex.* 341, 15 *S. W. Rep.* 390.

A plaintiff whose demand is based upon the negligence of the defendant must sue

upon the negligence. He cannot allege an implied contract to pay damages for the negligence. *Krause v. Pennsylvania R. Co.*, 19 *Phila. (Pa.)* 436.

In an action to recover damages against a railway company for injuries resulting from its failure to construct its road as required by Tex. Rev. St. art. 4171, negligence and want of skill in its construction need not be alleged *in totidem verbis*, if the petition contain distinct averments from which the deduction would necessarily follow that such negligence or want of skill existed. *Sabine & E. T. R. Co. v. Hadnot*, 30 *Am. & Eng. R. Cas.* 197, 67 *Tex.* 503, 4 *S. W. Rep.* 138.

88. What is a sufficient allegation of negligence.—A complaint in an action for negligence which alleges facts sufficient to show negligence on the part of the defendant, and avers that there was no contributory negligence on the part of the plaintiff, is sufficient unless it affirmatively appears, notwithstanding these allegations, that there was an absence of negligence on the defendant's part, or the presence of negligence on the part of the plaintiff. *Louisville, N. A. & C. R. Co. v. Stommel*, 126 *Ind.* 35, 25 *N. E. Rep.* 863.

A petition charging negligence in a railroad company in conducting and running its train, where the negligence complained of is that of the engineer in managing it at the time of the casualty, is sufficiently specific. *Ellet v. St. Louis, K. C. & N. R. Co.*, 12 *Am. & Eng. R. Cas.* 183, 76 *Mo.* 518.—FOLLOWED IN *Ely v. St. Louis, K. C. & N. R. Co.*, 16 *Am. & Eng. R. Cas.* 342, 77 *Mo.* 34.

An allegation that the plaintiff was injured by the defendant's servants negligently propelling the car in which he was against another car with great velocity, thereby throwing down upon him a part of the freight in the said car, is a good allegation of negligence. *Clay v. Chicago & A. R. Co.*, 17 *Mo. App.* 629.

An averment that the injury complained of was caused by the negligence of "the defendant, its agents and employes," is sufficient without specifying the particular agent or employé guilty of the negligence, that being a fact in this case peculiarly within the knowledge of the defendant. *Texas & P. R. Co. v. Euston*, 2 *Tex. Civ. App.* 378, 21 *S. W. Rep.* 575.

Where the separation of a railway train was accidental, a plaintiff seeking to hold the company for injury done by the detached

cars, upon the ground that a proper lookout for persons upon the track was not kept, must aver that servants of the company were left upon the detached cars, and had time before the accident to assume a proper position for observation. *Patton v. East Tenn., V. & G. R. Co.*, 48 *Am. & Eng. R. Cas.* 581, 89 *Tenn.* 370, 15 *S. W. Rep.* 919.

89. Setting out facts constituting negligence.—Where the action is based upon negligence, it is sufficient if the complaint sets forth generally that the accident was the result of defendant's negligence, and it is not necessary to set out the particulars constituting such negligence. *Clark v. Chicago, B. & Q. R. Co.*, 4 *McCrary (U. S.)* 360, 15 *Fed. Rep.* 588. *Andrew v. Chicago & N. W. R. Co.*, 45 *Ill. App.* 269. *St. Louis & S. E. R. Co. v. Mathias*, 50 *Ind.* 65, 8 *Am. Ry. Rep.* 381. *Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 *Ind.* 150. *Louisville, N. A. & C. R. Co. v. Jones*, 28 *Am. & Eng. R. Cas.* 170, 108 *Ind.* 551, 9 *N. E. Rep.* 476. *Ohio & M. R. Co. v. Walker*, 32 *Am. & Eng. R. Cas.* 121, 113 *Ind.* 196, 15 *N. E. Rep.* 234, 12 *West Rep.* 731. *Louisville & N. R. Co. v. Wolfe*, 80 *Ky.* 82. *Otto v. St. Louis, I. M. & S. R. Co.*, 12 *Mo. App.* 168. —DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 71 *Mo.* 514; *Edens v. Hannibal & St. J. R. Co.*, 72 *Mo.* 212; *Price v. St. Louis, K. C. & N. R. Co.*, 72 *Mo.* 414.—*Elldridge v. Long Island R. Co.*, 1 *Sandf. (N. Y.)* 89. Contra, see *Devino v. Central Vt. R. Co.*, 63 *Vt.* 98, 20 *Atl. Rep.* 953.

A general allegation of negligence, without stating the acts constituting negligence, is good against a demurrer. *Gulf, C. & S. F. R. Co. v. Washington*, 49 *Fed. Rep.* 347, 4 *U. S. App.* 121, 1 *C. C. A.* 286. *Cleveland, C. C. & I. R. Co. v. Wynant*, 100 *Ind.* 160. *Hammond v. Schweitzer*, 112 *Ind.* 246, 11 *West. Rep.* 661, 13 *N. E. Rep.* 869.—DISTINGUISHING *Pennsylvania Co. v. Marion*, 104 *Ind.* 239.—*Louisville, N. A. & C. R. Co. v. Cauley*, 119 *Ind.* 142, 21 *N. E. Rep.* 546. *Ohio & M. R. Co. v. McCartney*, 121 *Ind.* 385, 23 *N. E. Rep.* 258. *Ohio & M. R. Co. v. Craycraft*, 5 *Ind. App.* 335, 37 *N. E. Rep.* 297.

But where the pleader sees fit to specify the grounds of negligence, he will be confined in his proofs to the facts thus specified. *Ravenscraft v. Missouri Pac. R. Co.*, 27 *Mo. App.* 617. *Schneider v. Missouri Pac. R. Co.*, 75 *Mo.* 295.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 71 *Mo.*

514.—REVIEWED IN Jacksonville, T. & K. W. R. Co. v. Garrison, 30 Fla. 557.—*Atchison v. Chicago, R. I. & P. R. Co.*, 80 Mo. 213.

An allegation in a pleading that the party complained against negligently committed the particular act, or negligently omitted to do a particular thing, which led to the injury for which redress is sought, is sufficient without pleading all the facts and circumstances from which negligence could be inferred. *Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. Rep. 328. *Mack v. St. Louis, K. C. & N. R. Co.*, 77 Mo. 232.—APPROVED IN *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588.—*Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.—APPLYING *Kendig v. Chicago, R. I. & P. R. Co.*, 79 Mo. 207; *Wallace v. St. Louis, I. M. & S. R. Co.*, 74 Mo. 594. CRITICISING *Hoffman v. Missouri Pac. R. Co.*, 24 Mo. App. 546, *Welch v. Hannibal & St. J. R. Co.*, 20 Mo. App. 477.

But the act which is characterized by negligence must be stated. *Ohio & M. R. Co. v. Engerer*, 4 Ind. App. 261, 30 N. E. Rep. 924. *Wills v. Cape Girardeau S. W. R. Co.*, 44 Mo. App. 51.—FOLLOWING *Bufington v. Atlantic & P. R. Co.*, 64 Mo. 246. QUALIFYING *Waldhiser v. Hannibal & St. J. R. Co.*, 71 Mo. 514; *Current v. Missouri Pac. R. Co.*, 86 Mo. 62.—*Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289, 22 Pac. Rep. 1076.—QUOTING *Meyer v. Atlantic & P. R. Co.*, 64 Mo. 542; *Field v. Chicago, R. I. & P. R. Co.*, 76 Mo. 614. REVIEWING *Waldhiser v. Hannibal & St. J. R. Co.*, 71 Mo. 514. *Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212; *Chicago, B. & Q. R. Co. v. Harwood*, 90 Ill. 425; *Thomas v. Georgia R. & B. Co.*, 40 Ga. 231; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471.—DISTINGUISHED IN *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376.—*Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.—APPLIED IN *Gulf, C. & S. F. R. Co. v. Wilson*, 79 Tex. 371. REVIEWED IN *Parker v. Providence & S. Steamboat Co.*, 17 R. I. 376.

In a special verdict, however, the particular facts proved under such a pleading should be set out. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. Rep. 443.

A declaration which alleges that plaintiff was on a railroad track by consent of the company and was injured by the running of

cars unusually loaded, with timbers projecting seven feet beyond the track, and that he was injured while standing that distance from the track, at night, supposing that he was at a safe distance, states facts sufficient to entitle plaintiff, when established by evidence, to have the case submitted to the jury, and it is error to dismiss the complaint on demurrer. *Boston v. Georgia R. Co.*, 60 Ga. 333.—DISTINGUISHED IN *Central R. Co. v. Brinson*, 19 Am. & Eng. R. Cas. 42, 70 Ga. 207. QUOTED IN *Western & A. R. Co. v. Meigs*, 74 Ga. 857.

A petition in an action against a railroad company for personal injury growing out of the alleged negligence of the servants of the company must show to which servant or servants of the company negligence is imputed, and fully and definitely state what acts or omissions of such servants constitute the negligence complained of. *Atchison, T. & S. F. R. Co. v. O'Neill*, 49 Kan. 367, 30 Pac. Rep. 470.

A declaration for negligent injury must aver the fact and the manner of negligence, and plaintiff should be confined to what is set forth in his declaration. *Marquette, H. & O. R. Co. v. Marcott*, 41 Mich. 433.—DISTINGUISHED IN *McDonald v. Chicago & N. W. R. Co.*, 51 Mich. 628.

In actions on the case for negligence the plaintiff is bound to set out in his declaration the combination of material facts relied on as a cause of action, and to follow up the allegation by evidence pointing out and proving the same combination of circumstances, in order to apprise the parties and the court of the precise subject of the controversy. *Denman v. Johnston*, 85 Mich. 387, 48 N. W. Rep. 565.

90. Characterizing the degree of negligence.—Under a general charge of negligence, evidence may be given of any and every degree of negligence. Negligence must be charged in the complaint, but it is the province of the evidence to show in what it consisted. *Pennsylvania Co. v. Krick*, 47 Ind. 368. *Shumacher v. St. Louis & S. F. R. Co.*, 39 Fed. Rep. 174, 17 Wash. L. Rep. 550. *Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. Rep. 706.

A plaintiff who has simply averred negligence where there is proof of contributory negligence may prove gross negligence in defendant and recover under such declaration. *Rockford, R. I. & St. L. R. Co. v. Phillips*, 66 Ill. 548. *Louisville & N. R.*

Co. v. Mitchell, 87 Ky. 327, 8 S. W. Rep. 706.

Where a complaint charges negligence on the part of the defendant and due care on the part of the plaintiff, the gravamen of the action will be regarded as simply negligence, though it be charged that the injury was "wanton, wilful," and "with the intention to injure plaintiff." *Cleveland, C., C. & I. R. Co. v. Asbury*, 120 Ind. 289, 22 N. E. Rep. 140.

The allegation of wilful negligence in an action against a railroad company includes all the inferior grades, and the jury must determine from the proof whether recovery is to be had, if at all, under the first or the third section of Ky. Act of March 10, 1854, and then assess the damages according to the provisions of the act itself. *Louisville, C. & L. R. Co. v. Case*, 9 Bush (Ky.) 728.

An averment in a complaint that the plaintiff was injured through defendant's "gross negligence" will not limit plaintiff's right of recovery (if otherwise entitled) to an injury inflicted by the wilful or intentional act of another, but he may recover for any lesser degree of negligence. *Hays v. Gainesville St. R. Co.*, 34 Am. & Eng. R. Cas. 97, 70 Tex. 602, 8 S. W. Rep. 491.

3. Evidence—Presumptions—Burden of Proof.

91. When evidence is admissible.*

—Proof that an act charged to have been negligently done was done in an unusual manner is proper, as going to show that it was not necessary to do it as it was done. *Steffenson v. Chicago, M. & St. P. R. Co.*, 51 Minn. 531, 53 N. W. Rep. 800.

Where a person is charged with negligently doing or omitting an act, and the evidence is conflicting, it is competent to show that he had performed or omitted the same act in the same way before, as tending to show that he did or omitted the act at the time in question. *State v. Manchester & L. R. Co.*, 52 N. H. 528.—NOT FOLLOWED IN Savannah, F. & W. R. Co. v. Flannagan, 39 Am. & Eng. R. Cas. 661, 82 Ga. 579, 9 S. E. Rep. 471.

Where cars leave a track through alleged defects therein, proof that the track was in bad condition at other places in the vicinity of the accident is admissible for the pur-

* Admissibility of evidence of absence of flagman from station as tending to prove negligence, see note, 17 AM. REP. 363.

pose of showing negligence on the part of the company. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493; reversed in 45 N. Y. 575.

Where a passenger is injured through an alleged defect in a car, evidence of a defect in the car prior to the accident is competent to show negligence on the part of the company in not taking effectual steps to remedy it; and evidence of various previous accidents from the same cause is competent as illustrating the character of the defect. *Chase v. Jamestown St. R. Co.*, 38 N. Y. S. R. 954, 60 Hun 582, mem., 15 N. Y. Supp. 35; affirmed in 133 N. Y. 619, mem., 30 N. E. Rep. 1150, 44 N. Y. S. R. 931, mem.

In a suit growing out of the alleged negligent management of a train, a brakeman of defendant was asked: "Did you omit to do anything you could have done to prevent this accident?" Held, that it was competent to prove all the witness had done, but it was for the jury to decide whether by acts done or duties omitted he had been guilty of negligence. *North Pa. R. Co. v. Kirk*, 1 Am. & Eng. R. Cas. 45, 90 Pa. St. 15.

92. What evidence is inadmissible.

—It is not error to overrule an offer by defendants to prove what instructions were given by them to their servants relative to the care of a stove and other contents of an oil house, where the ground of plaintiff's case is the negligence of the servants. *Read v. Pennsylvania R. Co.*, 44 N. J. L. 280.

The claim of negligence on the part of defendant, the H., W. S. & P. F. R. Co., was an insufficient inspection of the running gear of its car, a brake rod of which broke because of a defect in the iron, and so prevented the stopping of the car. After a witness on its part had testified as to the mode of inspection, a witness called by the other defendant testified that this mode of examination would not discover a latent defect. Upon cross-examination by plaintiff the witness was permitted to testify, under objection and exception on the part of the S. A. R. Co., that such mode of examination was not a proper one. Held, error. *Schneider v. Second Ave. R. Co.*, 133 N. Y. 583, 30 N. E. Rep. 752, 44 N. Y. S. R. 680; reversing in part 27 J. & S. 536, 39 N. Y. S. R. 370, 15 N. Y. Supp. 556.

93. Evidence must correspond with negligence alleged.—In actions for negligence the evidence should corre-

spond to the specific neglect charged. *Harty v. St. Louis, I. M. & S. R. Co.*, 95 Mo. 368, 14 West. Rep. 760, 8 S. W. Rep. 562.

Where the negligence in proof at the trial is not the negligence alleged in the petition as a ground of recovery, it is inadmissible. *Conway v. Hannibal & St. J. R. Co.*, 24 Mo. App. 235.

94. Plaintiff need not prove all his averments.—Where the action is based on negligence, the plaintiff is not required to establish by proof all the material averments in the several counts of the declaration. He may recover if he proves the material averments of one count only. *Peoria, D. & E. R. Co. v. Johns*, 43 Ill. App. 83.

Immaterial acts of negligence, though alleged, need not be proved. *Thayer v. Flint & P. M. R. Co.*, 93 Mich. 150, 53 N. W. Rep. 216.—**DISTINGUISHING Wormsdorf v. Detroit City R. Co., 75 Mich. 472.**

Where a complaint for negligence states two or more grounds, in only one of which it charges knowledge on defendant's part, it is not necessary to prove knowledge in order to recover. *Louisville & N. R. Co. v. Coulton*, 86 Ala. 129, 5 So. Rep. 458.

95. Evidence of custom to show negligence or absence of negligence.*—Proof of a general custom as to the running of extra trains is competent, as affecting the question whether it is negligence so to operate them. *Larson v. St. Paul, M. & M. R. Co.*, 44 Am. & Eng. R. Cas. 529, 43 Minn. 423, 45 N. W. Rep. 722.

96. Evidence in defense, generally.—To rebut the charge of negligence which may be put in issue by the general denial, or by specially pleading matters negating negligence, it is competent to show that the act complained of was of inevitable necessity, act of God, etc. *Galveston, H. & S. A. R. Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. Rep. 955.

97. Sufficiency of evidence, generally.—Negligence must be affirmatively proved; but, like other facts it may be shown by irresistible inference from circumstances. *Alpern v. Churchill*, 53 Mich. 607, 19 N. W. Rep. 549. *Jacksonville, T. & K. W. R. Co. v. Peninsular L., T. & M. Co.*, 49 Am. & Eng. R. Cas. 603, 27 Fla. 1, 9 So. Rep. 661. *Garrett v. Chicago & N. W. R. Co.*, 36 Iowa 121. *Rine v. Chicago & A. R. Co.*,

41 Am. & Eng. R. Cas. 555, 100 Mo. 228, 12 S. W. Rep. 640. *Squire v. Central Park, N. & E. R. R. Co.*, 4 J. & S. (N. Y.) 436.

Negligence must be determined by what was known before and at the time of the accident, and not by subsequent facts; in other words, it must be decided upon the facts as they existed at the time of the injury. *Schmitt v. Dry Dock, E. B. & B. R. Co.*, 2 City Cl. (N. Y.) 359.

A jury cannot arbitrarily infer negligence, but the evidence must affirmatively establish circumstances from which the inference fairly arises that the accident resulted from the want of some precaution which the defendant ought to have taken. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West Rep. 877, 14 N. E. Rep. 391.

Evidence which is insufficient to sustain a finding of the lower degree of culpability is a *fortiori* insufficient to sustain a finding of the higher. *Magnin v. Dinsmore*, 8 J. & S. (N. Y.) 512.

Proof that an injury was unintentional will not establish the fact that it was not negligent. *Joyner v. South Carolina R. Co.*, 29 Am. & Eng. R. Cas. 258, 26 So. Car. 49, 1 S. E. Rep. 52.

In a suit against a railroad company for damages for an injury to the person from negligence, to entitle the plaintiff to recover, it is not enough that the evidence shows that the injured person did only what a prudent person would have done under the same circumstances, but it must likewise show that the defendant committed some fault or was guilty of some negligence which contributed to the injury. *Gulf, C. & S. F. R. Co. v. Wallen*, 26 Am. & Eng. R. Cas. 219, 65 Tex. 568.

In order to recover for negligence it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but it must be shown that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect. *Williams v. Chicago & A. R. Co.*, 135 Ill. 491, 26 N. E. Rep. 661; *affirming* 32 Ill. App. 339.

Evidence showing that the cross-ties on the railroad at and near the scene of the accident were in a rotten and unsafe condition establishes simple negligence only, when it is not also shown that the defendant had knowledge of their defective and dangerous condition; and the fact that the de-

* Evidence of custom inadmissible as bearing on negligence, see note, 23 AM. & ENG. R. CAS. 346.

facts had existed for two weeks does not import knowledge as matter of law, though knowledge may be inferable from it by the jury. *Richmond & D. R. Co. v. Vance*, 93 Ala. 144, 9 So. Rep. 574. — FOLLOWING Georgia Pac. R. Co. v. Lee, 92 Ala. 262. QUALIFYING Alabama G. S. R. Co. v. Hill, 90 Ala. 71.

Where, in an action for personal injuries caused by the negligence of a railroad, the physician who examined plaintiff after the accident testified that he found evidence of compression of the chest and pneumonia arising from the compression which involved both lungs, and where it appears that the malady from which plaintiff suffered both before and at the trial was superinduced by the pneumonia arising from the injuries, such evidence was sufficient to authorize the finding of the jury that plaintiff's malady was caused by the injuries received in the accident. *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. Rep. 233.

Plaintiff was injured while riding on a switchback railway, operated by the owner at defendant's pleasure resort, by the derailling of the car, caused, as she claims, by a chip having gotten upon the rail through the negligence of defendant's carpenters, who were working near the place of the accident. A witness for plaintiff testified to seeing one chip by the side of the track at the place of the accident with the shape of the car wheel upon it, and other witnesses testified to seeing chips alongside of and on the track. There was uncontradicted testimony that an hour before the accident a son of the owner of the switchback was at work with an adz trimming off the center in between the tracks at the very point of the accident. *Held*, that the jury were not warranted in finding that the accident was occasioned by reason of the carelessness or negligence of defendant's servants in allowing the track to be obstructed. *Knottnerus v. North Park St. R. Co.*, 93 Mich. 348, 53 N. W. Rep. 529. — DISTINGUISHING *Conrad v. Claude*, 93 Ind. 476.

The plaintiff was injured while riding upon a hand-car which was running unusually fast, and a temporary foot rest improvised for the occasion gave way, causing the plaintiff to fall in front of the car, from which he received injury. *Held*, that the evidence was sufficient to justify a finding that the accident was caused from the failure of the company's servants to use

ordinary care. *International & G. N. R. Co. v. Prince*, 44 Am. & Eng. R. Cas. 294, 77 Tex. 560, 14 S. W. Rep. 171.

98. Preponderance of evidence.—In order to recover a plaintiff must establish by a fair preponderance of evidence the negligence of the defendant, and that the injury resulted from that negligence, or, as the law puts it, that the negligence was the proximate cause of the injury. *Harris v. Union Pac. R. Co.*, 4 McCrary (U. S.) 454, 13 Fed. Rep. 591. *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. Rep. 658. — REVIEWED IN *Hartwig v. Chicago & N. W. R. Co.*, 1 Am. & Eng. R. Cas. 65, 49 Wis. 358.

Where a complaint sets out certain acts of negligence, as that the train approached without signals at a place where there was a heavy growth of weeds and bushes which shut off the view, and that the train was otherwise negligently operated, plaintiff must prove such allegations by a preponderance of evidence in order to recover. *Fulton County N. G. R. Co. v. Butler*, 48 Ill. App. 301.

99. When negligence will be presumed.*—The happening of a railroad accident is *prima facie* proof of negligence. *Pattee v. Chicago, M. & St. P. R. Co.*, 34 Am. & Eng. R. Cas. 399, 5 Dak. 267, 38 N. W. Rep. 435. — QUOTING *Spaulding v. Chicago & N. W. R. Co.*, 33 Wis. 582.

But this rule only obtains where the circumstances attending the accident do not themselves rebut the presumption of negligence. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.

* When occurrence of accident raises presumption of negligence, see notes, 44 AM. & ENG. R. CAS. 351; 30 *Id.* 621; 16 *Id.* 314; 6 *Id.* 418; 75 AM. DEC. 267; 83 *Id.* 589; 60 AM. REP. 553; 20 AM. ST. REP. 490; 30 *Id.* 736.

Presumption of negligence where injuries result from defects in train, see note, 15 L. R. A. 35.

Presumption of negligence where injury is shown, but where there is no evidence as to who was at fault, see note, 6 AM. ST. REP. 792.

Proof of injury to passenger, when *prima facie* evidence of negligence, see notes, 43 AM. DEC. 363; 62 *Id.* 680; 41 AM. REP. 73; 15 L. R. A. 37. See also 47 AM. & ENG. R. CAS. 492, *abstr.*; 52 *Id.* 249, *abstr.*

Killing of stock by train, when raises a presumption of negligence, see notes, 1 L. R. A. 448; 15 *Id.* 39.

Presumption of negligence in action for the destruction of property by fire, see notes, 45 AM. & ENG. R. CAS. 563; 15 L. R. A. 40. See also 43 AM. & ENG. R. CAS. 27, *abstr.*; 35 *Id.* 243, *abstr.*; 54 *Id.* 535, *abstr.*

Where one is injured by the running of a car and engine of a railroad company, the law presumes that such injury was the result of negligence on the part of the company, and to relieve itself of such presumption it must show that it used all ordinary care and diligence to prevent the injury. It is not enough for it to insist that it does not know how the accident occurred, and that it is impossible to find out. *Central R. Co. v. Sanders*, 27 Am. & Eng. R. Cas. 300, 73 Ga. 513. *Columbus & W. R. Co. v. Kennedy*, 31 Am. & Eng. R. Cas. 92, 78 Ga. 646, 3 S. E. Rep. 267.—EXPLAINED IN *Richmond & D. R. Co. v. White*, 88 Ga. 805.

Whenever property is injured by the running of locomotives, cars, or other machinery of a railroad company, a presumption of negligence arises against the company, but this presumption may be rebutted by showing that at the time the injury occurred its agents were exercising all ordinary and reasonable care and diligence. *Georgia R. & B. Co. v. Wilhoit*, 78 Ga. 714, 3 S. E. Rep. 698.

The running of a train off the track is *prima facie* evidence, though slight, of negligence on the part of the railroad or its employes. *Yonge v. Kinney*, 28 Ga. 111.

Proof that a locomotive engineer suddenly let off a jet of steam, just as defendant drove his horse alongside of the engine, on a city street, is *prima facie* evidence of negligence. *Stamm v. Southern R. Co.*, 1 Abb. N. Cas. (N. Y.) 438.

As a general thing, where the action is for injuries committed by immediate force, it is enough to prove the act of the defendant and a resulting injury, which constitute *prima facie* evidence that the act was wilful or negligent. *Galpin v. Chicago & N. W. R. Co.*, 19 Wis. 604.—FOLLOWING *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 334.

The failure of a company to introduce the testimony of its employes who were on the train at the time of the accident raises a presumption of negligence against the company. *Day v. New Orleans Pac. R. Co.*, 35 La. Ann. 694.

100. When no presumption of negligence arises.*—Actual negligence must be proved; it will not be implied nor

presumed. *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537. *Brown v. Congress & B. St. R. Co.*, 8 Am. & Eng. R. Cas. 383, 49 Mich. 153, 13 N. W. Rep. 494.—APPROVED IN *Kehdrick v. Towle*, 60 Mich. 363, 1 Am. St. Rep. 526, 27 N. W. Rep. 567.—*Hewitt v. Flint & P. M. R. Co.*, 31 Am. & Eng. R. Cas. 249, 67 Mich. 61, 11 West Rep. 148, 34 N. W. Rep. 659. *Paine v. Grand Trunk R. Co.*, 58 N. H. 611. *Knox v. New York, L. E. & W. R. Co.*, 52 N. Y. S. R. 730, 69 Hun 93, 23 N. Y. Supp. 198.

Negligence cannot be presumed in an action for personal injury if the company does nothing outside of the usual course of its business, unless that course of business is itself improper, or special circumstances require particular caution. *Mitchell v. Chicago & G. T. R. Co.*, 12 Am. & Eng. R. Cas. 163, 51 Mich. 236, 16 N. W. Rep. 388, 47 Am. Rep. 566.—DISTINGUISHED IN *Van Ostran v. New York C. & H. R. R. Co.*, 35 Hun (N. Y.) 590.—*Grand Rapids & I. R. Co. v. Judson*, 34 Mich. 506. *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462.

Negligence will not be presumed from the mere fact of accident, which is as consistent with the presumption that it was unavoidable as it is with negligence, and there should be some evidence that it could have been avoided with proper diligence and precaution. *Stern v. Michigan C. R. Co.*, 76 Mich. 591, 43 N. W. Rep. 587. *Werbowsky v. Ft. Wayne & E. R. Co.*, 86 Mich. 236, 48 N. W. Rep. 1097. *Toomey v. Eureka I. & S. Works*, 89 Mich. 249, 50 N. W. Rep. 850. *Yarnell v. Kansas City, Ft. S. & M. R. Co.*, 113 Mo. 570, 21 S. W. Rep. 1. *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. Rep. 190, 23 Atl. Rep. 167. *Barrett v. Smith*, 27 J. & S. 250, 14 N. Y. Supp. 307, 38 N. Y. S. R. 526; reversed in 128 N. Y. 607, 28 N. E. Rep. 23; see also 135 N. Y. 659, 32 N. E. Rep. 648.

Where an event takes place the real cause of which cannot be traced, or is at least not apparent, it ordinarily belongs to that class of occurrences designated as purely accidental, and, there being no presumption of negligence in such cases, the party who asserts negligence must show enough to exclude the case from the class mentioned. *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West Rep. 877, 14 N. E. Rep. 391.

Railroad trains are liable to be detained by various causes without any fault of the

* When mere happening of accident does not establish a presumption of negligence, see note, 2 L. R. A. 820

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company, and negligence cannot be imputed to the company from the fact that a train may be behind the usual time. *State v. Philadelphia, W. & B. R. Co.*, 47 Md. 76, 18 Am. Ky. Rep. 253.

The provision of Miss. Code of 1880, § 1059, that "in all actions against railroad companies for damage done to persons or property proof of injury inflicted by the running of locomotives or cars shall be *prima facie* evidence of the want of reasonable skill and care" is limited to suits for direct injuries to persons or property, and does not apply to actions arising *ex contractu* by persons who are neither shippers nor passengers. *Chicago, St. L. & N. O. R. Co. v. Trotter*, 60 Miss. 442.

Proof of injury inflicted by the running of trains is *prima facie* evidence of the want of skill and care, but where the circumstances attending the injury are shown by the evidence, the case must be determined upon the proven facts, not upon any presumption of negligence. *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3, 5 So. Rep. 629.

Where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense. If, however, the plaintiff's case shows him to be possessed of material but undisclosed evidence, the mere proof of the occurrence of an accident raises no presumption of negligence, to rebut which the defendant can be called upon to offer testimony. *Bahr v. Lombard*, 53 N. J. L. 233, 21 Atl. Rep. 190, 23 Atl. Rep. 167.

Where an injury happens at a highway crossing, the jury has a right to consider a statute requiring railroad companies to ring a bell or blow a whistle at such places in determining whether the company operated its train with due care; but the mere fact that the statute was not complied with does not necessarily imply negligence. *Van Ruden v. New York, N. H. & H. R. Co.*, 56 Hun 96, 30 N. Y. S. R. 300, 8 N. Y. Supp. 914.

101. How the presumption may be rebutted.—Where an injury is committed by a railroad, the presumption is always against the road, yet it may rebut that presumption by showing that its agents have exercised all ordinary and reasonable

care and diligence to avoid the injury; or that the damage was caused by the plaintiff's own negligence; or that the plaintiff, by ordinary care, could have avoided the injury to himself, although caused by the road's negligence. *Central R. Co. v. Brinson*, 8 Am. & Eng. R. Cas. 343, 64 Ga. 475. —DISTINGUISHED IN *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.—*Ellis v. Portsmouth & R. R. Co.*, 2 Ired. (N. Car.) 138. —DISTINGUISHED IN *Scott v. Wilmington & R. R. Co.*, 4 Jones (N. Car.) 432. FOLLOWED IN *Horne v. Memphis & O. R. Co.*, 1 Coldw. (Tenn.) 72. NOT FOLLOWED IN *Gandy v. Chicago & N. W. R. Co.*, 30 Iowa 420. QUOTED IN *Hull v. Sacramento Valley R. Co.*, 14 Cal. 387; *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321. REVIEWED IN *Smith v. Hannibal & St. J. R. Co.*, 37 Mo. 287; *Herring v. Wilmington & R. R. Co.*, 10 Ired. 402; *Danner v. South Carolina R. Co.*, 4 Rich. (So. Car.) 329.—*Herring v. Wilmington & R. R. Co.*, 10 Ired. (N. Car.) 402.—EXPLAINED IN *Aycock v. Raleigh & A. A. L. R. Co.*, 89 N. Car. 321. FOLLOWED IN *Scott v. Wilmington & R. R. Co.*, 4 Jones 432. OVERRULED IN *Deans v. Wilmington & W. R. Co.*, 107 N. Car. 686. QUOTED IN *Hull v. Sacramento Valley R. Co.*, 14 Cal. 387. REVIEWED IN *Zemp v. Wilmington & M. R. Co.*, 9 Rich. 84.

Proof of the bursting of a boiler raises a presumption of negligence, but this presumption may be overcome by proof of care in applying every test recognized as necessary by experts, and it is not necessary to show that every test known to experts was applied. *Robinson v. New York C. & H. R. R. Co.*, 20 Blatchf. (U. S.) 338, 9 Fed. Rep. 877.

If a car is overturned and a passenger thereby injured or killed, a presumption arises that the casualty was the result of negligence, but this presumption may be rebutted by the company by showing that the accident was such that human prudence and foresight could not have guarded against it. *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 1. See also *Denver, S. P. & P. R. Co. v. Woodward*, 4 Colo. 162.

To rebut a presumption of negligence arising against a company upon proof of an injury to a passenger, it is not necessary that the company explain how the accident happened. It is sufficient for it to show that it employed the utmost skill and prudence practicable, and that the accident

could not reasonably have been discovered and guarded against. *Louisville, N. A. & C. R. Co. v. Jones*, 28 Am. & Eng. R. Cas. 170, 108 Ind. 551, 9 N. E. Rep. 476.

Under the Mississippi statute proof of an injury by a railroad is *prima facie* evidence of a want of skill or care, and entitles the plaintiff to a verdict; but where both sides introduce evidence, then the rule prescribed by the statute does not apply, and the case is to be decided upon the evidence. *Farve v. Louisville & N. R. Co.*, 42 Fed. Rep. 441.

Under Ga. Code, § 3033, railroad companies are made liable for any damage done to persons or property by the running of locomotives or cars, and the presumption of negligence is against the company; and this presumption is not rebutted by proof that an engineer, through a spirit of revenge, blew a whistle on purpose to frighten plaintiff's horse. *Georgia R. Co. v. Newsome*, 60 Ga. 492.

102. Burden of proof, when on plaintiff.—He who seeks a recovery for an injury caused by the alleged negligence of the defendant must prove not only that he has suffered loss by the defendant's act or omission, but also that the act or omission was a violation of duty required of him, *Hot Springs R. Co. v. Newman*, 36 Ark. 607. *Behrens v. Kansas Pac. R. Co.*, 8 Am. & Eng. R. Cas. 184, 5 Colo. 400. *Case v. Chicago, R. I. & P. R. Co.*, 69 Iowa 449, 29 N. W. Rep. 596; affirming 64 Iowa 762. *State v. Philadelphia, W. & B. R. Co.*, 15 Am. & Eng. R. Cas. 481, 60 Md. 555. *Witting v. St. Louis & S. F. R. Co.*, 45 Am. & Eng. R. Cas. 369, 101 Mo. 631, 14 S. W. Rep. 743. *O'Malley v. Missouri Pac. R. Co.*, 53 Am. & Eng. R. Cas. 280, 113 Mo. 319, 20 S. W. Rep. 1079. *Leduke v. St. Louis & I. M. R. Co.*, 4 Mo. App. 485. *Myers v. Snyder, Bright, N. P. (Pa.)* 489. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241. — QUOTING *Dun v. Seaboard & R. R. Co.*, 78 Va. 645. — QUOTED AND FOLLOWED IN *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188. — *Sheeler v. Chesapeake & O. R. Co.*, 81 Va. 188. — QUOTING AND FOLLOWING *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 248. — *Richmond & D. R. Co. v. Moffett*, 88 Va. 785, 14 S. E. Rep. 370. *Steffen v. Chicago & N. W. R. Co.*, 46 Wis. 259, 21 Am. Ry. Rep. 385.

And for this purpose he must show the circumstances under which it occurred. If from the circumstances it appears that the

fault was mutual, or that contributory negligence is fairly imputable to him, he has by showing them disproved his right to recover. *Denver, S. P. & P. R. Co. v. Pickard*, 18 Am. & Eng. R. Cas. 284, 8 Colo. 163, 6 Pac. Rep. 149.

The *onus probandi* with respect to something more than simple negligence is upon the plaintiff, and there should therefore be made apparent something more than a mere conjectural probability of the commission of the wrong imputed: there must be some element of moral certainty and exclusion of reasonable doubt. *Magnin v. Dinmore*, 8 J. & S. (N. Y.) 512. — FOLLOWING *Payne v. Forty-Second St. R. Co.*, 8 J. & S. 13.

If the evidence shows that the injury may have resulted from one of two causes, only one of which was due to defendant's negligence, and the inference that the injury resulted from the one cause is no stronger than that it resulted from the other, the plaintiff has failed to make out his case, and it is not competent for the court to leave the question to the jury. *Hughes v. Cincinnati Southern R. Co.*, 91 Ky. 526, 16 S. W. Rep. 275. — QUOTING *Cotton v. Wood*, 8 C. B. N. S. 568; *Hayes v. Ferry R. Co.*, 97 N. Y. 259.

Where the evidence leaves the cause of an injury unproved, it cannot be attributed to defendant's negligence or fault. *Sauer v. Union Oil Co.*, 43 La. Ann. 699, 9 So. Rep. 566.

The burden of proof is upon the plaintiff to show that he was exercising ordinary care and diligence at the time of the accident, and he is required to prove that fact by a preponderance of the evidence. *North Chicago St. R. Co. v. Louis*, 138 Ill. 9, 27 N. E. Rep. 451; reversing 35 Ill. App. 477.

The burden is upon plaintiff to show not only that he was in the exercise of due care, but that defendant was guilty of a want of care. *Chicago City R. Co. v. Lewis*, 5 Ill. App. 242.

Where the charge of negligence is a general one, the particular act of negligence leading to the injury is a matter of proof. *Allender v. Chicago, R. I. & P. R. Co.*, 37 Iowa 264, 8 Am. Ry. Rep. 115.

It is not incumbent on the plaintiff after proving an accident which implies negligence to go further and to show what the particular negligence was when from the circumstances it is not in his power to do

80. *Gulf, C. & S. F. R. Co. v. Smith*, 74 Tex. 276, 11 S. W. Rep. 1104.

Where it does not appear from the pleadings and evidence that the car by which plaintiff was injured was in use by defendant, and where it is not shown that the car was running on defendant's railway, and where the connection between defendant and those in charge of the car is not shown, plaintiff cannot recover. *Edmunds v. St. Louis R. Co.*, 3 Mo. App. 602.

Where a passenger sues for a personal injury, it is not always enough to prove the injury alone, but it devolves upon him to show negligence on the part of the company, unless the injury results from a cause which ordinarily exists only by reason of negligence. So where a passenger attempts to enter a train at night which is standing still, and is injured by walking off the car platform by reason, as alleged, of it not being sufficiently lighted, proof of these facts alone is not sufficient, as the court cannot say that such accidents are ordinarily caused only by negligence. *Chicago, St. L. & N. O. R. Co. v. Trotter*, 60 Miss. 442.

103. Burden of proof, when on defendant.—When plaintiff has shown injury to himself without fault on his part, it is incumbent on defendant to show that the injury did not result from the want of ordinary and reasonable care and diligence on the part of its servants and agents. *Central R. Co. v. DeBray*, 71 Ga. 406.

After proof of an accident and a resulting injury the burden of proof is upon the defendant, and to relieve it from liability it is incumbent upon the company to show that the accident happened from causes over which it had no control. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

The court, among other pertinent instructions, told the jury that if the plaintiff's "injury was occasioned by an act which, with proper care, or by machinery which, with proper use and care, would not ordinarily produce damage," then the burden was on the defendant to prove that it was not chargeable with negligence. *Held*, that this was clearly sufficient and in harmony with numerous decisions of this court. *Grant v. Raleigh & G. R. Co.*, 108 N. Car. 462, 13 S. E. Rep. 209.

Under Tenn. Code, § 1167, where a company is sued for an accident on its road, the burden is on the company to show that the precautions required by the statute have

been observed; and the inquiry is not whether the accident was produced through a failure to observe such precautions, but whether the company was observing the precautions at the time of the accident. *Smith v. Nashville & C. R. Co.*, 6 Coldw. (Tenn.) 589.—DISAPPROVED IN *Louisville & N. R. Co. v. Conner*, 2 Baxt. (Tenn.) 382.

When a party is confessedly guilty of legal negligence, or when it is so proved by the evidence, the burden devolves upon him to bring himself within some recognized exception to the legal presumption. *Carrico v. West Virginia C. & P. R. Co.*, 52 Am. & Eng. R. Cas. 393, 35 W. Va. 389, 14 S. E. Rep. 12.

The burden is first on the plaintiff to prove the defendant's negligence, and, the evidence of this being offered, the burden is then on the defendant to prove the contributory negligence of the plaintiff. *Frech v. Philadelphia, W. & B. R. Co.*, 39 Md. 574, 10 Am. Ry. Rep. 474. *State v. Baltimore & P. R. Co.*, 15 Am. & Eng. R. Cas. 409, 58 Md. 482. *Thompson v. North Mo. R. Co.*, 51 Mo. 190, 3 Am. Ry. Rep. 492.—APPROVED IN *Crane v. Missouri Pac. R. Co.*, 25 Am. & Eng. R. Cas. 440, 87 Mo. 588, Gram v. Northern Pac. R. Co., 1 N. Dak. 252. FOLLOWED IN *Loyd v. Hannibal & St. J. R. Co.*, 53 Mo. 506. *Petty v. Hannibal & St. J. R. Co.*, 88 Mo. 306.—*Stepp v. Chicago, R. I. & P. R. Co.*, 85 Mo. 229. *Murray v. Missouri Pac. R. Co.*, 101 Mo. 236, 13 S. W. Rep. 817. *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 18 S. W. Rep. 1103.

4. Instructions.

104. Duty of the court as to instructions.—The instructions in an action for negligence should confine the jury to the negligence alleged in the petition. *Dahlstrom v. St. Louis, I. M. & S. R. Co.*, 35 Am. & Eng. R. Cas. 387, 96 Mo. 99, 8 S. W. Rep. 777, 15 West. Rep. 85. *Schlereth v. Missouri Pac. R. Co.*, 96 Mo. 509, 10 S. W. Rep. 66.

The evidence on the part of the plaintiff must be directed to the proof of the facts alleged, and the instructions of the court must be confined to the allegations and proofs. It is the law arising upon those allegations and upon the evidence offered to sustain them which the court is to give to the jury. It is the facts thus ascertained and the law applicable to them that will authorize a verdict. *Woodward v.*

Oregon R. & N. Co., 18 *Oreg.* 289, 22 *Pac. Rep.* 1076.

Where the declaration sets forth several particulars in respect to which it alleges negligence, the court in charging the jury may confine its instructions to those particulars on which the plaintiff insists at the trial, and upon which, according to the evidence, the merits of the case depend, and may treat the others as not involved in the controversy. *Crawford v. Georgia Pac. R. Co.*, 86 *Ga.* 5, 12 *S. E. Rep.* 176.

Where the evidence is conflicting, and the negligence charged, if proved at all, is a fact strongly disputed by the proof on behalf of defendant, instructions should not only state the law accurately, but should also be applicable to the evidence. *Peoria, D. & E. R. Co. v. Wagner*, 18 *Ill. App.* 598.

It is not the province of the judge to ask the jury to say whether this or that omission in itself constituted negligence, but to instruct them to determine from all the evidence, and under the circumstances disclosed, whether defendant has been negligent. *Morsemann v. Manhattan R. Co.*, 32 *N. Y. S. R.* 61, 10 *N. Y. Supp.* 105.

It is error in charging the jury on the question of negligence not to define what negligence would and what would not render the company liable. *Pittsburgh, Ft. W. & C. R. Co. v. Evans*, 53 *Pa. St.* 250.—QUOTED IN *Stone v. Oregon City Mfg. Co.*, 4 *Oreg.* 52.

It is not proper for a trial judge in charging a jury to attempt to define duties, neglect of which would be negligence, in the absence of a statutory definition of duties which, when disregarded, are negligence as a matter of law. The judge should inform the jury as to the degree of care or skill which the law demands of the party and what duty it devolves on him, and the province of the jury is to find from the facts in evidence whether that duty has been done. *Missouri Pac. R. Co. v. Lee*, 35 *Am. & Eng. R. Cas.* 364, 70 *Tex.* 496, 7 *S. W. Rep.* 857.—FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Anderson*, 42 *Am. & Eng. R. Cas.* 160, 76 *Tex.* 244, 13 *S. W. Rep.* 196.

In an action for wilful or gross negligence in which the court directs only a special verdict, the failure of the court to instruct the jury as to what is ordinary and what is wilful or gross neglect is no error, because when all the facts are found by the jury this is a question of law properly

reserved by the court under section 317 of the Code. *Witty v. Chesapeake, O. & S. W. R. Co.*, 83 *Ky.* 21.

105. What instructions are proper.—(1) *General rules.*—In an action to recover for injuries received by reason of the negligence of defendant, in a case where the latter should exercise the highest degree of care, the jury may properly be instructed that defendant should have exercised extraordinary care, as that does not differ from the phrase greatest care—utmost care, highest degree of care. *Toledo, W. & W. R. Co. v. Baddeley*, 54 *Ill.* 19.

It is no objection to an instruction that it fails to define what might or might not constitute negligence under certain claimed theories of proof, where no fundamental principle or indispensable condition to a recovery is omitted. Neither is it error in such an instruction to omit matters merely suppletory in their character which might properly be presented in a separate instruction. *Peoria & P. U. R. Co. v. Clayberg*, 15 *Am. & Eng. R. Cas.* 356, 107 *Ill.* 644.

Where an instruction merely lays down the general principles relating to the care that railroad employes must exercise to avoid injuries to others, it is not error to fail also to state the amount of care that the plaintiff must exercise. *Chicago & A. R. Co. v. Woolbridge*, 32 *Ill. App.* 237.

Under Miss. Code, § 1059, proof of an injury by the operation of a locomotive or cars raises a presumption of negligence; but where all of the facts attending the injury are in evidence, it is proper to instruct the jury that they are to decide the question of negligence from the evidence. *Vicksburg & M. R. Co. v. Phillips*, 64 *Miss.* 693, 2 *So. Rep.* 537.

Where there is no evidence of negligence, it is not error for the court to instruct the jury to that effect. *Dunn v. Cass Ave. & F. G. R. Co.*, 98 *Mo.* 652, 11 *S. W. Rep.* 1009.—DISTINGUISHING *Winkler v. St. Louis, I. M. & S. R. Co.*, 21 *Mo. App.* 99.

In charging the jury that the evidence to establish contributory negligence on the part of the plaintiff must be clear and convincing, there was no appealable error on the judge's part in failing to add that the evidence to establish negligence against defendant must also be clear and conclusive. *White v. Augusta & K. R. Co.*, 30 *So. Car.* 218, 9 *S. E. Rep.* 96.

(2) *Illustrations.*—One of the instruc-

tions given was that "it is not for the court to select from the evidence a state of facts and circumstances, and instruct the jury that the existence of these constitute negligence, or the absence of them diligence," and that negligence or diligence was a question of fact for the jury. *Held*, not error, where the instruction, taken in connection with others, must be construed to mean that the jury were the judges of whether defendant had exercised due care or had been negligent. *Central R. & B. Co. v. Nash*, 81 Ga. 580, 7 S. E. Rep. 808.

The court charged that "proof of other acts of negligence will not authorize a recovery unless the jury be satisfied from the evidence that the negligence charged has been proved; or, if several acts of negligence be charged, that one or more of them has been proved and shown to have occasioned the disaster." Defendant objected on the ground that it told the jury that other acts of negligence than those charged would authorize a recovery. *Held*, that the wording of the instruction is not to be recommended, but it is not open to the objection made. *Central R. & B. Co. v. Nash*, 81 Ga. 580, 7 S. E. Rep. 808.

The court in some of its instructions put the case that, if the accident happened without "fault" on the part of plaintiff, etc. It was urged that the words "ordinary care" should have been used in place of the word fault. *Held*, that the word used did not change the sense or meaning of the instructions, and did not make them erroneous. *Chicago & N. W. R. Co. v. Ryan*, 70 Ill. 211.

The court instructed the jury that certain omissions on the part of the defendant, if found from the evidence, were "culpable" negligence. *Held*, no error, as the word "culpable" was used in the sense of "blamable." *Peoria & P. U. R. Co. v. Clayberg*, 15 Am. & Eng. R. Cas. 356, 107 Ill. 644.

Plaintiff sued for injuries to his team by colliding with an engine. The court instructed the jury that they should find for the plaintiff if the engineer, by the exercise of ordinary care, might have seen the horses in time to have avoided the injury. It was objected that this instruction assumed that it was the duty of the engineer to keep a lookout regardless of his other duties. *Held*, that the term "ordinary care" in keeping a lookout would mean such as the engineer could exercise in con-

nection with his other duties, and was, therefore, correct. *Illinois C. R. Co. v. Burns*, 32 Ill. App. 196.

The court instructed the jury that "where there has been mutual negligence," etc., the plaintiff cannot recover. It was urged by the defendant that the word "mutual" as thus used was erroneous in that it referred to the degree of negligence. *Held*, otherwise, and that it simply expressed the idea of reciprocal or contributory negligence. *Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31.—FOLLOWING *Haley v. Chicago & N. W. R. Co.*, 21 Iowa 15.

A court instructed a jury that negligence, like other facts, may be established by showing facts and circumstances bearing, more or less directly, upon the fact of negligence. *Held*, that the instruction defined the character of the evidence rather than its weight and effect, and, when taken in connection with other instructions given, was not erroneous. *Baker v. Chicago, B. & Q. R. Co.*, 73 Iowa 389, 35 N. W. Rep. 460.

The court charged the jury (1) that the burden of proof was on plaintiff to show that defendant was negligent; (2) that such negligence caused the injury; (3) that the fact that an accident occurred is not negligence unless the nature of the accident is such that it could not have happened without negligence; (4) that if it appeared that the accident might have happened from some cause which the company could not guard against, then it was for the plaintiff to show that it did not happen from such cause, but from the negligence of defendant. The court further charged that the burden was on the defendant, and to relieve it from liability it must show that the accident happened from causes over which it had no control. *Held*, that the charge as a whole was as favorable to the defendant as it was entitled to, under the law. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

Defendant company was repairing its elevated track, when a crowbar fell and injured plaintiff, who was on the street below. The court charged the jury that "you must say whether the railroad company has used ordinary and reasonable care in performing this work. Has it neglected the precautions which reasonable and prudent people would have taken to prevent an accident similar to the one upon which you have to

pass?" *Held*, that this was not objectionable as inviting the jury to make affirmative suggestions as to possible safeguards which might have been supplied. *Morsemann v. Manhattan R. Co.*, 16 *Daly* 249, 10 *N. Y. Supp.* 105, 32 *N. Y. S. R.* 61.

A moving train struck a cart and threw it forward against plaintiff's intestate, who was standing on the street, but in a position not to be injured by the train itself, causing his death. *Held*, that it was proper to charge the jury that, if a sudden and instinctive effort on the part of the driver of the cart to escape impending danger resulted in the accident, and there was not time to form an intelligent and deliberate judgment as to the best means of escaping, then negligence was not imputable to him. *Quill v. New York C. & H. R. R. Co.*, 11 *N. Y. Supp.* 80, 16 *Daly* 313, 32 *N. Y. S. R.* 612; *affirmed in* 126 *N. Y.* 629, *mem.*, 27 *N. E. Rep.* 410, *mem.*, 36 *N. Y. S. R.* 1012, *mem.*

It is not error to charge a jury that "a railroad company contracts that the road is equipped and run according to the present state of the art. They are liable if the injury might have been avoided by the utmost care and skill on the part of their servants. If the injury occurred by running faster than a prudent, skilful conductor would then have run, or from an obstruction which the conductor saw, or might have seen if he had looked in the proper direction, or might have avoided by the most skilful and prompt use of all the means in his power, the company would be liable." *Nashville & C. R. Co. v. Messino*, 1 *Sneed (Tenn.)* 220.

106. What instructions are improper.—(1) *General rules.*—An instruction is erroneous which attempts to define the character and degree of negligence which would authorize a recovery for an injury, but omits the essential qualification that the negligence upon which a recovery must be based is such only as contributed to the injury. *Chicago & N. W. R. Co. v. Carroll*, 12 *Ill. App.* 643.

Where one instruction is given authorizing a recovery against a railroad company for injuries caused by negligence of its servants which contains no requirements of care or caution on the part of the injured party, the error will not be cured by other instructions which do contain such requirement. *Peoria & P. U. R. Co. v. O'Brien*,

18 *Ill. App.* 28.—*FOLLOWING Chicago, B. & Q. R. Co. v. Harwood*, 80 *Ill.* 88.

Where a complaint is filed in an action for negligently causing death, and it states negligence on several different grounds, it is error for the court in charging the jury substantially to copy the petition as to the charges of negligence. The grounds of negligence should be pointed out more specifically, and the jury directed to inquire as to these only. *Gorman v. Minneapolis & St. L. R. Co.*, 78 *Iowa* 509, 43 *N. W. Rep.* 303.

An instruction whose effect is to declare that the happening of an accident under given circumstances is conclusive evidence of negligence is erroneous. *Clay v. Chicago & A. R. Co.*, 17 *Mo. App.* 629.

Where injury is caused by a failure of the railroad company to use ordinary care in moving its trains or cars, it is liable unless there be contributory negligence by the person injured. Hence it is error to charge the jury that the company is liable only for gross negligence, where it may have been understood by the jury that this term was used as the equivalent of fraud or intentional wrong, and not as meaning the want of the ordinary care required under all the circumstances of the case. *Meek v. Pennsylvania Co.*, 13 *Am. & Eng. R. Cas.* 643, 38 *Ohio St.* 632.—*QUOTED IN Cogswell v. West St. & N. E. Elec. R. Co.*, 5 *Wash.* 46.

If the headlight of a train running at night is so obscured by rain or other natural causes that the "lookout" cannot see ahead, there being no defect in the headlight or fault on the part of those in charge of the train, it is error to instruct the jury that the company is without doubt more liable for all the consequences because of running the train on such a night. *Louisville & N. R. Co. v. Melton*, 2 *Lea (Tenn.)* 262.—*QUOTED IN Memphis City R. Co. v. Logue*, 13 *Lea* 32.

It is error to give a charge which in effect asserts that it is negligence for a porter on a railway train to close the doors of the company's cars without giving warning of his intention to do so in advance. *Galveston, H. & S. A. R. Co. v. Davidson*, 21 *Am. & Eng. R. Cas.* 431, 61 *Tex.* 204.

While a custom among railway companies as to the crew put in charge of a train is competent evidence, it seems to be error to charge the jury so that they may believe a departure from such custom is negligence.

Whether negligence exists should be determined by the jury upon the facts found also by them. *Gulf, C. & S. F. R. Co. v. Compton*, 44 Am. & Eng. R. Cas. 637, 75 Tex. 667, 13 S. W. Rep. 667.

(2) *Illustrations*.—In an action by a female passenger to recover for injuries received in alighting from a train, the court instructed the jury to find for plaintiff if they found that she, without negligence on her part, was injured through the fault or negligence of the company. *Held*, that the instruction was objectionable as being too general. It should have called attention to the specific acts of negligence charged in the declaration. *St. Louis, A. & T. H. R. Co. v. Berger*, 9 Ill. App. 341.

Where the declaration alleged that the plaintiff, through defendant's negligence, fell and received injuries to her arm and shoulder, and does not charge any abnormal change of condition, or any more than might happen from any serious injury to a sick or well person, and raises no inference that plaintiff before the injury was robust or weak, sound or unsound, and the evidence shows that the injury occurred as alleged, an instruction that if the jury believe that plaintiff's arm and shoulder were weak and disabled before the accident as the result of sickness, and that she cannot recover under the declaration for such disability or any aggravation of the same produced by the accident in question, is properly refused, although defendant has introduced evidence tending to show that plaintiff, when a child, suffered a severe illness which left her right arm and shoulder disabled and infirm. *Canfield v. Chicago & W. M. R. Co.*, 41 Am. & Eng. R. Cas. 566, 78 Mich. 356, 44 N. W. Rep. 385.—*DISTINGUISHING* *Wilkinson v. Detroit S. & S. Works*, 73 Mich. 405.

A charge which permits the jury in a negligence case to infer malice on the part of the defendant toward plaintiff's employer in setting a car in motion on defendant's own land, which ran against one which plaintiff was unloading and injured him, from the fact that defendant believed at the time of the accident that plaintiff's employer was owing him for rent, to recover which he afterwards commenced a suit, cannot be sustained. *McCallum v. Davidson*, 95 Mich. 382, 54 N. W. Rep. 952.

Plaintiff sued for the destruction of a building by sparks from an engine, and charged the company with negligence in overloading

its trains, whereby they often stalled on an up grade opposite the building, and in the effort to move the trains great showers of sparks were thrown out. *Held*, that an instruction which allowed the jury to predicate negligence on the fact alone that the trains were sometimes heavy and stalled was erroneous. *Flinn v. New York C. & H. R. R. Co.*, 34 N. Y. S. R. 451, 58 Hun 230, 12 N. Y. Supp. 341.

A charge of the court which first assumed a certain state of facts as constituting ordinary negligence, and which then instructed the jury that "gross negligence is a greater or higher degree of negligence than ordinary negligence"—*held*, error, as containing no definition of gross negligence. *Southern C. P. & M. Co. v. Bradley*, 52 Tex. 587.—*QUOTED IN* *Texas & P. R. Co. v. Gorman*, 2 Tex. Civ. App. 144.

Plaintiff, an employé, was injured while attempting to get on a moving train which carried him from place to place. *Held*, that it was error to give the jury an instruction which in effect made the liability of the company depend, not upon the negligence of the one in charge of the train, but upon the terror or fright of plaintiff from a real or apparent danger, after he had caught hold of the hand-rail of the coach, but was unable to pull himself up; and this without reference as to whether the terror was justified by the facts and circumstances, and whether the one in charge of the train was guilty of negligence in producing such terror. *Austin & N. W. R. Co. v. Beatty*, 73 Tex. 592, 11 S. W. Rep. 858.

107. Instruction broader than the pleadings.—A plaintiff is confined to the acts of negligence specified in his declaration, and it is error to instruct the jury that he may recover for other negligence. *Chicago, B. & Q. R. Co. v. Wells*, 42 Ill. App. 26.

Where the only negligence averred in a suit against a railroad company is that it ran its train carelessly, it is error to instruct the jury that if defendant was negligent in its failure to use air brakes or other proper machinery plaintiff is entitled to recover. *Toledo, W. & W. R. Co. v. Foss*, 88 Ill. 551, 21 Am. Ry. Rep. 368.

When there is no proof of any other negligence than that alleged in the declaration, an instruction stating what is negligence is not erroneous in not confining the right of recovery to the negligence alleged in the

declaration. *Chicago, B. & Q. R. Co. v. Avery*, 17 *Am. & Eng. R. Cas.* 649, 109 *Ill.* 314; *affirming* 10 *Ill. App.* 210.

108. Instructions not supported by the evidence.—It is error to instruct the jury, in an action for negligence and consequent injury, that if they believe, from the evidence, that the plaintiff was injured by the negligence of the defendant, as charged in the declaration, and that the plaintiff was at the time in the exercise of ordinary care and prudence, the plaintiff is entitled to recover for such injury if there is no conflict in the evidence, which, taken as a whole, does not tend to show a right of recovery. *Joliet, A. & N. R. Co. v. Velie*, 140 *Ill.* 59, 29 *N. E. Rep.* 706; *affirming* 36 *Ill. App.* 450.

109. Instructions assuming facts in issue.—Where the question of negligence is controverted, it is error for the court in instructing the jury to assume it as a fact. *Lake Shore & M. S. R. Co. v. Elson*, 15 *Ill. App.* 80. *Chicago & N. W. R. Co. v. Snyder*, 28 *Am. & Eng. R. Cas.* 611, 117 *Ill.* 376, 7 *N. E. Rep.* 604; *reversing* 18 *Ill. App.* 640.

An instruction which in effect decides the question of defendant's negligence as a question of law, and withdraws the case from the jury, which leaves nothing for them to do but to sign a verdict for the defendant, is erroneous. The general rule is that negligence is a question of fact, and not of law. *Davis v. Utah Southern R. Co.*, 3 *Utah* 218, 2 *Pac. Rep.* 521.

An instruction that "if the jury believe from the evidence that the plaintiff, while in the exercise of ordinary care, was injured by or in consequence of the negligence, as charged in the declaration or either one of the counts thereof, then you will find the defendant guilty," does not assume that the defendant was guilty of negligence, as the qualifying words "if the jury believe from the evidence" apply to the whole sentence. *Chicago & A. R. Co. v. Fisher*, 141 *Ill.* 614, 31 *N. E. Rep.* 406; *affirming* 38 *Ill. App.* 33.

The court did not assume negligence in its instructions to the jury by telling them that if they believed the defendant "negligently" did certain things, and the plaintiff was injured thereby, they must find for plaintiff. The omission of the word "negligently" would have assumed negligence. *South Covington & C. St. R. Co. v. Ware*, 27

Am. & Eng. R. Cas. 206, 84 *Ky.* 267, 1 *S. W. Rep.* 493.

110. Instructions relative to speed.—The rate of speed at which a train is run through the streets of a city may be an important fact in determining the question of negligence, and an instruction to the contrary is properly refused. *Pacific R. Co. v. Houts*, 12 *Kan.* 328.

In an action for personal injuries it is not error to refuse to instruct the jury broadly that "a railroad company has a right to propel its trains over its road at a reasonable rate of speed, and when its track is in a good and safe condition, and the cars properly equipped and in safe condition, except as to latent defects which by the highest degree of skill and care could not be discovered, it would not be negligence *per se* to run the train at a rate of speed of forty miles an hour." *Pennsylvania Co. v. Newmeyer*, 52 *Am. & Eng. R. Cas.* 454, 129 *Ind.* 401, 28 *N. E. Rep.* 860.

Under a petition stating the specific act of negligence to have been the high rate of speed of the defendant's train, it is not improper to instruct as to the question whether the defendant after discovering the danger could, by exercising reasonable care, have avoided the injury. *Neier v. Missouri Pac. R. Co.*, 12 *Mo. App.* 35.

It was error to charge that if the train was running at such a speed that it could not be stopped within the distance the headlight would discover objects upon the said road the jury might find the company guilty of recklessness, notwithstanding all the prescribed precautions were observed. *Louisville & N. R. Co. v. Milam*, 13 *Am. & Eng. R. Cas.* 507, 9 *Lea (Tenn.)* 223.

It is error to instruct that the fact of running a train at a greater speed than is permitted by the rules of the company is of itself negligence, as this contravenes the rule forbidding the trial court to say in the absence of statutory declaration that any particular act or omission constitutes negligence. *Fl. Worth & D. C. R. Co. v. Thompson*, 2 *Tex. Civ. App.* 170, 21 *S. W. Rep.* 137.

The court charged in substance that defendant had a right to travel over its road at pleasure, and at such rate of speed as it saw fit, but that circumstances might make the exercise of such right an element of negligence; that great speed was not necessarily negligence, but in connection with

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other facts and circumstances might tend to establish it. *Held*, no error. *Salter v. Utica & B. R. R. Co.*, 8 Am. & Eng. R. Cas. 437, 88 N. Y. 12; *affirming* 24 Hun 494.—**FOLLOWING** *Massoth v. Delaware & H. Canal Co.*, 64 N. Y. 531; *Cordell v. New York C. & H. R. R. Co.*, 70 N. Y. 124.—**APPLIED IN** *Miller v. New York C. & H. R. R. Co.*, 20 N. Y. Supp. 163.

In an action for a personal injury on the ground of negligence in running and operating a train and running the train at a high and dangerous rate of speed, the court on behalf of the plaintiff instructed the jury that, "If such train was being run by the employes of the defendant at a high and dangerous rate of speed, such speed being so high and dangerous as to become a negligent management of the train, and that such accident resulted in consequence thereof, the jury will find the issues for the plaintiff." The proof showed that the train, at the time of the accident, was running at the rate of forty miles an hour, and upon a straight line, on which an animal on the track might have been seen in ample time to have checked the train. *Held*, that the instruction was not liable to the objection that it announced that a given high rate of speed for a passenger-train was a dangerous rate, which would of itself render the company liable for damages arising from accident. *Indianapolis, B. & W. R. Co. v. Hall*, 12 Am. & Eng. R. Cas. 146, 106 Ill. 371.

111. Misleading or obscure instructions.—An instruction "that slight negligence is not a slight want of ordinary care, but a want of extraordinary care, and the law does not require such care of the person injured by the negligence of another as a condition precedent to his recovery," is erroneous as being obscure, and calculated to mislead the jury. *Little Rock, M. R. & T. R. Co. v. Haynes*, 28 Am. & Eng. R. Cas. 572, 47 Ark. 497, 1 S. W. Rep. 774.

Such expressions as "slight negligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language. *Omaha St. R. Co. v. Craig*, 58 Am. & Eng. R. Cas. 208, 39 Neb. 601, 58 N. W. Rep. 209.

It is misleading and erroneous for the court to instruct the jury that negligence remotely contributing to the injury is not material, when in fact, if there was any neg-

ligence at all, it was clearly direct and proximate, and not remote or far removed from the injury. *Atchison, T. & S. F. R. Co. v. Plunkett*, 2 Am. & Eng. R. Cas. 127, 25 Kan. 188.

An instruction declaring it to be the duty of those operating a train to keep a vigilant watch of the track ahead that they might discover persons on the track in time to avoid injuring them is not objectionable as being calculated to mislead the jury on the ground that it appears from the evidence that there were two parallel tracks near together, and that they would not understand which track it was declared to be the duty of the trainmen to watch. *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.

112. Necessity of prayer for instructions.—A carrier was sued for the loss of goods, and there was some evidence of a delay in the shipment, and plaintiff claimed that the delay was due to negligence and should have been submitted to the jury, but made no request that it be so submitted. *Held*, that, in order to have the benefit of such failure, he should have made a distinct request that the question be submitted. *Stedman v. Western Transp. Co.*, 48 Barb. (N. Y.) 97.

113. What prayers should be granted.—In an action for damages from gross negligence of the servants and employes of a railway company it devolves upon the plaintiff, in order to recover, to establish such degree or character of negligence, and it is error in the court to refuse to instruct the jury that unless gross neglect, defining it, be established the plaintiff cannot recover. *Texas & P. R. Co. v. Hill*, 71 Tex. 451, 9 S. W. Rep. 351.

The use of the word "accident" in an instruction embodying the rule of law that no presumption of negligence arises from the breaking of a chain would not justify the court in refusing the instruction. *Brymer v. Southern Pac. Co.*, 90 Cal. 496, 27 Pac. Rep. 371.

114. What prayers may be properly refused.—A charge instructing the jury that, if they believe from the evidence that the defendant's servants in charge of the train at the time plaintiff's intestate was killed "were at the time operating the train in a reckless manner, that is, without regard to consequences, they may find that the injury was produced by wanton, or reck-

less, or intentional, negligence of defendant," is properly refused, because argumentative merely. *Carrington v. Louisville & N. R. Co.*, 41 *Am. & Eng. R. Cas.* 543, 88 *Ala.* 472, 6 *So. Rep.* 910.

In providing against accidents resulting from the act of God, ordinary care and diligence is all the law requires of a common carrier. It is not error, therefore, to refuse to charge the jury that the defendant carrier must exercise extreme care and diligence to avoid the consequences of such an event. *Gleeson v. Virginia Midland R. Co.*, 28 *Am. & Eng. R. Cas.* 202, 5 *Mackey (D. C.)* 356.

An instruction is properly refused which singles out an isolated fact, saying that it alone does not constitute wilful or wanton negligence, especially when the question does not hinge on such fact alone, and the instruction does not assume to be predicated upon the evidence. *Pennsylvania Co. v. Conlan*, 6 *Am. & Eng. R. Cas.* 243, 101 *Ill.* 93.

It is not proper to separate a few of many facts from their connection with others by which their force and meaning are, or may be, materially modified, and ask the court to instruct the jury that these enumerated facts are evidence to show a want of ordinary care on the part of the plaintiff in avoiding, and the exercise of due care by the defendant in preventing, the accident by which the plaintiff was injured. *Baltimore & O. R. Co. v. Boteler*, 38 *Md.* 568, 10 *Am. Ky. Rep.* 506.

It is not error for the court to refuse an instruction asked by the defendant declaring that the burden is on the plaintiff to prove his case as alleged in the declaration, and that plaintiff must make and establish his case by a preponderance of the evidence, when the same principle or rule is not stated in other instructions given. *North Chicago St. R. Co. v. Louis*, 138 *Ill.* 9, 27 *N. E. Rep.* 451; reversing 35 *Ill. App.* 477.—*REVIEWING Dyer v. Talcott*, 16 *Ill.* 300; *Kepperly v. Ramsden*, 83 *Ill.* 354.

An instruction to the effect that the engineer and fireman of the train inflicting the injury were personally liable to the defendant for any negligence which the jury might believe was committed by them at the time mentioned in the case, and for all damages, if any, which should be allowed by the jury on account of such negligence, is properly refused. *Pennsylvania Co. v. Keane*, 143 *Ill.* 172, 32 *N. E. Rep.* 260.

The jury having been instructed that plaintiff could not recover unless the act of defendant was negligent, it is not error to refuse an instruction to the effect that he cannot recover if the injury was the result of unavoidable accident. *Mascheck v. St. Louis R. Co.*, 3 *Mo. App.* 600.

Where the action is for personal injuries, it is proper for the court to tell the jury that "it is for you to determine from the evidence whether the injuries were or were not caused by this accident," and to refuse to charge, at the request of the company, that there is no evidence which shows, to a reasonable certainty, that the condition of plaintiff's body was caused by the accident. *Heath v. Broadway & S. A. R. Co.*, 15 *N. I. Supp.* 142, 39 *N. Y. S. R.* 378; affirmed in 133 *N. Y.* 526, *mem.*, 30 *N. E. Rep.* 1148.

Defendant's train struck a cart and threw it against plaintiff's intestate, inflicting injuries from which he died. Held, that it was proper to charge that there could be no recovery if the accident was caused exclusively by the negligence of the driver of the cart, and to refuse to charge that there could be no recovery if the negligence of the driver caused the accident. *Quill v. New York C. & H. R. R. Co.*, 11 *N. Y. Supp.* 80, 16 *Daly* 313, 32 *N. Y. S. R.* 612; affirmed in 126 *N. Y.* 629, *mem.*, 27 *N. E. Rep.* 410, *mem.*, 36 *N. Y. S. R.* 1012.

Where, in an action for injuries caused by negligence of defendant, it appeared that plaintiff was herself a practising physician, and immediately after the accident went to see a patient, that she had not been kept at home nor carried her arm in a sling, but continued to practise her profession as a physician and to drive with her injured hand, it was not error to refuse a special instruction "that plaintiff did not use the proper means for restoring herself to health," and could not recover for the injury caused by her own neglect, when the question of such neglect had already been left to the jury under a proper charge. *Alexander v. Richmond & D. R. Co.*, 112 *N. Car.* 720, 16 *S. E. Rep.* 896.

Where a projection from a car, if a defect, is an obvious one, which defendant was bound to remedy, there is no error in refusing to charge the jury that if the car became thus defective after it was first put in use by defendant (several years before the accident) the latter was not liable unless it had notice of the defect. *Wedgwood v. Chicago*

& *N. W. R. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393.—FOLLOWING *Smith v. Chicago M. & St. P. R. Co.*, 42 Wis. 520.

NEGOTIABILITY.

Of bills of lading, see **BILLS OF LADING**, 108-114.

- commercial paper, see **BILLS, ETC.**, 2, 3.
- corporate bonds, see **BONDS**, 16-21.
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NEGOTIABLE PAPER.

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NEVADA.

- Assessment and levy of taxes in, see **TAXATION**, 272.
- Constitutionality of statutes of, as to municipal aid for railways, see **MUNICIPAL AND LOCAL AID**, 42.
- Deductions for benefits under condemnation laws of, see **EMINENT DOMAIN**, 744.
- Operation of statute of, giving right of action for causing death, see **DEATH BY WRONGFUL ACT**, 26.
- Taxation in aid of railways in, see **MUNICIPAL AND LOCAL AID**, 420.
- of land grants in, see **TAXATION**, 122.

NEW HAMPSHIRE.

- Assessment and levy of taxes in, see **TAXATION**, 273.
- Constitutionality of statutes of, as to municipal aid for railways, see **MUNICIPAL AND LOCAL AID**, 43.
- — — relative to condemnation of land, see **EMINENT DOMAIN**, 38.
- — — tax laws of, see **TAXATION**, 38.
- Constitutional provisions in, relative to condemnation of land, see **EMINENT DOMAIN**, 16.
- Crossing of streets and highways under statutes of, see **CROSSING OF STREETS AND HIGHWAYS**, 5.
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Statutory duty to fence in, see **FENCES**, 31.

— provisions in, limiting amount recoverable for causing death, see **DEATH BY WRONGFUL ACT**, 360.

Taking land for streets and laying out roads in, see **STREETS AND HIGHWAYS**, 23.

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Assessment and levy of taxes in, see **TAXATION**, 274.

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— — — tax laws of, see **TAXATION**, 30.

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Laying out streets across railways under statutes of, see **CROSSING OF STREETS AND HIGHWAYS**, 47.

Local assessments upon steam railways in, for repairs, paving, etc., see **STREETS AND HIGHWAYS**, 351.

Occupation of streets by steam roads under legislative grants by, see **STREETS AND HIGHWAYS**, 52.

Rule as to imputed negligence in, see **IMPUTED NEGLIGENCE**, 18.

Statutes of, relative to connecting lines, see **CONNECTING LINES**, 2.

— — — relative to distribution of damages for causing death, see **DEATH BY WRONGFUL ACT**, 64.

Statutory regulation of grade crossings in, see **CROSSING OF STREETS AND HIGHWAYS**, 90.

Taking land for streets and laying out roads in, see **STREETS AND HIGHWAYS**, 24.

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Assessment and levy of taxes in, see **TAXATION**, 275.

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I. GROUNDS.**1. Error on the Trial.**

1. In general.—The mere fact that three successive juries in three trials have found for plaintiff, though with different damages and upon somewhat different facts, does not deprive defendant of his right to a new trial when substantial error has been committed. *Brown v. Atchison, T. & S. F. R. Co.*, 10 Am. & Eng. R. Cas. 739, 29 Kan. 186; further appeal, 15 Am. & Eng. R. Cas. 271, 31 Kan. 1.

After the introduction of plaintiff's testimony to a jury impaneled to try a personal injury cause, the court has no authority to dismiss a case and discharge the jury without a verdict upon the merits. If the evidence so introduced tends in any degree to sustain plaintiff's petition, a new trial will be ordered. *Smith v. Sioux City & P. R. Co.*, 15 Neb. 583, 19 N. W. Rep. 638.—QUOTED IN *Johnson v. Missouri Pac. R. Co.*, 23 Am. & Eng. R. Cas. 429, 18 Neb. 690.

Where the verdict is for the plaintiff, it is error to grant a new trial on grounds upon which his right of recovery does not depend. So held, where the action was to recover damages for falling through a bridge in entering a car, where the motion was granted on the ground that plaintiff had entered the car without consent, and before it reached the place where passengers were received, and therefore assumed the risk, but where his right of recovery did not depend upon such question. *Bellman v. New York C. & H. R. R. Co.*, 5 N. Y. S. R. 153; affirmed in 122 N. Y. 671, mem., 26 N. E. Rep. 755, mem.

In an action for negligently causing the death of an employé, the evidence tended to show that the deceased had equal knowledge of the risk with the company and assumed it, but the court offered to submit the question to the jury on condition that plaintiff would stipulate that in case he was successful the verdict might be set aside and judgment entered as of nonsuit, to which plaintiff agreed on condition that he stand in the same position as if a nonsuit had been regularly granted. Held, that it was reversible error to grant a new trial without regard to the stipulation. *Doig v. New York, O. & W. R. Co.*, 43 N. Y. S. R. 820, 63 Hun 626, 17 N. Y. Supp. 689.

The allegations of the declaration being

ambiguous and uncertain as to whether the negligence intended to be complained of was only the failure to warn the plaintiff generally that going under the engine and aiding in removing the eccentric was dangerous, or the further failure to warn him specially of the result of unfastening the eccentric and the consequences thereof when the fireman was about to remove the bolt, and it being very doubtful whether it was negligent at all to fail to give plaintiff the general warning indicated, and the evidence of negligence upon the theory that the special warning was not given being vague and uncertain, and it being apparent that it can be cleared up and made more satisfactory so as to show the cause to which the injury was really attributable, the ends of justice require a new trial. *Georgia R. & B. Co. v. Miller*, 90 Ga. 571, 16 S. E. Rep. 939.

2. Improper admission of evidence.

—A new trial will not be granted on the ground that improper evidence was admitted, when there is no conflict in the evidence, if the fact sought to be proved is amply shown by other evidence, and it is plain that the jury were not misled. *Pensacola & A. R. Co. v. Anderson*, 26 Fla. 425, 8 So. Rep. 127.

In an action against a carrier for failing to deliver goods, the admission of evidence that his servant requested the person from whom he received them to make out a bill of the goods "said to have been lost" is no ground for granting the carrier a new trial. *Ingledew v. Northern R. Co.*, 7 Gray (Mass.) 86.

3. Exclusion of evidence.—The company offered in evidence flags similar to the one used by a flagman at the time of the accident. *Held*, that the exclusion of such flags and the testimony relating to them did not constitute error such as to entitle defendant to a new trial. *Quill v. New York C. & H. R. Co.*, 11 N. Y. Supp. 80, 16 Daly 313, 32 N. Y. S. R. 612; *affirmed in* 126 N. Y. 629, *mem.*, 27 N. E. Rep. 410, *mem.*, 36 N. Y. S. R. 1012.

4. Errors in counsel's argument to the jury.*—Where in an employe's action for personal injuries plaintiff's attorney in his argument to the jury appeals to their

prejudices and inflames their passions by reference to matters not in the record and statements not warranted by the testimony, urging upon the jury that the defendant was a powerful and wealthy railroad corporation, and by the exercise of superior power and the use of corrupt and unlawful means had procured plaintiff's indictment for the purpose of impeaching his testimony, he is guilty of such misconduct as will entitle defendant to a new trial. *Henry v. Sioux City & P. R. Co.*, 70 Iowa 233, 30 N. W. Rep. 630.

A verdict will not be disturbed for extravagances of counsel in summing up and urging inferences from facts in evidence unless the trial court has plainly allowed them to mislead the jury. *Staal v. Grand Rapids & I. R. Co.*, 57 Mich. 239, 23 N. W. Rep. 795.

The court may interfere and stop the argument of counsel, when he is discussing matters outside of the case, without objection or suggestion from opposing counsel; and such action will be sustained unless there be a gross abuse of discretion. But a failure on the part of the court to interfere, when opposing counsel are present and do not ask the interposition of the court or object to the line of argument pursued, will not entitle the party represented by such opposing counsel to a new trial. *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566.—*QUOTING* *Tucker v. Henniker*, 41 N. H. 317.

Improper statements made by counsel in argument which the presiding judge did not hear, and to which his attention was not called either then or afterwards during the progress of the trial, not even by any request to charge the jury, will not require or justify the granting of a new trial. *Augusta R. Co. v. Glover*, 58 Am. & Eng. R. Cas. 269, 92 Ga. 132, 18 S. E. Rep. 406.

An improper remark of counsel in discussing the question of punitive damages, although objected to at the time and not rebuked by the court, where all consideration of punitive damages was excluded by the judge's charge to the jury, is not a sufficient ground for a new trial. *East Tenn. V. & G. R. Co. v. Gurley*, 17 Am. & Eng. R. Cas. 568, 12 Lea (Tenn.) 46.

5. What errors in instructions will warrant a new trial.—(1) *General rules.*

—In an action for injuries received by being run over by a train, a new trial will be

* Misconduct of counsel in addressing the jury. Attempts to excite prejudice against railroads and corporations, see 46 Am. & Eng. R. Cas. 153, *abstr.*

granted if the charge tended to give the jury the impression that they might go beyond the general inquiry as to reasonable care and establish some particular standard of their own. *Springman v. Baltimore & P. R. Co.*, 5 *Mackey (D. C.)* 1.

Where, in an action for personal injury, the charge as to the measure of damages for partial or total permanent disability is so obscure, inaccurate, and incomplete as to render it possible, if not probable, that the jury were misled, a new trial will be granted, especially where a very large verdict is rendered for the plaintiff. *Chattanooga, R. & C. R. Co. v. Owen*, 90 *Ga.* 265, 15 *S. E. Rep.* 853.

Where the action is for injuring plaintiff at a crossing, it is ground for a new trial to instruct the jury that they may give exemplary damages if they believe that the injury was wilful or reckless, where there is no evidence of gross negligence, or of wilfulness or recklessness. *Kennedy v. North Mo. R. Co.*, 36 *Mo.* 351.—DISTINGUISHED IN *Ohio & M. R. Co. v. Dickerson*, 59 *Ind.* 317. REVIEWED IN *Scaling v. Pullman Palace Car Co.*, 24 *Mo. App.* 29.

The trial court has the power, and it is its duty, to rectify its errors; and where it has improperly declared the law, and its attention is called thereto in a motion for new trial, and it orders a new trial, this court will not reverse its action. And with or without such motion the court might, and ought, to order a rehearing where it at the time discovers its error. *Wight v. Missouri Pac. R. Co.*, 20 *Mo. App.* 481.—EXPLAINING *Braxton v. Hannibal & St. J. R. Co.*, 77 *Mo.* 455.

A party is entitled to a full and fair hearing before the jury; and when that right has been denied him by some word or act of the trial judge, although without intending to prejudice his rights in the minds of the jury, it is not an abuse of discretion to correct it by granting a new trial. *Campanello v. New York C. & H. R. R. Co.*, 39 *N. Y. S. R.* 445, 15 *N. Y. Supp.* 670; affirmed in 136 *N. Y.* 644, *mem.*, 32 *N. E. Rep.* 1015, 49 *N. Y. S. R.* 914.

Where the issues submitted to the jury are confused and calculated to mislead the jury, a new trial will be directed. *Bottoms v. Seaboard & R. R. Co.*, 109 *N. Car.* 72, 13 *S. E. Rep.* 738.

A charge which consists mainly of extracts from opinions in reported cases

having no special reference to the circumstances of the case on trial is objectionable; and where, from the consideration of the whole evidence, it is reasonable to suppose the jury may have been misled by such charge, a new trial ought to be granted. *Marietta & C. R. Co. v. Picklesly*, 24 *Ohio St.* 654, 7 *Am. Ry. Rep.* 186.

Where the action is for personal injuries received through negligence, it is error for the court in instructing the jury to assume that the company was negligent in a certain particular, where the evidence relating thereto is contradictory, and to ignore other evidence tending to establish certain facts. *Powell v. Wilmington & W. R. Co.*, 68 *N. Car.* 395.

(2) *Illustrations.*—In an action by a father for causing the death of a colored girl about sixteen years old, the jury returned a verdict of \$250. The question was in issue whether the family was domiciled in the state where the trial was had, where a female became of age at twenty-one, or in an adjoining state, where she was of age at eighteen. On a motion for a new trial the court was of opinion that the verdict was sufficient if the domicile was in the latter state, but not if the domicile was in the former state; and was further of the opinion that the instructions given the jury were not sufficiently definite, and granted a new trial. *Gaither v. Kansas City, etc., R. Co.*, 27 *Fed. Rep.* 544.—FOLLOWING *Lett v. St. Lawrence & O. R. Co.*, 21 *Am. & Eng. R. Cas.* 165, 11 *Ont. App.* 1; *Little Rock & Ft. S. R. Co. v. Barker*, 39 *Ark.* 491; *St. Louis, I. M. & S. R. Co. v. Freeman*, 36 *Ark.* 41.

The circuit judge charged the jury as follows: "If you believe from the evidence that it was apparent to the car driver that the plaintiff when he entered the car was in a crippled condition, having to use a cane or crutches to aid him in moving about, then it was the duty of the driver to use a greater degree of care than in a common case of an apparently well and sound passenger." *Held*, error, there being no testimony showing that it was so apparent. *Jacksonville St. R. Co. v. Chappell*, 28 *Am. & Eng. R. Cas.* 227, 21 *Fla.* 175.

The damages found being extreme, if not excessive, the error of the court in charging the jury on that branch of the case is cause for a new trial; the error being in referring the jury to certain elements of damage as to which there was no evidence, such as

habits, avocation, money made by labor, prospect of increased earnings, prospects of obtaining steady and remunerative employment, etc., the person injured being a child nine years of age. *Western & A. R. Co. v. Young*, 42 Am. & Eng. R. Cas. 135, 83 Ga. 512, 10 S. E. Rep. 197; former appeal, 81 Ga. 397, 7 S. E. Rep. 912.

Plaintiff hired a carriage at a livery stable, with a driver, and was injured by a train in crossing defendant's track. It was admitted that the negligence of the driver could not be imputed to plaintiff; and from the evidence the jury might have found that both the driver and the company were negligent. Held, that it was ground for a new trial to refuse to submit the question to the jury whether each was negligent, and therefore jointly negligent. *Collins v. Long Island R. Co.*, 29 J. & S. 154, 18 N. Y. Supp. 779, 46 N. Y. S. R. 252.

The circuit judge, in a personal injury case, upon the jury's report that they could not agree upon a verdict, said "that it seemed to be a very difficult matter for juries at the present term of court to decide questions of fact submitted to them; that it seemed to the court that nearly every jury had returned and said they could not agree"; and "that they ought to agree and decide cases, for they had to be decided by juries," and "that he had no idea of discharging them, but would keep them together on the case during the entire term, if it lasted three weeks, unless they sooner agreed upon it." Next day the jury returned a verdict. Held, reversible error. *Chesapeake, O. & S. W. R. Co. v. Barlow*, 86 Tenn. 537, 8 S. W. Rep. 147.

A section master going on a hand-car to load scrap iron allowed plaintiff to go along if he would assist. On the return the hand-car collided with a train, injuring plaintiff, who sued the company. The court instructed the jury that, "the court being of opinion that it could not be fairly inferred from the testimony that plaintiff was either a passenger or an employé of the company, it was fairly inferable that he was aware of the rules of the company prohibiting persons from riding on hand-cars." Held, such an invasion of the province of the jury as entitled plaintiff to a new trial. *Tyler v. Chesapeake & O. R. Co.*, 88 Va. 389, 13 S. E. Rep. 975.

Plaintiff sued his company for wages due, and the company made defense that it had

assumed and become liable for a board bill of the plaintiff. The evidence was conflicting as to whether there was any arrangement or agreement by which the company became liable for the board. Held, that it was error for the court to instruct the jury that there was no satisfactory evidence that any such arrangement had been made, or that no liability therefor existed on the part of the company; it should have been left to the jury. *Hunkins v. Milwaukee & St. P. R. Co.*, 30 Wis. 559.

6. Errors in instructions not warranting new trial.—Where the action is for a personal injury caused by negligence, and the instructions are as favorable as plaintiff is entitled to, and there is nothing to indicate that the jury were actuated by passion or prejudice, the verdict will be sustained. *Reese v. Third Ave. R. Co.*, 16 Fed. Rep. 368.

Where the evidence shows the loss to plaintiff, in respect of certain damage to his property, to have been trifling—about \$15—the appellate court will not grant a new trial because that element of injury was erroneously excluded from the consideration of the jury. *Neitzey v. Baltimore & P. R. Co.*, 26 Am. & Eng. R. Cas. 553, 5 Mackey (D. C.) 34.

A new trial will not be granted because a certain instruction standing alone might bear an interpretation prejudicial to the right of the plaintiff, but which when taken in connection with the other instructions and the charge of the court appears to be a fair statement of the law. *Gleeson v. Virginia Midland R. Co.*, 28 Am. & Eng. R. Cas. 202, 5 Mackey (D. C.) 356.

A new trial should not be granted in an action by a passenger for personal injuries because the court gave in charge to the jury section 3034 of the Ga. Code, there being testimony from which the jury might find both parties were at fault, and it appearing also that the court gave in charge section 2972. *Western & A. R. Co. v. Abbott*, 74 Ga. 851.

It is not error to charge a jury that the law requires extraordinary diligence on the part of railroads in transporting passengers, and that they are liable for slight negligence; but an encomium upon the wisdom of such a law is unnecessary, if not one-sided, unless it be passed also upon the law that imposes care and diligence upon the passenger; yet this error will not warrant a

new trial. *Central R. Co. v. Thompson*, 76 Ga. 770.

A charge to the jury which is abstractly incorrect, but, under the peculiar circumstances of the case cannot injure any one, is not ground for a new trial. *Ross v. West Phila. Pass. R. Co.*, 17 Phila. (Pa.) 361.

A charge should not indicate the limit of damages claimed, but such error is not ground for reversal where from the amount of the verdict and other circumstances it appears to have been harmless. *Texas & P. R. Co. v. Huffman*, 83 Tex. 286, 18 S. W. Rep. 741.

A conductor whose contract of service was made in Georgia was injured in South Carolina by reason of a defective ladder, and the negligence charged was a failure to inspect the ladder before the train left Georgia. It appeared that the law of South Carolina was more stringent as to the duty of a master to furnish safe machinery and appliances than that of Georgia, and the case was submitted to the jury under instructions more favorable than if the South Carolina law had been applied. *Held*, that a verdict for plaintiff would not be set aside and a new trial granted even if it be assumed that the South Carolina law furnished the rule for determining the company's liability. *Atlanta & C. A. L. R. Co. v. Tanner*, 68 Ga. 384.

7. Refusal of requests to charge.—Where the action is for personal injuries, and contributory negligence is relied upon as a defense, and there is substantial evidence tending to establish it, it is error for the court to ignore this defense in charging the jury, especially when attention is specially directed to it. *Georgia R. Co. v. Thomas*, 68 Ga. 744. — **DISTINGUISHING** *Georgia R. & B. Co. v. Neely*, 56 Ga. 543. — **REVIEWED IN** *Western & A. R. Co. v. Bloomingdale*, 74 Ga. 604; *Savannah, F. & W. R. Co. v. Stewart*, 71 Ga. 427.

Where the action is for wrongfully causing death, the law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence, whether requested or not, or whether the attention of the court be called thereto or not; otherwise the verdict will be set aside and a new trial granted. *Central R. Co. v. Harris*, 76 Ga. 501.

Where a party sues for damages resulting from negligence and calls but one witness, who effectually disproves the charge of neg-

ligence, it is error for the trial court to refuse to instruct the jury that plaintiff has wholly failed to prove the charge, and a new trial should be granted. *Underhill v. New York & H. R. Co.*, 21 Barb. (N. Y.) 489.

Notwithstanding the discretion which is given to the jury under New York Act of 1847, as amended in 1849, giving a right of action for wrongfully causing death, it is the duty of the court to give definite instructions as to what may be taken into consideration in estimating the damages, and if explicit instructions are asked for and refused it is ground for a new trial. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25.

Where a verdict for the plaintiff may have been rendered upon either of two causes of action, but it does not appear upon which, a refusal to give a proper instruction on behalf of the defendant as to either cause of action will entitle him to a new trial. *Pennsylvania Co. v. Miller*, 35 Ohio St. 541. *Booth v. Boston & A. R. Co.*, 67 N. Y. 593, *mem.* — **REFERRING TO** *Flike v. Boston & A. R. Co.*, 53 N. Y. 549; *Sprong v. Boston & A. R. Co.*, 58 N. Y. 56.

8. Effect of failure to object at the trial.—When the rule of damages adopted on the trial is fundamentally erroneous, the verdict may, in some cases, be set aside, although no objection was made to the introduction of the evidence on which such rule was founded. *Hatfield v. Central R. Co.*, 33 N. J. L. 251. — **RECONCILED IN** *Scott v. Indianapolis & V. R. Co.*, (Ind.) 10 Am. & Eng. R. Cas. 189.

Where the jury were told upon an appeal from the award of land damages by the railroad commissioners that the law in relation to highways applied generally to railroads, and the court was not at the time asked to make the instructions more definite—*held*, that it was not sufficient to set aside the verdict. *March v. Portsmouth & C. R. Co.*, 19 N. H. 372.

A female passenger entered a car before the train was made up and was injured by another car being kicked against the one she had entered. The company relied upon the defense that she had improperly entered the car before the train was made up, and gave considerable evidence as to public notice given on the car platforms, prohibiting passengers entering cars until the train was made up; but no exceptions were taken

to the charge, and no request was made to charge that plaintiff had the burden of proof of showing that she had no notice not to enter, and was rightfully in the car. *Held*, that such questions could not be considered on motion for a new trial. *Root v. Catskill Mt. R. Co.* 33 *Fed. Rep.* 858.

9. Cases where substantial justice has been done.—Substantial justice having been done by the verdict rendered, a new trial is properly refused, though the motion therefor contains grounds which, technically considered, have some merit. *Western & A. R. Co. v. Lewis*, 84 *Ga.* 211, 10 *S. E. Rep.* 736.

Where two companies are jointly liable for their negligence, one of them has no right to a new trial because of the failure of justice against the other. *Lockhart v. Little Rock & M. R. Co.*, 40 *Fed. Rep.* 631.

2. Disqualification or Misconduct of Jurors.

10. Disqualification or incompetency of jurors.—The fact that the foreman of a jury was uncle of the treasurer of defendant corporation, who was also a stockholder and a witness on the trial, is not sufficient ground for setting aside the verdict, when diligence has not been used to ascertain the juror's disqualification, and objection is not made before the verdict. *Harrington v. Manchester & L. R. Co.*, 62 *N. H.* 77.

A new trial will not be granted in an action against a railway company on the ground that a shareholder of the company sat on the jury. *Williams v. Great Western R. Co.*, 3 *H. & N.* 869, 28 *L. J. Ex.* 2.

The court will not grant a new trial because one of the jurors has not been sworn where no injustice is done thereby. *So held*, in an action by a husband for the death of his wife. *Goose v. Grand Trunk R. Co.*, 17 *Ont.* 721.—*Quoting Williams v. Great Western R. Co.*, 3 *H. & N.* 869.

11. Misconduct of jurors, generally.—Where it is sought to set aside a verdict on the ground of misconduct of a juror, the test is whether the misconduct was such as to make it probable that the juror's mind was influenced by it so as to render him unfair and prejudiced. *Poole v. Chicago, B. & Q. R. Co.*, 2 *McCrory (U. S.)* 251, 6 *Fed. Rep.* 844.

The argument that the court ought not to set aside a verdict because of the misbehavior of a juror, where the successful party

is not at fault, and when there is no prejudice to the losing party—i. e., that the verdict is clearly right—cannot be sustained. The losing party is entitled to a fair trial by the jury, and not by the court. *Poole v. Chicago, B. & Q. R. Co.*, 2 *McCrory (U. S.)* 251, 6 *Fed. Rep.* 844.

Where one of the principal questions involved is the amount of damage done to a hedge by fire caused by defendant, and the evidence is conflicting, and one of the jurors during the deliberations, and before they have fully agreed upon their verdict, states to the other members that he had about the same amount and kind of hedge burned by defendant, and that defendant had paid him \$1.50 a rod as damages therefor, and this amount is greater than the amount of plaintiff's damages, as shown by the evidence, and the verdict is in favor of plaintiff for a larger sum than it probably would have been but for the statement—*held*, that the statement of the juror may have influenced the verdict, and is sufficient to require a new trial. *Atchison, T. & S. F. R. Co. v. Bayes*, 42 *Kan.* 609, 22 *Pac. Rep.* 741.

During the second trial of a negligence case the newspapers of the city published an item stating the amount of the verdict recovered by plaintiff on the first trial, which was read by members of the jury; whereupon defendant's counsel requested the court to arrest the progress of the trial and grant a new trial. *Held*, not ground for a new trial. *Sherwood v. Chicago & W. M. R. Co.*, 88 *Mich.* 108, 50 *N. W. Rep.* 101.

12. Drinking of liquor by jurors.—The mere fact that a juror in a civil case drank intoxicating liquor during an adjournment of the court while the trial was in progress is not a sufficient reason for granting a new trial unless there be reason to suspect that it may have had some influence on the final result of the case. *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 *Ohio St.* 328.

Where it appears that during the progress of a trial the prevailing party or his attorney has furnished intoxicating liquors to a juror, this is a good ground for a new trial, unless it is clearly shown that it was not intended to influence his action in the case, and that it had no influence on his mind as a juror. *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 *Ohio St.* 328.

A juror, pending the trial, took a small

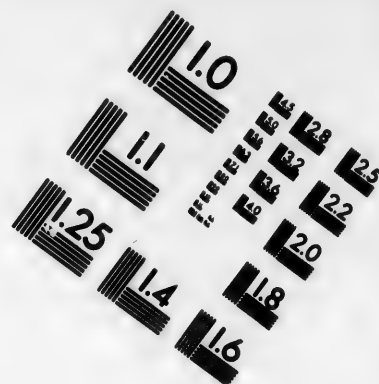
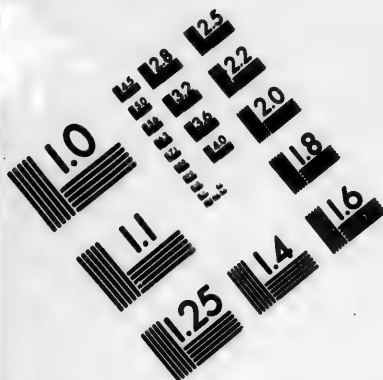
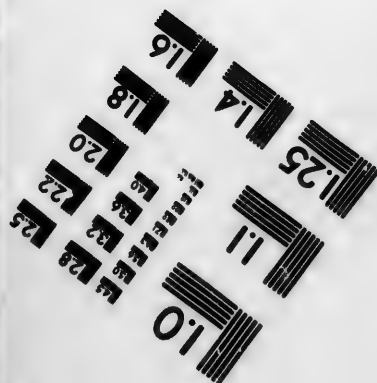
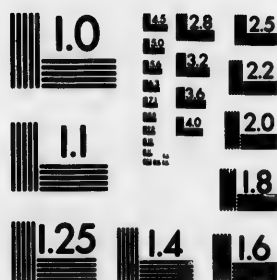


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quantity of intoxicating liquors for medicinal purposes at night. *Held*, that this did not constitute ground for granting a new trial. *O'Neill v. Keokuk & D. M. R. Co.*, 45 Iowa 546.

13. Communications with outside parties.—Where a juror in an action for wrongfully causing death talks outside of the jury room about the case before it is decided, he thereby gives the clearest evidence that he is not an impartial and unbiased juror. The very discussion of any matter by a juror elsewhere than in the jury room tends to the forming of false impressions and prejudgment. *Wesley v. Chicago, B. & Q. R. Co.*, 2 *McCrary* (U. S.) 251, 6 *Fed. Rep.* 844.

Where the natural tendency of what such a juror does or says or willingly listens to from others is to bias his mind, or where his misconduct evinces a prejudgment of the case, or ill will or passion against the losing party, the inference of prejudice inevitably follows, and the verdict cannot be said to be the result of a fair trial. *Poole v. Chicago, B. & Q. R. Co.*, 2 *McCrary* (U. S.) 251, 6 *Fed. Rep.* 844.

A communication by the successful party to jurors pending the trial if casually made, without any intent to influence the verdict, and if the court can clearly see that it could not have had any effect on the minds of the jurors, is not ground for a new trial. *Oswald v. Minneapolis & N. W. R. Co.*, 29 *Minn.* 5, 11 *N. W. Rep.* 112.

Any attempt on the part of the prevailing party or his attorney to corrupt a juror, though it is not shown to be successful, is good ground for a new trial. *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 *Ohio St.* 328.

A trial against a railroad company for maliciously bringing a civil suit against plaintiff was adjourned from one day until the next, and the jurors instructed not to talk to any one about the case, and not to accept the hospitality of either party. After the adjournment some of the jurors asked plaintiff to entertain them for the night, which he declined to do, and nothing was said about the trial. *Held*, not sufficient ground for setting aside a verdict in favor of plaintiff, and granting a new trial. *Southwestern R. Co. v. Mitchell*, 80 *Ga.* 438, 5 *S. E. Rep.* 490.

While a jury was deliberating on their verdict one of the jurors was ill, but was able to participate in the active considera-

tion of the case, and after a general verdict for plaintiff was agreed upon he was, with the consent of defendant, treated by a physician. *Held*, that defendant was not on such account entitled to a new trial. *Wesley v. Chicago, St. P. & K. C. R. Co.*, 84 Iowa 441, 51 *N. W. Rep.* 163.

14. View of locus in quo by jurors.

—The fact that, in an action for personal injuries occasioned to plaintiff's intestate by being struck by a locomotive, the jury took a view of the place where the accident occurred will not warrant the inference that they acquired knowledge of material facts which were not put in evidence, and which might have influenced their verdict, especially if the view was taken more than two years after the accident and at a different season of the year; or that they rejected as incorrect, from their own observations, the testimony of a civil engineer who made measurements of certain distances in the vicinity of the place of the accident. *Tully v. Fitchburg R. Co.*, 14 *Am. & Eng. R. Cas.* 682, 134 *Mass.* 499.

At the trial of a proceeding to condemn land for a right of way, two of the jurors after the evidence was in, but before argument, went upon the land and examined it without permission from the court. *Held*, such misconduct as to authorize a new trial. *Ortman v. Union Pac. R. Co.*, 17 *Am. & Eng. R. Cas.* 136, 32 *Kan.* 419, 4 *Pac. Rep.* 858.

At the hearing of a motion for a new trial of an action for personal injuries occasioned by a collision of plaintiff's team with defendant's car, on the ground of misconduct of one of the jurors, it appeared that after the arguments had been made, and before the charge of the judge had been given, the juror went alone to view the premises where the accident happened, and made inquiries of persons there concerning the accident, and also asked one who had been a witness in the case where he stood at the time of the accident, and the place was pointed out to him. The jury had taken a view of the premises previously by direction of the court. *Held*, that the judge in the exercise of his discretion properly granted a new trial. *Harrington v. Worcester, L. & S. St. R. Co.*, 157 *Mass.* 579, 32 *N. E. Rep.* 955.

The juror was asked by defendant, "Did you see or hear anything at the time you viewed the premises alone that influenced your mind one way or the other in relation

to this case, or anything that influenced your mind against plaintiffs or their cause in any degree?" *Held*, that the question was properly excluded. *Harrington v. Worcester, L. & S. St. R. Co.*, 157 Mass. 579, 32 N. E. Rep. 955.

15. Irregular mode of arriving at verdict.—In a damage suit the fact that the jury arrived at the measure of damages by dividing by twelve the aggregate of the several amounts which each had privately jotted down is not a ground for a new trial where the amount thus ascertained is freely assented to by each juror. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

Affidavits to the effect that the jury reached a verdict by aggregating twelve different sums and dividing by twelve, the quotient corresponding with the verdict, are not sufficient to impeach the verdict. *St. Clair v. Missouri Pac. R. Co.*, 29 Mo. App. 76.

3. Verdict against Law or Evidence; Defective Verdict.

16. Verdict against law or the instructions of the court.—When the verdict of the jury is contrary to the instructions of the court announcing the law correctly, or is not properly supported by the proof, the court should set it aside. *New Orleans, J. & G. N. R. Co. v. Enochs*, 42 Miss. 603.—FOLLOWING *Mississippi C. R. Co. v. Miller*, 40 Miss. 45.—FOLLOWED IN *Memphis & C. R. Co. v. Orr*, 43 Miss. 279.

The refusal of the court to do so, upon proper application, is reversible error. *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, 50 N. W. Rep. 10.

A verdict will be set aside, notwithstanding the presumption of law that an accident was caused by the negligence of the railroad, when four unimpeached and uncontradicted witnesses have testified that the accident was unavoidable. *Brunswick & A. R. Co. v. Gale*, 56 Ga. 322.

The action being for injuries to plaintiff, who was struck by a train when crossing a track, if it clearly appears from plaintiff's evidence that he could have avoided the injuries by the use of ordinary care, a new trial should be granted after verdict in his favor, whether the railroad company was negligent or not. *Atlanta & W. P. R. Co. v. Loftin*, 86 Ga. 43, 12 S. E. Rep. 186.

17. Verdict unsupported by evidence.—New trial granted.—A new trial

will be ordered upon a question of fact where the verdict has nothing to sustain it, and is therefore capricious. *McNair v. South Carolina R. Co.*, 10 Rich. (So. Car.) 284.

A new trial may be awarded, although the verdict be supported by some evidence, where it appears that the evidence is insufficient to justify the verdict. *Pederson v. Seattle Con. St. R. Co.*, 6 Wash. 202, 33 Pac. Rep. 351, 34 Pac. Rep. 665.

Negligence cannot be presumed, but must be affirmatively proven; and when the testimony fails to show that defendant, in an action for damages for injury caused by it, was negligent, and that its negligence caused the injury, a new trial will be granted. *Jacksonville St. R. Co. v. Chappell*, 28 Am. & Eng. R. Cas. 227, 21 Fla. 175.

The court may set aside a verdict for the plaintiff in an action for personal injury on the ground of insufficiency of the evidence to show that there was no contributory negligence, notwithstanding the preponderance of evidence in his favor on the question of negligence. *Breen v. Railway Transfer Co.*, 51 Minn. 4, 52 N. W. Rep. 975.

A new trial will be granted for want of evidence to support a special finding of facts by the jury in answer to interrogatories, only when it would be granted for insufficiency of evidence to support the general verdict. *Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

A verdict against evidence will not be permitted to stand because it is the third time that the case has been submitted to a jury. The court should set aside a verdict if 100 juries insist on depriving a suitor of his property without evidence, no matter how great or how small the wrong may be. *Lodge v. Railroad Co.*, 10 Phila. (Pa.) 153.

Plaintiff having testified that he could easily have avoided injury, and having failed to explain why he omitted to do so, and his declaration alleging that he was injured after he discovered that the danger was imminent, a new trial should be awarded. *Chattanooga, R. & C. R. Co. v. Huggins*, 52 Am. & Eng. R. Cas. 473, 89 Ga. 494, 15 S. E. Rep. 848.

Where, in executing interrogatories for a witness, in an action against a company for damages caused by fire from an engine, the witness was made to say that he "saw the fire burning about fifty feet of the road," when he had in fact testified that he "saw

the fire burning about fifty feet off the road," and it also being exceedingly doubtful that the verdict was warranted by the evidence, a new trial was granted. *Georgia R. & B. Co. v. Clark*, 90 Ga. 4, 15 S. E. Rep. 786.

Where the action is for an injury at a crossing, and the negligence relied upon is a failure to ring a bell or sound a whistle, and the plaintiff and another witness swear that they did not hear either, and the conductor swears positively to having sounded the whistle, and another witness that he heard it, there is not sufficient evidence to sustain a verdict for plaintiff, and a new trial should be awarded. *Seibert v. Erie R. Co.*, 49 Barb. (N. Y.) 583.

In an action by a conductor against the company for the loss of two fingers, the evidence showed that he continued in the employment of the company for two years after the accident, and received higher wages than before, until he was discharged for neglect of duty, but that at the time of bringing suit he was receiving lower wages for other work. *Held*, that a new trial was properly granted on motion of the company on the ground that the evidence did not show that the plaintiff's earning capacity was diminished by the accident. *Kane v. Savannah, F. & W. R. Co.*, 85 Ga. 858, 11 S. E. Rep. 493.

Plaintiff sued to recover damages to his land by the building of defendant's road, and alleged in one paragraph of his complaint that the company had agreed to pay him a certain amount, which was not paid. Another paragraph alleged that he instituted proceedings against the company, and that while the same were pending on appeal the company agreed to pay him the same amount to have a hearing postponed. At the trial he first testified that the amount agreed to be paid was to procure postponement only, but afterwards, on cross-examination, admitted that it was to include damages for a right of way across his premises. *Held*, that a verdict in his favor awarding the amount claimed for a postponement of the litigation should be set aside. *Nutting v. Kings County El. R. Co.*, 42 N. Y. S. R. 621, 62 Hun 621, 16 N. Y. Supp. 673.

18. — new trial refused.—The appellate court will not disturb a verdict on the sole ground that in its opinion the proof was not sufficient to support it, when it appears that there was lawful evidence on

which to base such verdict. *International & G. N. R. Co. v. Dawson*, 62 Tex. 260. *Richmond & D. R. Co. v. Green*, 73 Ga. 814.

The fact that a verdict in a damage suit rests wholly upon inference to be drawn from the evidence and upon expert testimony, and that no one can affirm with certainty that it is right, is no ground for setting it aside. *Estill v. New York, L. E. & W. R. Co.*, 41 Fed. Rep. 849.

A third verdict for plaintiff in a personal injury case should not be set aside unless the evidence is clearly insufficient to sustain it, or error otherwise clearly appears. *Harrigan v. Savannah, F. & W. R. Co.*, 84 Ga. 793, 11 S. E. Rep. 965.

Plaintiff was assistant yardsman for defendants, his duty being to marshal and couple cars subject to the orders of the conductor of a shunting engine, to whose orders the engine driver was also subject. According to his evidence, while attempting to carry out specific instructions received from the conductor, which the latter denied, as to coupling certain cars, the conductor negligently allowed the cars to be backed up, thus driving them together and injuring him. Plaintiff had for a long time been in defendants' employment, was thoroughly experienced in his duties, had never received specific instructions before, and knew before he went in between the cars that the engine was in motion backing up, and only eight feet distant. On a motion to set aside a verdict for plaintiff the court, though not satisfied with the verdict, was of opinion that there was evidence for plaintiff to be submitted to the jury, and therefore refused to interfere either by granting a nonsuit or a new trial. *Weegar v. Grand Trunk R. Co.*, 23 Ont. 436.

19. Verdict founded on indefinite and unsatisfactory evidence.—A verdict will be set aside where proof of damage as presented in the statement of facts is indefinite, general, and unsatisfactory. *International & G. N. R. Co. v. Jordan*, 1 Tex. App. (Civ. Cas.) 494.

Where the evidence concerning an injury is very loose, and no medical witnesses are called, the jury returning a verdict for \$2000, a new trial will be granted on payment of costs. *Watson v. Northern R. Co.*, 24 U. C. Q. B. 98.

When plaintiff's declaration alleges that her husband was killed in a specified way

by the negligent running of a particular train or engine, and the proof shows that he was killed by another engine of the company, and in a manner different from that alleged, and the evidence is such that, in any view of the case, plaintiff's right to recover is very doubtful, a verdict in her favor should be set aside. *Central R. Co. v. Hubbard*, 86 Ga. 623, 12 S. E. Rep. 1020. —CRITICISING *Port Royal & A. R. Co. v. Tompkins*, 83 Ga. 759. FOLLOWING *Georgia R. & B. Co. v. Oaks*, 52 Ga. 410; *Mayor, etc., of Montezuma v. Wilson*, 82 Ga. 206. REVIEWING *Central R. & B. Co. v. Avant*, 80 Ga. 195.

Plaintiff was engaged as a bridge watchman and claimed to be injured by a passing train which threw him from a trestle. The only evidence to support this theory was that of three witnesses who visited the place several hours afterwards and swore that they found blood at the foot of an embankment some thirty to fifty feet from the top of the trestle. Plaintiff was rendered unconscious, and when he recovered knew nothing of the details of the accident. The evidence of the trainmen and two passengers was to the effect that he was struck while sitting at the end of the bridge on or near the track, and that he was picked up at the top of the embankment. Held, that a verdict for plaintiff was not sustained by the evidence. *Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95.

20. Verdict against weight of evidence—General rules.—To warrant the setting aside of a verdict in a negligence case as against the weight of evidence, the preponderance must be so great as to evince that the jury were unable to understand, or in fact misapprehended, the law or the evidence, or that they were influenced by partiality, prejudice, or other improper motive. *Housatonic R. Co. v. Knowles*, 30 Conn. 313. —FOLLOWING *Daley v. Norwich & W. R. Co.*, 26 Conn. 591. —*Pike v. Chicago & A. R. Co.*, 41 Fed. Rep. 95. *Empey v. Grand Ave. Cable Co.*, 45 Mo. App. 422. *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. Rep. 994.

But a preponderance of evidence does not necessarily depend upon the number of witnesses, especially where some of defendant's witnesses corroborate a straightforward, consistent story detailed by the plaintiff. *Redlien v. Long Island R. Co.*, 7 N. Y. S. R. 263, 43 Hun 639.

A fair preponderance in this connection means evidence of such character and weight as will carry conviction to the minds of the jurors of the existence of the facts sought to be proven. *Schick v. Brooklyn City R. Co.*, 32 N. Y. S. R. 245, 10 N. Y. Supp. 528.

A new trial should be allowed when it is clear that material uncontradicted evidence has been disregarded by the jury, and which, if considered and given due weight, would have required a different verdict from that returned. *Chicago, B. & Q. R. Co. v. Landaner*, 54 A. & Eng. R. Cas. 640, 36 Neb. 642, 54 N. W. Rep. 976.

Where the verdict is against the weight of evidence on one of the essential questions of fact submitted to the jury, a new trial will be granted. *Good v. New York, L. E. & W. R. Co.*, 18 N. Y. S. R. 773, 50 Hun 601, 2 N. Y. Supp. 419.

A mere preponderance of evidence against a verdict will not authorize the supreme court to reverse a judgment entered thereon when the evidence in favor of it, taken by itself, is sufficient to sustain it. *Houston & T. C. R. Co. v. Larkin*, 64 Tex. 454.

Where the question of contributory negligence has been fairly submitted to the jury, and they have found the facts against the railroad, the court will not disturb this finding unless it be clearly against the weight of the evidence. *Chicago, B. & Q. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425.

21. — discretionary power of the court.—Where a trial court is of opinion that a verdict, although supported by some evidence, is against the weight of evidence, it may be justified in setting it aside, and submitting the case to a second jury, when the court would not feel warranted in disturbing a second verdict, although rendered on the same evidence. *Buenemann v. St. Paul, M. & M. R. Co.*, 18 Am. & Eng. R. Cas. 153, 32 Minn. 390, 20 N. W. Rep. 379.

The discretion to award a new trial because the verdict is against the weight of evidence is not confined to the trial court, but may and should be exercised by the appellate tribunal when it is clear that justice has not been done, and it is probable that a new trial will result differently. *Vincent v. Chicago & N. W. R. Co.*, 29 Iowa 592.

While the supreme court will not exercise so great a discretion in granting a new trial as should the district judge who hears

the evidence, yet when the record shows that there is a deficiency of evidence to support the action, and it is manifest that the verdict is clearly contrary to the evidence, it has never felt wanting in power to reverse a judgment based on such a verdict. *Houston & T. C. R. Co. v. Schmidt*, 21 *Am. & Eng. R. Cas.* 345, 61 *Tex.* 282.

22. — when a new trial should be granted.—(1) *In general.*—Where a company is sued for causing the death of one of its employes from the alleged improper construction of a switch track, a verdict for plaintiff should be set aside where it is proven by experts that the switch tracks were properly constructed and in good condition. *St. Louis Bridge Co. v. Follows*, 39 *Ill. App.* 456.

A finding of the jury in favor of plaintiff, and directly in conflict with his own testimony, indicates that the jury were influenced by passion in arriving at their verdict. *Jeffrey v. Keokuk & D. M. R. Co.*, 51 *Iowa* 439.

Where the evidence clearly shows that there was no negligence on the part of defendant, and that plaintiff did not exercise due care, a verdict for plaintiff will be set aside. *Pullutro v. Delaware, L. & W. R. Co.*, 39 *N. Y. S. R.* 293, 15 *N. Y. Supp.* 783. *Caroley v. Winnifrede R. Co.*, 31 *W. Va.* 116, 5 *S. E. Rep.* 318.

A verdict against a street-railway company for killing a boy will be set aside as against the weight of evidence where but two witnesses for the plaintiff testify that the death was caused by the conductor shoving the boy off the car, one of whom is a girl of thirteen and susceptible of influence, and both make confused and contradictory statements; and where the conductor and four others testify positively that the conductor did not touch the boy, but that he let go and fell off upon seeing the conductor coming towards him. *Heusner v. Houston, W. S. & P. F. R. Co.*, 27 *N. Y. Supp.* 365, 57 *N. Y. S. R.* 528, 7 *Misc.* 48.

A third verdict in a damage suit will be set aside where it is clearly against the weight of evidence, although there has been two previous concurring verdicts. *Carlin v. Chicago, R. I. & P. R. Co.*, 37 *Iowa* 316, 8 *Am. Ry. Rep.* 141.

Although after two trials, with a like finding by the jury, the court would not set aside a verdict merely because the evidence is deemed greatly preponderating against it

upon a question of negligence, yet the fact that the jury has also found, on a question of damages, in decided opposition to the views of the court upon the testimony, forms a coincidence which strengthens the apprehension of bias and partiality, and may require interference even where, upon either ground alone, it might have been refused. *Gilligan v. New York & H. R. Co.*, 1 *E. D. Smith (N. Y.)* 453.

(2) *Illustrations.*—When the evidence shows conclusively that the servants of a railroad company used all ordinary and reasonable care and diligence to prevent killing a cow, a verdict in favor of the owner for the value of the animal is contrary to law and the evidence, and should be set aside. *Georgia R. & B. Co. v. Walker*, 87 *Ga.* 204, 13 *S. E. Rep.* 511.

Plaintiff had his eye put out while being ejected from defendant's freight-car, and on his part there was no evidence except his own as to how the injury occurred, while the evidence for defendant showed that it was the result of his own fault. *Held*, that a verdict for plaintiff should be set aside as against the weight of evidence. *Finney v. Northern Pac. R. Co.*, 12 *Am. & Eng. R. Cas.* 17, 3 *Dak.* 270, 16 *N. W. Rep.* 500.

The evidence showing that a shipment of mules was made on a valid special contract, at a reduced rate of freight, and the finding of the jury being upon the basis of general liability, irrespective of the special contract, the verdict was contrary to law and the evidence, and the court erred in not granting a new trial. *Georgia R. & B. Co. v. Reid*, 55 *Am. & Eng. R. Cas.* 363, 91 *Ga.* 377, 17 *S. E. Rep.* 934.

Upon a motion for a new trial, in an action where plaintiff obtained a verdict for injuries received by means of an alleged defective car, it appearing that the overwhelming weight of evidence was in favor of a sound car, that plaintiff's account of the manner of his injury was improbable, and his admissions to others, before the action was brought, differing therefrom—*held*, that the jury must have been influenced by some improper motive in rendering a verdict for plaintiff, and a new trial should be ordered. *Roberts v. Boston & M. R. Co.*, 83 *Me.* 298, 22 *Atl. Rep.* 174.

Plaintiff testified that while he was a passenger the conductor and other passengers said to him and in his presence that they intended to tie his hands, rob him, and then

throw him from the car window, which he believed, and which so frightened him that he jumped from the moving train and was injured. By the company it was proven that he had been drinking, and the evidence tended to show that he was suffering from delirium tremens or some other disorder of the mind, and the story about threatening to rob him was emphatically denied by the conductor. *Held*, that a verdict for a large sum for plaintiff should be set aside and a new trial granted. *Spohn v. Missouri Pac. R. Co.*, 26 *Am. & Eng. R. Cas.* 252, 87 *Mo.* 74. — FOLLOWED IN *Duggan v. Wabash Western R. Co.*, 46 *Mo. App.* 266.

Plaintiff sued a street-car company for personal injuries, and proved by himself and two other witnesses negligence on the part of the company, and due care on his own part. One of these witnesses lived in the house with plaintiff, and the other was a relative, and the similarity of their evidence was such as to excite suspicion. They were directly contradicted by five witnesses on the part of the company, four of whom were disinterested, and none of them impeached or their evidence shaken on cross-examination. *Held*, that the verdict for plaintiff was against the weight of evidence and should be set aside. *McCarthy v. Christopher & T. St. R. Co.*, 10 *Daly (N. Y.)* 540. — APPLIED IN *Shultz v. Third Ave. R. Co.*, 15 *Daly* 95, 2 *N. Y. Supp.* 693, 19 *N. Y. S. R.* 917.

In a suit against a street-car company for running over a boy a little more than three years old, it was sought to establish negligence on the part of the driver in that he was sitting instead of standing, that the car was moving at an excessive rate of speed, and that he did not promptly apply the brakes; but the evidence on the part of the company tending to negative these several charges greatly outweighed plaintiff's evidence. *Held*, that a verdict for plaintiff should be set aside and a new trial granted. *Trotzky v. Forty-second St. & G. S. F. R. Co.*, 73 *Hun* 26, 57 *N. Y. S. R.* 155.

23. — when a new trial should be refused.—The supreme court will not award a new trial on the mere weight of the evidence. *Terre Haute & I. R. Co. v. Jackson*, 95 *Ind.* 594.

A new trial in a personal injury case will not be granted for a verdict against evidence unless the verdict is so manifestly against the evidence as to show that the jury

adopted some wrong principle in their deliberations, or that their minds were not open to reason and conviction, or that in some way they were improperly and unduly influenced. *Daley v. Norwich & W. R. Co.*, 26 *Conn.* 591. — FOLLOWED IN *Housatonic R. Co. v. Knowles*, 30 *Conn.* 313.

Diligence and the want of it are questions of fact to be determined by the jury under the evidence and the charge of the court, and a new trial ought not to be granted by the trial judge unless the jury find strongly and decidedly against the weight of testimony. *Wallace v. Clayton*, 42 *Ga.* 443.

In a civil action triable by jury as a matter of right, if there be evidence tending to establish plaintiff's cause of action in substance as alleged, the verdict will not be disturbed merely on the ground that there is evidence of an opposite tendency. *Colorado Midland R. Co. v. O'Brien*, 48 *Am. & Eng. R. Cas.* 235, 16 *Colo.* 219, 27 *Pac. Rep.* 701. *Allen v. Chicago, M. & St. P. R. Co.*, 44 *Minn.* 165, 46 *N. W. Rep.* 306.

A new trial ought not to be granted on the ground that the verdict is against the weight of evidence unless the verdict is one which a jury viewing the whole of the evidence reasonably could not properly find. *Metropolitan R. Co. v. Wright*, 11 *App. Cas.* 152. — APPLIED IN *How v. London & N. W. R. Co.*, [1892] 1 *Q. B.* 391.

In a suit against a carrier for the loss of a trunk where the shipper placed a value upon the trunk at the time of shipment much less than the amount of the verdict in favor of the plaintiff, a new trial will not be granted at his instance, especially where the verdict is not decidedly against the weight of evidence. *Green v. Southern Exp. Co.*, 45 *Ga.* 305.

Where in a suit for the killing of a mule only the engineer was sworn for defendant to show the use of all ordinary and reasonable care, although he testified that the fireman was engaged in firing at the time, and where there was a difference of opinion about the distance at which the mule could have been seen, and there was some conflict between the testimony of the engineer and the statements testified by other witnesses to have been made by him as to reversing the engine and blowing on the brakes, there was no abuse of discretion in refusing a new trial on the ground that the verdict was contrary to law and evidence. *East Tenn., V. & G. R. Co. v. Culler*, 75 *Ga.* 704. — DIS-

TINGUISHED IN Savannah, F. & W. R. Co. v. Gray, 77 Ga. 440, 3 S. E. Rep. 158.

It appearing that plaintiff was absent from her home when a fire began, for causing which she brought suit, and it not appearing that she had any part or lot in it, a ground for new trial that the jury failed to consider the contributory negligence on her part is not tenable. *Port Royal & W. C. R. Co. v. Griffin*, 86 Ga. 172, 12 S. E. Rep. 303.

Where a general verdict is returned for plaintiff, which is correct if either one of three several facts exist, and special questions are submitted to the jury as to existence of these facts, and all answered in the affirmative, the verdict will not be set aside as against the evidence if one of these answers is supported by the testimony, although the second answer is clearly and the third probably against the evidence. *Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456.

Where the evidence taken on the hearing of a petition for a new trial in an action for personal injury tends to show that the injury was committed in a somewhat different manner from that testified to by some of the witnesses on the trial, but does not negative the commission of the injury, it is insufficient to justify the vacating of the judgment. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753, 40 N. W. Rep. 298.

Where plaintiff sues for damages sustained in a collision, and the proof is that he had left his seat and gone to the platform, and was the only person injured, but the jury find that he was free from negligence, this being a question within their province to decide, the court will not set aside the verdict as being against the weight of evidence. *Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.) 492.—DISTINGUISHED IN *South Western R. Co. v. Paulk*, 24 Ga. 356.

Where every question in a damage suit is closely contested, and the case is submitted to the jury on proper instructions, a verdict for plaintiff will be permitted to stand, where the evidence is sufficient to sustain it, if found true by the jury. *Brennan v. New York C. & H. R. R. Co.*, 30 N. Y. S. R. 378, 55 Hun 611, 8 N. Y. Supp. 716.

Plaintiff testified that he was injured while riding on the platform of a street-car; but he was contradicted by the driver of the car and another witness who testified that he was

riding on the guard rail. *Held*, that a verdict in his favor was not against the weight of evidence, as the jury had a right to believe his evidence rather than that of the two. *Hourney v. Brooklyn City R. Co.*, 27 N. Y. S. R. 49, 7 N. Y. Supp. 602; *affirmed in* 130 N. Y. 641, *mem.*, 29 N. E. Rep. 1033, 41 N. Y. S. R. 950.

24. Application of the rule to cases of conflicting evidence.—As a rule, where there is a conflict of testimony, the preponderance must be overwhelming to induce a court to disturb a verdict. *Cheney v. New York C. & H. R. R. Co.*, 16 Hun (N. Y.) 415.

In an action against a railroad for negligence where the evidence is conflicting, and no exceptions are taken to the charge, the verdict will not be disturbed. *King v. New York, L. E. & W. R. Co.*, 50 N. Y. S. R. 103, 66 Hun 636, 21 N. Y. Supp. 829.

In an action for personal injuries, where there is a conflict of evidence, the appellate court will not interfere with the verdict. *Chicago W. D. R. Co. v. Bolton*, 37 Ill. App. 143. *Wayt v. Burlington, C. R. & M. R. Co.*, 45 Iowa 217. *Vautrain v. St. Louis, I. M. & S. R. Co.*, 78 Mo. 44; *affirming on other grounds* 8 Mo. App. 538.

Where the action is based on negligence, and the evidence is conflicting, the court will not set aside a verdict even where it would have been satisfied if the verdict had been for the other party. *Hardy v. Minneapolis & St. L. R. Co.*, 36 Fed. Rep. 657. *Leopold v. Delaware & H. Canal Co.*, 49 N. Y. S. R. 459, 66 Hun 628, 21 N. Y. Supp. 100.

Where conflicting evidence on the questions of the negligence of a railroad company in operating its trains on the one part, and of contributory negligence and want of ordinary care on the part of the person who is injured, is submitted to a jury, their verdict and findings thereon are conclusive. *Interstate C. R. T. R. Co. v. Fox*, 39 Am. & Eng. R. Cas. 318, 41 Kan. 715, 21 Pac. Rep. 797. *Murray v. Washington & G. R. Co.*, 2 MacArth. (D. C.) 195.

Where suit is brought against a railroad company for damages done to certain machinery, and the evidence as to the amount of the damage is conflicting, that on behalf of plaintiff sustaining the finding of the jury, there is no error in refusing to grant a new trial on the ground that the verdict was

contrary to law and without evidence to support it. *Western & A. R. Co. v. Mathis*, 77 Ga. 488, 2 S. E. Rep. 692.

A conflict of evidence should not restrain trial courts from granting a new trial whenever they believe substantial justice has not been done between the parties. *Dewey v. Chicago & N. W. R. Co.*, 31 Iowa 373, 2 Am. Ry. Rep. 369.—FOLLOWED IN *Stutsman v. Burlington & S. W. R. Co.*, 53 Iowa 760. QUOTED IN *Johnson v. Chicago, R. I. & P. R. Co.*, 8 Am. & Eng. R. Cas. 206, 58 Iowa 348.

The general rule is, the jury are the judges of the credibility of the witnesses, but where they capriciously disregard the testimony of five unimpeached witnesses, and rely solely upon the testimony of two little boys, aged seven and eleven years, simply because they desire to find a verdict in accordance with their testimony, a new trial should be granted. *Chicago, B. & Q. R. Co. v. Stumps*, 69 Ill. 409.—FOLLOWING *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 367.

Under the amendment to the federal constitution that "no fact tried by a jury shall be re-examined otherwise than according to the rules of the common law," a verdict for defendant, a street-railway company, will not be set aside where the evidence as to defendant's negligence is conflicting. *Stewart v. Sixth Ave. R. Co.*, 45 Fed. Rep. 21.

If physicians disagree as to the nature of the injuries sustained by plaintiff, this will not be sufficient to set aside the verdict on the ground that the evidence does not show that he suffered any physical injury, when they all agree as to his physical suffering. *Texas & St. L. R. Co. v. Suggs*, 21 Am. & Eng. R. Cas. 475, 62 Tex. 323.

In an action against a railroad by a passenger for being rudely treated and thrown from the train by the conductor and other employes of the company, a motion for a new trial on the ground that the verdict is contrary to the evidence should not be granted where there is a conflict of evidence; neither should a new trial be granted on the ground of newly discovered evidence where the affidavits show that the new evidence is only cumulative. *East Line & R. R. Co. v. Boon*, (Tex.) 1 S. W. Rep. 632.

Where the evidence is contradictory as to whether coupling apparatus was unusually dangerous, and as to the knowledge by plaintiff of the defect, and there being testimony if believed to sustain a recovery by

plaintiff, the verdict will not be set aside as without or in conflict with the testimony. *Bonner v. Bean*, 80 Tex. 152, 15 S. W. Rep. 798.

In a suit to recover for an injury to a child there was ample evidence to support a finding of the master that the train was moving at an excessive rate of speed, and that the trainmen failed to keep such lookout as the ordinances of the city required at the place. Held, that the court will not set it aside on the ground of conflicting testimony. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 31 Fed. Rep. 246.

25. Effect of ambiguity or uncertainty in verdict.—Where the action is against a carrier for goods lost, and there is no evidence of negligence, and the jury fails to find whether the loss occurred before or after the goods reached the company's warehouse, a verdict for plaintiff should be set aside and a new trial granted. *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269.

The rule absolving companies from liability for injury to animals coming on the track through gates in fences is applicable only to gates erected at farm crossings; and where the verdict is ambiguous and uncertain as to whether there was a farm crossing for the convenience of the adjacent farm owner at the place where the gate was erected, a motion for a *venire de novo* should be sustained. *Louisville, N. A. & C. R. Co. v. Thomas*, 1 Ind. App. 131, 27 N. E. Rep. 302.

26. Errors in special findings.—Where the special questions submitted to the jury are evasively and unfairly answered, and some of the findings made thereon are unsupported by the testimony, it is the duty of the trial court, upon application, to grant a new trial. *St. Louis & S. F. R. Co. v. Clark*, 55 Am. & Eng. R. Cas. 367, 48 Kan. 321, 29 Pac. Rep. 312.

Where the findings on the issues are contradictory, a new trial will be granted. So where in response to one issue the jury found that there was no contributory negligence, but in response to another they found that the plaintiff's intestate knew of the reckless character of his fellow-servant by whose negligence the injury occurred, a new trial should be granted. (Smith, C.J., dissenting.) *Porter v. Western N. C. R. Co.*, 97 N. Car. 66, 2 Am. St. Rep. 272, 2 S. E. Rep. 580.

Where the special findings of fact of a

jury in eminent domain proceedings repeat the same element of damages several times, the verdict should be set aside and a new trial granted. *Ellsworth, M. P., N. & S. E. R. Co. v. Maxwell*, 39 Kan. 651, 18 Pac. Rep. 819.—FOLLOWING Minneapolis Harvester Works Co. v. Cummings, 26 Kan. 367.

Where the general verdict is perfect and complete in every particular, a *venire de novo* ought not to be granted merely because the answers of the jury to interrogatories submitted to them are "irregular, indefinite, improper, and uncertain." *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 Am. & Eng. R. Cas. 374, 110 Ind. 225, 11 N. E. Rep. 285.

The fact that a special verdict contains no finding upon particular matters of fact in issue is not sufficient ground for a *venire de novo*. To require a *venire de novo* the verdict must be so defective that a judgment cannot be rendered on it. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. Rep. 443.

In examining a special verdict under a motion for a *venire de novo*, mere conclusions of law, mere evidence and findings outside the issues will be disregarded; and if, when stripped of such improper matters, the verdict is sufficient to sustain a judgment for either party, a *venire de novo* will not be granted. *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 237, 28 N. E. Rep. 443.

In an action for the killing of cattle at a crossing, the engineer testified that as soon as he saw the cattle on the track he put on the air brakes and reversed the engine, stopping the train within 300 yards, which, he testified, was the quickest a train of the kind going at the rate of speed at which his train was going could be stopped. The jury found for the plaintiff, and as a special finding of fact that the train could have been stopped within 350 or 375 feet. There was no evidence to support this finding. *Held*, that the jury had no right so to find and that a new trial would be ordered. *Union Pac. R. Co. v. Shannon*, 19 Am. & Eng. R. Cas. 500, 33 Kan. 446, 6 Pac. Rep. 564.

In an action for an injury occasioned by negligence a special verdict, after reciting facts, stated that the plaintiff was not guilty of contributory negligence, and that the injury was the result of negligence on the part of the defendant. *Held*, that such findings as to negligence were conclusions of law, which the jury could not make, and that

they must be disregarded on a motion for a *venire de novo* assigning them as the ground thereof. *Indianapolis, P. & C. R. Co. v. Bush*, 101 Ind. 582.

Plaintiff, a passenger, alighted at a station, and, the train having started before he had re-entered it, endeavored to jump on while it was in motion, and in doing so was injured. There was evidence of an invitation by the conductor to jump on while it was in motion, and the jury found that there was such invitation; that plaintiff used a reasonable degree of care in endeavoring to get on, and that he was injured while trying to get on in pursuance of the request of the conductor. It was argued by defendants that the danger to plaintiff was so patent and obvious that he had no right to act on the conductor's invitation or to attempt to get on. *Held*, that this was a matter which should have been submitted to the jury; that the questions involved in the action could not be determined upon the findings, and that there should be a new trial. *Curry v. Canadian Pac. R. Co.*, 17 Ont. 65.

27. Inconsistency between special findings and general verdict.—A general verdict which is clearly inconsistent and in conflict with a special finding of fact submitted to the jury in the same case should be set aside on motion. *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, 50 N. W. Rep. 10.

In an action for an injury received by collision with a train while crossing a railroad track, the evidence of defendant's negligence being weak, and the special findings bearing upon the question of plaintiff's negligence being inconsistent, the refusal of the circuit court to grant a new trial is erroneous. *Burns v. North Chicago Rolling Mill Co.*, 19 Am. & Eng. R. Cas. 412, 60 Wis. 541, 19 N. W. Rep. 380.

4. Excessive Damages.

a. In General.

28. When the verdict should be set aside.*—A failure to estimate damages by any correct legal principle is good ground

* Excessive damages in actions for personal injuries not resulting in death. Various illustrations of what are and what are not excessive damages, see notes, 46 AM. & ENG. R. CAS. 667; 44 *Id.* 440; 2 AM. ST. REP. 40; 14 L. R. A. 677. See also 41 AM. & ENG. R. CAS. 368, *abs.r.*

for setting aside the verdict. *Ellsworth v. Central R. Co.*, 34 *N. J. L.* 93.—DISTINGUISHED IN *St. Louis & S. E. R. Co. v. Myrtle*, 51 *Ind.* 566.

Where a verdict appears to be palpably and manifestly excessive, it is the duty of the court to set it aside and send the case to another jury; and on it being made to appear, on appeal, that the court below erred in refusing to do so, the case will be reversed and remanded. *Houston & G. N. R. Co. v. Randall*, 50 *Tex.* 254.—FOLLOWED IN *Houston & T. C. R. Co. v. Pinto*, 15 *Am. & Eng. R. Cas.* 286, 60 *Tex.* 516; *Saldana v. Galveston, H. & S. A. R. Co.*, 43 *Fed. Rep.* 862.

When the damages found by the jury are either so large or so small as to force upon the mind of every man familiar with the circumstances of the case the conviction that, by some means, the jury have acted under the influence of a perverted judgment, it is the duty of the court, in the exercise of a sound judicial discretion, to grant a new trial. *Clapp v. Hudson River R. Co.*, 19 *Barb. (N. Y.)* 461. *Mobile & M. R. Co. v. Ashcraft*, 48 *Ala.* 15.

Courts will not always set aside verdicts in damage suits where they are either larger or smaller than they ought to be, but in a personal injury action where the verdict is abnormally large, and it appears that this may have been brought about by improper remarks of counsel, the verdict will be set aside. *C., T. & N. W. R. Co. v. Hancock*, 2 *Tex. Unrep. Cas.* 301.

Where the case is one for only compensatory damages, the rule which restrains courts from setting aside verdicts for excessive damages is not so rigid as in cases calling for punitive or exemplary damages. *Florida R. & N. Co. v. Webster*, 25 *Fla.* 394, 5 *So. Rep.* 714.—FOLLOWED IN *Florida Southern R. Co. v. Hirst*, 30 *Fla.* 1.

Where, according to the weight of evidence, there is grave doubt whether plaintiff ought to recover anything, the court below is warranted in granting a new trial, even a second new trial, if the damages found are extreme or excessive. *Smith v. Savannah, F. & W. R. Co.*, 42 *Am. & Eng. R. Cas.* 105, 84 *Ga.* 698, 11 *S. E. Rep.* 455.

When the injury is the result of unavoidable accident, not of wilful negligence or gross carelessness, damages will be regarded excessive where awarded to the full extent allowed by law where death ensues, where

the evidence shows that the loss of a foot, as in this case, would not necessarily shorten life nor wholly incapacitate one for business. *Kennon v. Gilmer*, 5 *Mont.* 257, 5 *Pac. Rep.* 847.—QUOTING *Union Pac. R. Co. v. Hand*, 7 *Kan.* 393.

Wherever it is apparent that juries, either from passion or prejudice against incorporate companies, have rendered verdicts which are grossly excessive, the appellate court will not hesitate to set them aside and grant a new trial. The legal and equitable rights of incorporate companies are to be measured by the same standard in the rendition of the verdicts of juries as those of natural persons. *Greene v. Southern Exp. Co.*, 41 *Ga.* 515.

In a case where intrinsic circumstances may properly be introduced to aid in the construction of a deed, a new trial should be granted when it appears such circumstances were not fully before the court and jury, and the damages awarded by the jury were excessive. *Morris & E. R. Co. v. Bonnell*, 34 *N. J. L.* 474.

Though a personal injury be very serious, such as will shorten life, still a verdict for double the amount of damages which could be awarded if death had ensued will generally be deemed excessive and set aside. *Collins v. Albany & S. R. Co.*, 12 *Barb. (N. Y.)* 492.—REVIEWED IN *Belknap v. Boston & M. R. Co.*, 49 *N. H.* 358; *Murray v. Hudson River R. Co.*, 47 *Barb.* 196.

29. When it should not be.—A verdict in damages will not be set aside as excessive where there is nothing before the court to show in what respect it is so. *Washington Fifth Baptist Church v. Baltimore & P. R. Co.*, 5 *Mackey (D. C.)* 269.

Unless at first blush the damages seem excessive, the court should not disturb the verdict. *Indianapolis & V. R. Co. v. McLin*, 8 *Am. & Eng. R. Cas.* 237, 82 *Ind.* 435. *Ohio & M. R. Co. v. Judy*, 120 *Ind.* 397, 22 *N. E. Rep.* 252.

A new trial will not be granted because the evidence is conflicting and the damages are apparently extreme where the verdict is not so excessive as to warrant the court in setting it aside. *So held*, where plaintiff recovered a large verdict for injuries received while driving in a large city, by being run into by a dummy engine negligently operated by the men in charge. *Metropolitan St. R. Co. v. PoweN*, 89 *Ga.* 601, 16 *S. E. Rep.* 118.

Where the action is for personal injuries, and the plaintiff has twice obtained a verdict, and the trial court after hearing the evidence has permitted the second verdict to stand, the appellate court will not interfere upon the ground that the damages are excessive. *Peoria, D. & E. R. Co. v. Rice*, 46 Ill. App. 60.

Where the verdict of a jury establishes the fact that the deceased, at the time of the accident, was deceived and misled by the negligence of a railroad company in leaving its gates open at a time when they should have been closed, the court refused to set aside the verdict. *Hooper v. Boston & M. R. Co.*, 81 Me. 260, 17 Atl. Rep. 64.

A verdict considerably lower than the outside range of the testimony would warrant is not excessive. *Balch v. Grand Rapids & I. R. Co.*, 78 Mich. 654, 44 N. W. Rep. 151. *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. Rep. 1008.

Where the question is a mere matter of damages, and different minds might, and probably would, arrive at different results, and nothing inconsistent with an honest exercise of judgment appears, the court should not disturb the verdict. *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466.

In actions for personal injuries damages are not to be weighed in a very delicate scale; and it is not enough to warrant the court in granting a new trial that it would have preferred a different admeasurement of damages. *Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.) 492.

Courts are more reluctant to grant new trials for excessive damages in actions for personal injury than in any other class of cases. *Quinn v. South Carolina R. Co.*, 37 Am. & Eng. R. Cas. 166, 29 So. Car. 381, 7 S. E. Rep. 614, 1 L. R. A. 682.

A new trial will not be granted after verdict because the amount of damages assessed by the verdict exceeds the amount claimed in the writ, but not the amount laid in the declaration. *Roderick v. Baltimore & O. R. Co.*, 7 W. Va. 54.

30. Bias, prejudice, or mistake on part of jury must appear.—A court cannot interfere with a verdict on the ground of excessive damages unless such damages are so excessively large and disproportionate as to warrant the inference that the jury were swayed by prejudice, preference, partiality, passion, or corruption. *Shumacher v. St. Louis & S. F. R. Co.*, 39

Fed. Rep. 174, 17 Wash. L. Rep. 550. *Dwyer v. St. Louis & S. F. R. Co.*, 52 Fed. Rep. 87. *Wheaton v. North Beach & M. R. Co.*, 36 Cal. 590. *Macon & W. R. Co. v. Winn*, 26 Ga. 250. *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 333. *Chicago, R. I. & P. R. Co. v. Otto*, 52 Ill. 416. *Ohio & M. R. Co. v. Col-larn*, 5 Am. & Eng. R. Cas. 554, 73 Ind. 261, 38 Am. Rep. 134. *Louisville, N. A. & C. R. Co. v. Wood*, 113 Ind. 544, 12 West. Rep. 314, 14 N. E. Rep. 572, 16 N. E. Rep. 197. *Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456. *Louisville & N. R. Co. v. Fox*, 11 Bush (Ky.) 495, 14 Am. Ry. Rep. 374.—QUOTING *Louisville & N. R. Co. v. Sickings*, 5 Bush 1; *Fair v. London & N. W. R. Co.*, 21 L. T. 326. REVIEWING *Louisville & P. R. Co. v. Smith*, 2 Duv. (Ky.) 556; *Louisville & N. R. Co. v. Collins*, 2 Duv. 114; *Louisville & N. R. Co. v. Robinson*, 4 Bush 508; *Shaw v. Boston & W. R. Co.*, 8 Gray (Mass.) 45.—*Louisville & N. R. Co. v. Mitchell*, 87 Ky. 327, 8 S. W. Rep. 706. *Du Laurant v. St. Paul & P. R. Co.*, 15 Minn. 49 (Gil. 29). *Mississippi C. R. Co. v. Caruth*, 51 Miss. 77. *Kennedy v. North Mo. R. Co.*, 36 Mo. 351. *Graham v. Pacific R. Co.*, 66 Mo. 536.—FOLLOWING *Kennedy v. North Mo. R. Co.*, 36 Mo. 351.—*Parsons v. Missouri Pac. R. Co.*, 94 Mo. 286, 12 West. Rep. 618, 6 S. W. Rep. 464. *Tennessee C. & R. Co. v. Roddy*, 31 Am. & Eng. R. Cas. 340, 85 Tenn. 400, 5 S. W. Rep. 286.—CRITICISING *Nashville, C. & St. L. R. Co. v. Foster*, 10 Lea (Tenn.) 366.

Or so large as to justify the inference of gross mistake. *Central R. & B. Co. v. Roach*, 70 Ga. 434. *Whipple v. West Phila. Pass. R. Co.*, 11 Phila. (Pa.) 345.—REVIEWING *Caldwell v. Catawissa R. Co.*, 8 Phila. 30; *Williams v. Philadelphia*, 8 Phila. 30; *Pennsylvania R. Co. v. Allen*, 53 Pa. St. 276.—*Texas & P. R. Co. v. Johnson*, 2 Tex. App. (Civ. Cas.) 154.

Or a clear misapprehension by the jury of their duty and the facts of the case. *Terre Haute, A. & St. L. R. Co. v. Vanatta*, 21 Ill. 188.

When the damages found by a jury are either so large or so small as to force the conviction that by some means the jury have acted under the influence of a perverted judgment, it is the duty of the court, in the exercise of a sound discretion, to grant a new trial. *Clapp v. Hudson River R. Co.*, 19 Barb. (N. Y.) 461.—FOLLOWING *Collins v. Albany & S. R. Co.*, 12 Barb. 492.—REVIEWED IN *Bellmap v. Boston & M.*

R. Co., 49 N. H. 358; *Murray v. Hudson River R. Co.*, 47 Barb. 196.—*Missouri, K. & T. R. Co. v. Weaver*, 16 Kan. 456. *Louisville Southern R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. Rep. 357. *Matthews v. Missouri Pac. R. Co.*, 26 Mo. App. 75. *Wills v. Cape Girardeau S. W. R. Co.*, 44 Mo. App. 51. *Belknap v. Boston & M. R. Co.*, 49 N. H. 358.—EXPLAINING *Black v. Carrollton R. Co.*, 10 La. Ann. 33. REVIEWING *Collins v. Albany & S. R. Co.*, 12 Barb. 492; *Clapp v. Hudson River R. Co.*, 19 Barb. 461.—*Collins v. Albany & S. R. Co.*, 12 Barb. (N. Y.) 492.—FOLLOWED IN *Clapp v. Hudson River R. Co.*, 19 Barb. 461.

While the case of a railroad train running regardless of law demands at the hands of the jury something more in the way of damages than a mere individual, and this for the protection of the public, yet the verdict should not be so excessive as to show a vengeful feeling towards the defendant or favor towards the plaintiff. *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218.

Where some of the material findings of the jury are against the evidence, and others are unsatisfactory, and it appears thereby that the findings have been given under the influence of passion or prejudice, or at least that the jury have not intelligently or fairly considered the evidence, a new trial must be granted. *Southern Kan. R. Co. v. Michaels*, 49 Kan. 388, 30 Pac. Rep. 408.

When a verdict is rendered for \$200 actual damages and \$10,000 exemplary damages, the disproportion is so great as to manifest that character of passion, prejudice, or partiality in the jury which requires a reversal. *International & G. N. R. Co. v. Telephone & T. Co.*, 69 Tex. 277, 5 S. W. Rep. 517.—QUOTING *Railroad Co. v. Nichols*, Tex. (1882).

31. Effect of approval of verdict by trial judge.—Where there is nothing involved but a question of fact, and the evidence justifies the verdict rendered, and the trial court has refused to set it aside, the supreme court will not interfere on the ground that the damages are excessive. *Illinois C. R. Co. v. Hays*, 19 Ill. 166. See also *Richmond & D. R. Co. v. Williams*, 88 Ga. 16, 14 S. E. Rep. 120. *Dugan v. Chicago, St. P., M. & O. R. Co.*, 85 Wis. 609, 55 N. W. Rep. 894.

32. Permanent injuries.—The court does not err in refusing to set aside a verdict as excessive where the evidence tends

to show that the injury is serious, and it is uncertain when, if at all, the plaintiff will fully recover. *Brusch v. St. Paul City R. Co.*, 52 Minn. 512, 55 N. W. Rep. 57.—FOLLOWING *Johnson v. Northern Pac. R. Co.*, 47 Minn. 430, 50 N. W. Rep. 473.

33. Injury to plaintiff's wife.—In an action by a husband to recover for injuries to his wife, the evidence showed that she did the housework before the injury for her husband and three children, assisted in a store, and sometimes earned by sewing as much as \$20 a week. *Held*, that a verdict for \$2500 should not be set aside as excessive. *Cregin v. Brooklyn Cross-Town R. Co.*, 18 Hun (N. Y.) 368.—QUOTING *Sloan v. New York C. & H. R. R. Co.*, 1 Hun 543.

Where plaintiff's wife was thrown down upon leaving a car, fracturing her shoulder so as to become permanently disabled, a verdict in favor of the husband for pecuniary loss of \$3000 is not excessive. *Allen v. Manhattan R. Co.*, 42 N. Y. S. R. 227, 17 N. Y. Supp. 187.

A verdict for \$5000 is not excessive in an action for personal injuries to plaintiff's wife which produced a miscarriage, caused her great pain, and resulted in permanent disorders of her spine and womb, rendering her an invalid. *Missouri Pac. R. Co. v. White*, 48 Am. & Eng. R. Cas. 206, 80 Tex. 202, 15 S. W. Rep. 808.

Where it appears that the husband expended over \$800 in the necessary treatment and care of his wife to the time of the trial, and since the injury she has been wholly disabled from doing any household duty, or from being of any aid or assistance to the husband, a verdict for \$5000 will not be interfered with in the supreme court as excessive. *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 15 S. W. Rep. 315.

34. Injury to child.—A verdict in favor of a widowed mother for \$1027 for loss of service of her minor son for more than nineteen months will not be set aside as excessive where the evidence showed that he lived with his mother, who received his wages, and that he was earning at the time \$60 a month. *Mauerman v. St. Louis I. M. & S. R. Co.*, 41 Mo. App. 348.

A boy eleven years old was so injured as to necessitate the amputation of his foot and a portion of his leg. *Held*, that the

*See also CHILDREN, INJURIES TO, 192, 193.

jury might consider not only the loss of service, but the increased care and expense of bringing up the crippled child, and a verdict in favor of the father for \$1500 was not excessive. *Lang v. New York, L. E. & W. R. Co.*, 51 Hun 603, 22 N. Y. S. R. 110, 4 N. Y. Supp. 565; affirmed in 123 N. Y. 656, mem., 33 N. Y. S. R. 1030.

Where a mother is entitled to recover for injuries to her minor child, a verdict for \$5000 will not be disturbed as excessive where the jury is authorized to consider both the loss of service and the extra care and expense that the mother has been put to, though the child has already recovered \$10,000 in its own right. *Cumming v. Brooklyn City R. Co.*, 24 N. Y. S. R. 718, 52 Hun 613, 1 Silv. Sup. Ct. 327, 5 N. Y. Supp. 476.

A widowed mother who was poor sued for the killing of her only son, five years old, who was smart, healthy, intelligent, large of his age, and obedient. The physician's bill and funeral expenses amounted to \$290. On the first trial the jury returned a verdict of \$4500. On the second trial they returned a verdict for \$3500, of which \$1235 was remitted. *Held*, that the court would not grant another trial on the ground that the damages were excessive. *Little Rock & Ft. S. R. Co. v. Barker*, 19 Am. & Eng. R. Cas. 195, 39 Ark. 491.—FOLLOWED IN *Gaither v. Kansas City, etc., R. Co.*, 27 Fed. Rep. 544.

35. Injuries to passengers.*—Where a female passenger is thrown down on leaving a train, and has her dress torn off and her side injured, from which she suffers from nervousness and insomnia, a verdict in her favor for \$750 should not be disturbed. *Hoffkins v. Manhattan R. Co.* 25 N. Y. S. R. 160, 53 Hun 634, 2 Silv. Sup. Ct. 588, 6 N. Y. Supp. 953.

Proof that a passenger was carried 250 yards past his station and put off in the night-time in mud half-way to his boot tops will not support a verdict of \$300 against the company, where it is not shown that he suffered any inconvenience other than the walk back to the station and having to clean his boots the next morning. *Texas Pac. R. Co. v. Florence*, 4 Tex. App. (Civ. Cas.) 58, 14 S. W. Rep. 1070.

Proof that a street-car passenger through

the negligence of the driver was thrown down and "dazed," that his lip was cut, and that he paid \$5 for having his lip treated, and lost part of a day, will not support a verdict for \$200. *Texas & P. R. Co. v. Doherty*, 4 Tex. App. (Civ. Cas.) 231, 15 S. W. Rep. 44.

A passenger paid for transportation to a certain mile post. The conductor engaged to stop there and put him off. On nearing the point the passenger left the car, and took his position on the steps ready to land. The speed of the train was but slightly checked; and while the passenger was upon the step and somewhat encumbered with baggage, the train being in rapid progress, a sudden jar took place by some movement of the cars, and he lost his footing and fell to the ground. He was painfully and permanently injured. The jury gave him a verdict for over \$2000. The court granted a new trial. On the facts in the record the appellate court could not say that the court abused its discretion. *Delane v. Central R. & B. Co.*, 59 Ga. 633.

36. Ejection of passenger.*—Where a passenger has surrendered his ticket and holds a conductor's check for the trip, and is delayed by a wreck on the road and compelled to take another train, and the check is refused, and the passenger is ejected because he refuses to pay the extra fare demanded when tickets are not purchased before entering the train, he is entitled to recover something more than for his loss of time—enough, at least, to compensate him for his humiliation and mortification of being ejected—yet \$2500 is excessive. *Louisville & N. R. Co. v. Wilsey*, (Ky.) 12 S. W. Rep. 275.—REVIEWING *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 3 S. W. Rep. 530.

Where a passenger is ejected from a car under circumstances for which he can only recover compensatory damages, and the only unnecessary force used is seizing him and pulling him while he is holding on to the rail of the platform, whereby one finger was so injured that a felon resulted, a verdict for \$3000 is excessive, and should be set aside. *Cox v. New York C. & H. R. R. Co.*, 11 Hun (N. Y.) 621.

* Excessive damages for injuries to passengers, see note, 30 AM. & ENG. R. CAS. 543. See also CARRIAGE OF PASSENGERS, 640-651.

* Various illustrations of excessive damages for ejecting passenger, see note, 47 AM. & ENG. R. CAS. 643. See also 39 AM. & ENG. R. CAS. 420, *abstr.*; EJECTION OF PASSENGERS, 124-136.

Damages for \$600 against a railroad company for putting a female passenger off a train after midnight are excessive where it appears that she was put off with others three fourths of a mile from the station; that the only inconvenience suffered was getting her feet wet, and having to walk back to the station, and carry her hand baggage. *Howe v. Oliver*, (Tex. Civ. App.) 22 S. W. Rep. 828.

Two hundred dollars damages are not excessive for the humiliation suffered by a passenger whose ticket has been wrongfully refused by the conductor, and who was forced to pay an additional fare in order to avoid expulsion from the train. *Chicago & E. I. R. Co. v. Conley*, 6 Ind. App. 9, 32 N. E. Rep. 865.

The facts that plaintiff only had his hands slightly pinched in being ejected from a train, and that he had a verdict for \$350, contrary to a strong intimation from the court, is not sufficient to show that the jury were actuated by passion or prejudice, where the evidence was conflicting, and the jury had a right to consider plaintiff's injured feelings. *Hamilton v. Third Ave. R. Co.*, 8 J. & S. (N. Y.) 376.

Where a street-car passenger is ejected on a false charge of being intoxicated, \$400 damages is not so large as to evince prejudice, passion, or corruption on the part of the jury, and a judgment thereon will not be set aside as excessive. *Regner v. Glens Falls, S. H. & Ft. E. St. R. Co.*, 74 Hun 202, 26 N. Y. Supp. 625, 56 N. Y. S. R. 300.

A verdict of \$50 damages in favor of a passenger who has been ejected from a train for refusal to pay fare, at a place where there was no station, and had been in consequence compelled to walk three and a half miles to her home, is not excessive. *Durfee v. Union Pac. R. Co.* 9 Utah 213, 33 Pac. Rep. 944.

A verdict for \$300 for an unlawful expulsion at a desolate place some distance from a station where passage could be procured is not excessive, where it appears that the passenger was forcibly ejected in such a manner as to excite the ridicule of the other passengers. *Phetliplace v. Northern Pac. R. Co.*, 58 Am. & Eng. R. Cas. 61, 84 Wis. 412, 54 N. W. Rep. 1092. — FOLLOWING *Wightman v. Chicago & N. W. R. Co.*, 73 Wis. 169.

Plaintiff, a passenger, presented a valid ticket, which the conductor rudely refused and told plaintiff he would have to pay or

get off. To avoid being ejected he got off, but again entered the car and paid his fare. *Held*, that a verdict in his favor for \$500 should be set aside. *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399.

A lady traveling with her aunt purchased first-class tickets, but upon entering the car platform the aunt was permitted to enter the ladies' car, but a brakeman refused to allow the other lady to enter the car, and pushed her against the iron railing, hurt her side, and forced her to enter and travel in the smoking car, where no other women were, but where there were intoxicated and boisterous men, one of whom addressed her with improper familiarity. *Held*, that a verdict in her favor for \$650 damages was authorized. *Texas & P. R. Co. v. Johnson*, 2 Tex. App. (Civ. Cas.) 154.

A verdict for \$7000 in favor of one injured in being brutally and cruelly removed from a train was held not excessive. *Marion v. Chicago, R. I. & P. R. Co.*, 64 Iowa 568, 21 N. W. Rep. 86.

37. Injury to property of abutting owner.*—Where an abutting owner sues a railroad for damages to his property by reason of depreciation in its value, caused by putting in additional switches in front of it, a verdict of \$2000 will not be set aside as excessive where plaintiff's evidence shows that before the switches were put in his property was worth \$6000; that it had depreciated nearly fifty per cent. since by reason of the soot, smoke, and cinders thrown in and about his house, and by the necessary obstruction to the passage to and from it, and the disturbing noises, both day and night, caused by the increased number of trains on the switches. *Gulf, C. & S. F. R. Co. v. Necco*, (Tex.) 15 S. W. Rep. 1102.

A verdict for \$800, in an action to recover for the depreciation in the value of two lots, caused by the construction and operation of a railroad, will be set aside as excessive where the proof shows that the lots before the railroad was built were worth not more than \$625. *Gulf, C. & S. F. R. Co. v. Fink*, (Tex.) 18 S. W. Rep. 492.

Plaintiff brought action against defendant company for taking her land and constructing its road thereon. A special interrogatory was submitted to the jury whether defendant entered the premises as a trespasser,

* Injuries to abutting property caused by construction of railroad. Excessive damages, see 52 AM. & ENG. R. CAS. 33, *abstr.*

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which was answered in the negative. The evidence showed the value of the land to be \$100. The jury gave a verdict for \$250. *Held*, that as defendant was not a trespasser the verdict was clearly excessive. *Kitterman v. Chicago, M. & St. P. R. Co.*, 27 *Am. & Eng. R. Cas.* 432, 69 *Iowa* 440, 30 *N. W. Rep.* 174.

38. Injury to personal property.—

In an action for damages both to land and growing crops thereon where the proof shows that the damages to the crops could not be estimated at more than \$400 or a very little more, and failed to establish any particular sum for damages as to the land, a verdict for \$500 in all is not supported by the evidence. *St. Louis, A. & T. R. Co. v. Graham*, 55 *Ark.* 294, 18 *S. W. Rep.* 56.

Where the alleged value of a folding machine is \$600, but it had been used for two years after its shipment, with only \$37.50 repairs, a verdict against the carrier for damages and injuries to it, while being carried, for \$137 was not supported by the evidence, though the owner at the time of the trial testifies that it is worthless. *Missouri Pac. R. Co. v. Breeding*, 4 *Tex. App. (Civ. Cas.)* 217, 16 *S. W. Rep.* 184.

Defendant company fastened a telegraph wire to the wall of a building occupied by plaintiff, which caused a part of it to fall during a storm, whereby his rooms were flooded by water. The evidence showed that the whole value of the property injured was \$475, and that it could have been sold for \$30 after it was flooded. *Held*, that a verdict for the whole value of the property was excessive. *Gulf, C. & S. F. R. Co. v. Johnson*, 71 *Tex.* 619, 1 *L. R. A.* 730, 9 *S. W. Rep.* 602.

In an action to recover damages resulting from a team of horses colliding with a train the evidence showed that but one horse was killed, and failed to show that the other was so injured as to be worthless. A verdict was rendered for a sum equal to the highest value placed on both horses. *Held*, that the verdict was not supported by the evidence. *Texas C. R. Co. v. Ascue*, (*Tex.*) 4 *S. W. Rep.* 13.

In an action for damages to a carriage it appeared that it was once worth \$500; that it had been twice run into by trains, the damages for the first injury (estimated at from \$50 to a total loss) being laid in the complaint at \$50, and for the second collision at \$450. It was found that the railroad

company was not liable for the first injury. The jury gave a verdict of \$400. *Held*, that as there was nothing to show that the jury did not take into consideration the damages for the first collision the verdict should be set aside. *Missouri Pac. R. Co. v. Peay*, (*Tex.*) 20 *S. W. Rep.* 57.

39. Killing or injuring animals.*

—It is not error in a trial court to refuse to set aside a verdict in an action to recover for damages to cattle while being carried, on the ground that the verdict is excessive, where the evidence is conflicting, but the verdict is supported by evidence. *Galveston, H. & S. A. R. Co. v. Johnson*, (*Tex.*) 19 *S. W. Rep.* 867.

Plaintiff sued for negligently killing a well-bred English mastiff dog. He proved by a witness who made a practice of raising and training dogs, and knew their value, that a mastiff trained to watch was worth from \$100 to \$200, and this evidence was uncontradicted. *Held*, that a verdict for \$96.83 should not be set aside as excessive. *Meisch v. Rochester Elec. R. Co.*, 25 *N. Y. Supp.* 244, 55 *N. Y. S. R.* 146, 72 *Hun* 604.

Plaintiff sued to recover \$200, the value of a jack killed on the track, and recovered a verdict and judgment of \$125. He testified that he valued the animal at \$200 and had so valued him for taxation, but that he had bought him for \$12.50. It was shown that the animal was a small one, known as a "prairie jack," and that the person from whom plaintiff had bought had purchased him for \$7.50, and that the previous owner had bought him for \$5 and a pocket knife. Four other witnesses testified that the animal was not worth over \$15 in the market. *Held*, that the verdict was so manifestly against the weight of evidence as to be set aside. *Texas & P. R. Co. v. Taylor*, 2 *Tex. App. (Civ. Cas.)* 368.

b. Instances of Verdicts Claimed to be Excessive.

40. Verdict for \$150.—Plaintiff was thrown from his carriage by a collision and suffered a fracture of both arms. *Held*, that a verdict for \$150 did not indicate passion or prejudice on the part of the jury, though there was some conflict of evidence, and the greater number of witnesses testified

* See also ANIMALS, INJURIES TO, 593, 594.

for the defendant. *Volk v. Livingston*, 31 N. Y. S. R. 668, 10 N. Y. Supp. 211.

41. — \$300. — Plaintiff's evidence showed that he was so injured that his eyes were closed, or partly closed, and wholly useless for several weeks, during which time he was sick and disabled, and suffered great pain, and at the time of the trial, nearly three years afterward, was still suffering. *Held*, that a verdict for \$300 was not excessive. *Schuler v. Third Ave. R. Co.*, 44 N. Y. S. R. 774, 17 N. Y. Supp. 834; *affirmed in* 48 N. Y. S. R. 663, 1 Misc. 351, 20 N. Y. Supp. 683.

42. — \$350. — A verdict for \$350 is not excessive where plaintiff was thrown out of his buggy and was confined to his bed for three weeks. *Roberts v. Chicago & N. W. R. Co.*, 35 Wis. 679.

The uncontradicted evidence of plaintiff showed that he was a married man, a tailor, and worked for himself; that he was hurt about his ankle, and that his leg was broken; that he was taken to a hospital, where he remained about eight weeks, suffering much pain, and still suffered at the time of the trial, and was unable to work. *Held*, that a verdict for \$350 was not excessive. *Schapieler v. Third Ave. R. Co.*, 39 N. Y. S. R. 209, 14 N. Y. Supp. 921.

43. — \$800. — Plaintiff, a female, fell in alighting from a car, and received a slight bruise or scratch on her arm, which she claimed resulted in a sore which stiffened her arm and incapacitated her to labor for three months. The court was inclined to the opinion, from other evidence, that the sore resulted from bad blood rather than from the fall, yet it refused to set aside a verdict for \$800, a medical witness having testified that the fall caused the sore, which was not disproved by the defendant. *Corrigan v. Dry Dock, E. B. & B. R. Co.*, 14 Daly 120, 6 N. Y. S. R. 243.

44. — \$1000. — Plaintiff with her two children was carried past the station to which she was bound. The conduct of the conductor was courteous and respectful. *Held*, that a verdict for \$1000 was excessive. *Trigg v. St. Louis, K. C. & N. R. Co.*, 6 Am. & Eng. R. Cas. 345, 74 Mo. 147, 41 Am. Rep. 305.

For an injury to the hip and sciatic nerve which has caused continuous suffering for more than five years, and which will probably be permanent, a finding of damages in the sum of \$1000 will not be declared ex-

cessive. *Winkler v. St. Louis, .. M. & S. R. Co.*, 21 Mo. App. 99.

A verdict for \$1000 was sustained in favor of a negro boy, sixteen years old, injured while working as brakeman. *Gulf, C. & S. F. R. Co. v. Jones*, 76 Tex. 350, 13 S. W. Rep. 374.

A verdict of \$1000 was not excessive for injuries suffered by a colored passenger through the conductor's failure to protect him from molestation and humiliation at the hands of drunken men on the same train. *Richmond & D. R. Co. v. Jefferson*, 52 Am. & Eng. R. Cas. 438, 89 Ga. 554, 16 S. E. Rep. 69.

A female passenger sued for being ejected from a train, and the evidence showed her entitled to recover something. At the first trial she received a verdict for \$1000, which was set aside, and a second verdict was rendered for \$500, which was set aside. At the third trial she obtained a verdict for \$1000. *Held*, that the limit of the court's discretion had been reached and the verdict could not be interfered with. *Johnson v. Northern Pac. R. Co.*, 46 Fed. Rep. 347.

Plaintiff testified that she was struck by a street-car and severely bruised about the hip and leg; that she suffered great pain and required medical attention for four months, during which time she was unable to attend to her household duties, and was still suffering at the time of the trial. Her physician testified that he found her suffering from severe contusions of the hip and lower part of the back; that she suffered exceedingly in moving one leg, and that rheumatic fever resulted, and that she was still suffering. *Held*, that a verdict for \$1000 was not excessive. *O'Toole v. Central Park, N. & E. R. R. Co.*, 12 N. Y. Supp. 347, 58 Hun 609, 35 N. Y. S. R. 591; *affirmed in* 128 N. Y. 597, *mem.*, 28 N. E. Rep. 251.

45. — \$1500. — A verdict for \$1500 for a severe permanent injury to a woman twenty-seven years old will not be disturbed where it appears that the trial was so conducted as not to arouse passion or prejudice against defendant, and the jury were told to return such a verdict as would simply compensate plaintiff for the injuries received. *Mitchell v. Broadway & S. A. R. Co.*, 70 Hun (N. Y.) 387.

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isted, caused by defendant's cars running off the track and shocking the nervous system of plaintiff. *Houston & T. C. R. Co. v. Shafer*, 6 Am. & Eng. R. Cas. 421, 54 Tex. 641.

Plaintiff was a working girl and received injuries which confined her to her bed for a month, and it was a year before she was able to earn anything, during which time she suffered more or less. At the time of the injury she was receiving wages and board worth \$30 a month, and her medical attendance cost her \$205. *Held*, that a verdict for \$1500 should not be set aside as excessive. *Fowler v. Broadway & S. A. R. Co.*, 36 N. Y. S. R. 806, 59 Hun 623, 13 N. Y. Supp. 453.

46. — \$1600.—Plaintiff was a farmer about sixty-two years of age when injured. Prior thereto he was healthy and strong, and able to do regular work. The evidence tended to show that his injuries were permanent and would probably disable him for the remainder of his life. *Held*, that a verdict for \$1600 should not be disturbed. *Duffy v. Chicago & N. W. R. Co.*, 34 Wis. 188, 8 Am. Ry. Rep. 1.—REVIEWING *Goodno v. Oshkosh*, 28 Wis. 300; *Spicer v. Chicago & N. W. R. Co.*, 29 Wis. 580; *Patten v. Chicago & N. W. R. Co.*, 32 Wis. 524.—DISTINGUISHED IN *Kittner v. Milwaukee & N. R. Co.*, 77 Wis. 1.

47. — \$1650.—Plaintiff, a hotel waiter, was sent by a hotel keeper as was the daily custom, to take dinner to a conductor, who told him to put the dinner upon the desk in the cab car and then commanded him to leave the car, which was moving rapidly, and threatened that if he did not jump from the car he would kick him off; and plaintiff then left the car and was thrown upon the track, jerked under the wheels, and had one of his feet cut off. *Held*, that the evidence warranted a verdict for \$1650 against the company. *Savannah, F. & W. R. Co. v. Watson*, 89 Ga. 110, 14 S. E. Rep. 890.

48. — \$1840.—Where the evidence shows that plaintiff's leg was broken, and that she was unable to walk for four months, and suffered great pain, and was put to considerable expense, the court will not set aside a verdict for \$1840. *Sheff v. Huntington*, 16 W. Va. 307.

49. — \$2000.—A verdict for \$2000 in favor of a brakeman for an injury which necessitated amputation of the left thumb

at the second joint will be set aside as excessive. *Louisville & N. R. Co. v. Law*, (Ky.) 21 S. W. Rep. 648.

A verdict of \$2000 for damages to a married woman by being thrown from the steps of a car while dismounting will not be set aside as excessive where the evidence shows that she was so seriously injured as practically to lose the use of one arm. *Little Rock & Ft. S. R. Co. v. Harkey*, (Ark.) 15 S. W. Rep. 456.

Where the evidence shows that plaintiff's injuries consisted of a bad sprain of the ankle and a rupture or great sprain of the ligaments of the ankle joint, the court will not set aside a verdict for \$2000, though it seems to the court large. *Dimmitt v. Hannibal & St. J. R. Co.*, 40 Mo. App. 654.

When a bodily injury of a permanent character is sustained, inflicting great bodily pain when it was received and for a long time afterwards, a verdict for \$2000 is not so excessive as to require a reversal. *Texas & P. R. Co. v. Lowry*, 61 Tex. 149. See also *Lowe v. Minneapolis St. R. Co.*, 37 Minn. 283, 34 N. W. Rep. 33.

Plaintiff was a shoemaker and earning \$25 a week prior to his injuries. He was confined to his bed for ten days, and was prevented from doing his work for some five weeks. His earning power was reduced from \$25 per week to \$7 or \$8 per week. *Held*, that a verdict for \$2000 was not excessive. *Miller v. Manhattan R. Co.*, 73 Hun 512, 26 N. Y. Supp. 162, 56 N. Y. S. R. 189.—FOLLOWING *Strohm v. New York, I. E. & W. R. Co.*, 96 N. Y. 305.

50. — \$2250.—A car in which plaintiff was riding was derailed and turned over, and she had the leaders of her hand cut, from which her hand was stiffened and crippled, and from which she suffered severe pain and anguish. Medical witnesses testified that her fingers were permanently disabled. *Held*, that a verdict for \$2250 was large, but did not so plainly show passion or prejudice on the part of the jury as to justify the court in setting it aside. *Honeycutt v. St. Louis, I. M. & S. R. Co.*, 40 Mo. App. 674.

51. — \$2500.—Where evidence tended to show that plaintiff's spine was seriously and permanently injured so as to render him forever incapable of performing ordinary manual labor, and subjecting him to constant pain, a verdict for \$2500 damages was not excessive. *Macy v. St. Paul*

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& D. R. Co., 35 Minn. 200, 28 N. W. Rep. 249.

Where the evidence tends to prove a severe, and probably permanent, injury to plaintiff's hand and wrist, a verdict for \$2500 ought not to be set aside as excessive. *Maloy v. New York C. R. Co., 58 Barb. (N. Y.) 182, 40 How. Pr. 274.*

A verdict for \$2500 in favor of a female passenger will not be set aside as excessive where it appears that she required medical attendance for some time, and that the injuries were permanent, and that she will be more apt to suffer from other ailments than if she had not been injured. *Crank v. Forty-second St. & St. N. A. R. Co., 25 N. Y. S. R. 53, 6 N. Y. Supp. 229, 53 Hun 425; affirmed in 127 N. Y. 648, mem., 27 N. E. Rep. 856.*

Where a car is derailed and a passenger is greatly cut and bruised by its turning over, and the evidence shows that his injuries are severe, a verdict for \$2500 will not be set aside as excessive, though there is some conflict as to the nature of the injuries by the medical witnesses testifying. *Gulf, C. & S. F. R. Co. v. Smith, 74 Tex. 276, 11 S. W. Rep. 1104.*

A lady aged sixty-two was unintentionally injured by having an arm broken, which resulted in a protracted effort at cure, without success, so that she could never again perform her usual domestic duties. *Held*, that a verdict for \$2500 damages was not so excessive as to justify a new trial. *Pittsburgh, C. & St. L. R. Co. v. Spouler, 8 Am. & Eng. R. Cas. 453, 85 Ind. 165.*

52. — \$2725.—The injuries received by plaintiff produced pains in her back, loss of memory to some extent, paralysis in one side for three or four weeks, and some hemorrhage, with a tendency to miscarriage, and she still suffers at times from pains in her sides and lower limbs, and cannot use one arm in lifting as before the accident. *Held*, that a verdict for \$2725 was not excessive. *Brown v. Hannibal & St. J. R. Co., 42 Am. & Eng. R. Cas. 87, 99 Mo. 310, 12 S. W. Rep. 655.*

53. — \$3000.—Where the plaintiff recovered a judgment for \$3000 as the personal representative of a deceased minor, who at the time of his death was eleven years and eight months old, and was also intelligent, healthy, and promising, and left surviving him a father, who was a poor man, working as an engineer of steam ma-

chinery, and having a wife and three children—*held*, not so grossly excessive as to require a reversal. *Union Pac. R. Co. v. Dunden, 34 Am. & Eng. R. Cas. 88, 37 Kan. 1, 14 Pac. Rep. 501.*

Plaintiff was thrown to the ground by a sudden start on leaving a train. A bruise on her head swelled up to the size of an egg and left a depression in the skull. Her right side was injured from her waist to her feet, one knee swelled and remained larger than the other to the time of the trial, and she was lame and sometimes could not walk. Her physician testified that the depression in the skull and the enlargement of the knee were permanent. *Held*, that a verdict for \$3000 was not excessive. *Montgomery v. Long Island R. Co., 25 N. Y. S. R. 159, 53 Hun 633, 6 N. Y. Supp. 178.*

In an action by a husband to recover pecuniary loss resulting from an injury to his wife, the evidence showed that she fell from defendant's train, which caused a fracture of the scapula of the left shoulder which never united, and which left her permanently disabled in her shoulder and arm. The injury was claimed to be incurable, and she was compelled to wear an iron frame to support her shoulder, and even then could make no exertion without pain. *Held*, that a verdict for \$3000 would not be disturbed, as the jury had a right to consider, in addition to the direct loss, the loss of society and companionship. *Allen v. Manhattan R. Co., 28 J. & S. 230, 17 N. Y. Supp. 187, 42 N. Y. S. R. 227, mem.; affirmed in 137 N. Y. 561, 33 N. E. Rep. 338.*

A verdict of \$3000 is not excessive where the evidence tends to show that plaintiff's injuries were of a permanent character and seriously impaired his ability to perform the manual labor to which he was accustomed before the accident. *Wesley v. Chicago, SA P. & K. C. R. Co., 84 Iowa 441, 51 N. W. Rep. 163.*

54. — \$3200.—A child two and a half years old was run over by a street-car, and the attending physicians testified that the larger bones of the left leg were laid bare from below the knee to the ankle; that there was a complete fracture of the large bone above the ankle joint and a diagonal splint of the bone two or three inches long; that the foot sagged to the outer side and hung down; that the bone when healed would be slightly shorter, and that the deformity would be slightly increased as the

child became older, and that she would probably not be able to touch her heel readily when walking. *Held*, that a verdict for \$3200 was not excessive. *Hyland v. Yonkers R. Co.*, 4 N. Y. Supp. 305, 51 Hun 643, 22 N. Y. S. R. 100; *affirmed in* 119 N. Y. 612, *mem.*, 23 N. E. Rep. 1143, *mem.*

55. — \$3500.—A verdict for \$3500 in favor of a woman whose hip was permanently injured, the leg being shortened one inch, and who suffered much pain and other inconveniences likely to be permanent, was not so excessive as to warrant the interference of the court. *McDonald v. Ashland*, 78 Wis. 251, 47 N. W. Rep. 434.—DISTINGUISHING *Goodno v. Oshkosh*, 28 Wis. 300.

Plaintiff, a woman sixty-four years old, healthy, a good worker, and earning \$1.25 per day, was injured in the head, lost three toes, suffered great pain, was seven weeks in the hospital, and has earned nothing since. *Held*, that a verdict for \$3500 was not excessive. *Larkin v. New York & N. R. Co.*, 46 N. Y. S. R. 658, 19 N. Y. Supp. 479; *affirmed in* 138 N. Y. 634, *mem.*, 51 N. Y. S. R. 935, *mem.*, 33 N. E. Rep. 1084.

56. — \$3650.—A verdict for \$3650 as damages for severe injuries sustained by an employé in consequence of the unsafe condition of the track, and of unsafe appliances furnished by the company—*held*, not excessive. *Gorham v. Kansas City & S. R. Co.*, 113 Mo. 408, 20 S. W. Rep. 1060.

57. — \$4000.—Where a jury finds upon conflicting evidence that plaintiff's spine was permanently injured, a verdict in his favor for \$4000 should not be disturbed as excessive. *Reed v. New York C. R. Co.*, 56 Barb. (N. Y.) 493.

Where the evidence shows that a female passenger fell in getting on a car and injured her spine, causing pain in walking, and also bringing on *prolapsus uteri*, which her physician testified might cause her life-long suffering, a verdict for \$4000 should not be set aside as excessive. *Valentine v. Broadway & S. A. R. Co.*, 14 Daly 540, 4 N. Y. Supp. 481, 16 N. Y. S. R. 602. *Filton v. Brooklyn City R. Co.*, 25 N. Y. S. R. 948, 5 N. Y. Supp. 641; *affirmed in* 127 N. Y. 650, *mem.*, 27 N. E. Rep. 856.

58. — \$4500.—Plaintiff, a grain-stower, recovered \$4500 for the fracture of his arm by being run over by a street-car, the only proof of the lasting character of the injury being that of plaintiff and a fellow-

laborer, from which injury it was claimed he could not do the work of an able-bodied man. *Held*, that the damages were excessive. *Chicago W. D. R. Co. v. Hughes*, 87 Ill. 94.

In an action for an injury to plaintiff's five-year-old son, resulting in the loss of a leg and the toes of the other foot, where the testimony is to the effect that the boy's services would be worth one hundred dollars per year from his tenth or twelfth year until he attained his majority, a verdict of \$4500 is excessive. *Hurt v. St. Louis, I. M. & S. R. Co.*, 34 Am. & Eng. R. Cas. 422, 94 Mo. 255, 13 West. Rep. 233, 237, 7 S. W. Rep. 1.—QUOTING *Atchison, T. & S. F. R. Co. v. Brown*, 26 Kan. 458; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 369.

59. — \$4750.—Plaintiff was employed as a section foreman, and was injured when thirty-two years old. He was confined to his bed eight weeks, suffered much pain, his leg was permanently shortened, and his nervous system affected. *Held*, that a verdict for \$4750 was not excessive. *Dougherty v. Rome, W. & O. R. Co.*, 45 N. Y. S. R. 154, 18 N. Y. Supp. 841, 64 Hun 633, *mem.*; *affirmed in* 138 N. Y. 641, 53 N. Y. S. R. 929, 34 N. E. Rep. 512.

Plaintiff's evidence tended to show that previous to the accident she had been in reasonably good health, but by the accident she was bruised in different parts of her body, and that she suffered pain in her hands, arms, legs, and back to the time of the trial, and was unable to do anything or follow her occupation of nurse. The jury returned a verdict for \$4750. The company gave evidence tending to show that she was addicted to the use of quinine and morphine and was suffering from a wound received in childhood, all of which was denied by plaintiff and her medical witnesses. *Held*, that the question of whether her condition resulted from the accident was for the jury, and that the court would not interfere with the verdict. *Haviland v. Manhattan R. Co.*, 15 N. Y. Supp. 898, 40 N. Y. S. R. 773; *affirmed in* 131 N. Y. 630, *mem.*, 30 N. E. Rep. 864.

60. — \$5000.—A verdict for \$5000 in favor of a brakeman for loss of two fingers is so grossly excessive as to justify the appellate court in setting it aside. *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. Rep. 866.

Plaintiff was in her sixty-ninth year when

injured. She was a confirmed invalid, and earned an average of \$6 a week in washing and scrubbing. She received a scalp wound which in itself was neither painful nor serious, and if it resulted in anything serious it was due to her condition. *Held*, that a verdict for \$5000 was excessive, and a new trial would be ordered unless she stipulated to remit one half of the amount. *Anderson v. Manhattan R. Co.*, 49 N. Y. S. R. 233, 1 Misc. 504, 21 N. Y. Supp. 1.

When the proof shows that at the time of the injury plaintiff, an employé, was forty-seven years old and earning \$50 per month, and that the fracture of his ankle was very painful and would probably result in a permanent disability, a verdict for \$5000 damages will not be disturbed as excessive. *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. Rep. 86.

Evidence that plaintiff had several ribs broken, a hip contused, his nose broken and disfigured, a permanent case of catarrh superinduced and the sense of smell impaired, as results of an injury, will justify an award of \$5000 as damages. *Fortyce v. Jackson*, 56 Ark. 594, 20 S. W. Rep. 528, 597.

Though it is apparent that plaintiff contributed to the injury, this court cannot be certain, on the facts in evidence, that the damages were excessive, the injury being immeasurable by a court as to pain and suffering, and the damages found being \$5000. *Metropolitan St. R. Co. v. Moore*, 41 Am. & Eng. R. Cas. 240, 83 Ga. 453, 10 S. E. Rep. 730.

Plaintiff was about twenty-one years of age when injured and was earning \$45 a month. He fell fifty-two feet, the train being upon a trestle, was unconscious several days and in bed over a month, suffered great pain for a long time, and became generally debilitated. *Held*, that \$5000 damages were not excessive. *Georgia Pac. R. Co. v. Hudson*, 89 Ga. 558, 16 S. E. Rep. 70.

A verdict for \$5000 damages for personal injuries to a healthy, active woman seventy years old which permanently destroyed the use of one of her limbs is not excessive. *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. Rep. 147.

The evidence showed that plaintiff's injuries were serious and permanent. His thigh bone was fractured, which rendered him a cripple for life, and he received other injuries. *Held*, that the court regarded a verdict

for \$5000 as high, but not so excessive as to justify a reversal. *Chicago City R. Co. v. Mumford*, 3 Am. & Eng. R. Cas. 312, 97 Ill. 560.

Plaintiff was thirty-five years old at the time of his injury; his right eye was entirely destroyed, the other eye was affected whenever he took cold, and he could not do more than half the work he could before the accident. *Held*, that a verdict for \$5000 was not excessive. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790.

A verdict for \$5000 damages, where plaintiff sustained a fracture of the thigh bone, followed by pain, permanent after-effects, etc., is not sufficiently large to justify a reversal. *O'Connell v. St. Louis C. & W. R. Co.*, 106 Mo. 482, 17 S. W. Rep. 494.

Plaintiff's wrist was sprained and his right leg injured so that he suffered constant pain, was confined to his room for some time, and has been unable to attend to his outside business. His physicians testified that the injury to his leg was irreparable, which was denied by those for defendant. *Held*, that the question was for the jury, and that a verdict of \$5000 should not be interfered with. *Kellow v. Long Island R. Co.*, 42 N. Y. S. R. 813, 62 Hun 620, 16 N. Y. Supp. 676.

As plaintiff was entering defendant's elevated train a brakeman forcibly swung a gate against her, striking her a severe blow, which was immediately followed by pains, and ultimately by a miscarriage. *Held*, that a verdict for \$5000 should not be disturbed as excessive. *Butler v. Manhattan R. Co.*, 52 N. Y. S. R. 498, 30 Abb. N. Cas. 78, 3 Misc. 453, 23 N. Y. Supp. 163; affirmed in 60 N. Y. S. R. 873, *mem.*, 143 N. Y. 630, *mem.*, 37 N. E. Rep. 826.

Plaintiff was confined from two to three weeks to his bed, but did not, when quiet, suffer greatly. After that period he began to walk about, though with great difficulty, but did not resume business for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. *Held*, if such temporary confinement and pain were the only consequences of the injury, that a verdict of \$5000 was excessive. But there being evidence from which the jury might find plaintiff would never entirely recover, the attending physician and two others testifying that in their opinion any imprudence or unusual exposure might lead to very

serious and even fatal results, a verdict for that amount was not disturbed. *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138, 3 Am. Ry. Rep. 454.

61. — \$5500.—Where the evidence justifies the jury in finding that plaintiff's injuries are permanent, and will unfit him for the business for which he has been reared, and upon which he relied for a support for himself and family, or for any laborious employment, and that he will be subject to pain and suffering during his life, a verdict for \$5500 will not be set aside as excessive. *Karasich v. Hasbrouck*, 28 Wis. 569.

Plaintiff had two ribs broken and the pleura of the left lung was lacerated, and according to the testimony of his physician it was reasonably certain that there would be permanent adhesion of the pleura to the lung tissue. Previous to the accident he had been able to do full work, and had been earning from \$2.50 to \$3 per day. After the accident he was not able to work at all for six months, and at no time had been able to work more than a few days in the week. He was fifty-five years old. *Held*, that a verdict for \$5500 was not excessive. *Germann v. Suburban Rapid Transit Co.*, 37 N. Y. S. R. 360, 13 N. Y. Supp. 897; *affirmed in* 128 N. Y. 681, *mem.*, 29 N. E. Rep. 149, 40 N. Y. S. R. 980, *mem.*—**DISTINGUISHED** in *Hayden v. Brooklyn El. R. Co.*, 44 N. Y. S. R. 377, 17 N. Y. Supp. 352.

62. — \$5875.—Plaintiff was a farmer, and while driving his team was injured at a crossing. He suffered pecuniary loss by injuries to his team and expense of medical attendance and nursing amounting to \$575 to \$600. He lost the toes of his left foot. *Held*, that a verdict for \$5875 was excessive and should be set aside. *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218.—**DISTINGUISHING** *Chicago, B. & Q. R. Co. v. Triplett*, 38 Ill. 482.

63. — \$6000.—A verdict for \$6000 in a personal injury case is not excessive where plaintiff was earning \$1150 a year, and had expended \$400 for medical treatment, and was in part paralyzed by reason of the injury. *Mellor v. Missouri Pac. R. Co.*, 47 Am. & Eng. R. Cas. 450, 105 Mo. 455, 16 S. W. Rep. 849.

A verdict of \$6000 in favor of a brakeman for a personal injury will not be set aside as excessive where the evidence shows that he was twenty-seven years of age and earning

\$60 to \$75 per month, and where the accident reduced his capacity for labor one half. *Houston & T. C. R. Co. v. Lowe*, (Tex.) 11 S. W. Rep. 1065.

Plaintiff had his hand and wrist severely injured, by which he lost three fingers, and during the following eight months his hand was sore and needed treatment and frequent operations, various bones being removed from the hand and wrist; he suffered great pain, and the injury left him in a nervous, excitable, and somewhat delirious condition. He was a married man with one child, and was receiving, at the time of the accident, \$1.50 per day. *Held*, that a verdict for \$6000 was not excessive. *Murlough v. New York C. & H. R. R. Co.*, 23 N. Y. S. R. 636, 3 N. Y. Supp. 483, 49 Hun 456.—**QUOTING** *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 534.

Plaintiff, a female passenger, fell and broke her knee-pan. She was taken to a hospital, where she remained between three and four months, during which time she underwent great pain. Her attending surgeon testified that there was some stiffness of the knee and swelling, but there was no reason to believe that it would be permanent; that she might be lame for some time, but in two years at the farthest she would have a good joint. She had been engaged in doing crayon work or in coloring photographs. For the latter she received about \$9 a week, and for the crayon work higher pay for the time employed, but the work was not so regular; she was prevented from doing the work after the accident. *Held*, that a verdict for \$6000 was excessive and ground for a new trial. *Langley v. Sixth Ave. R. Co.*, 16 J. & S. (N. Y.) 542, *mem.*; *affirmed* (?) 99 N. Y. 662, *mem.*

64. — \$6500.—Plaintiff, a female, who was fifty-five years old, was thrown to the ground on leaving a car and injured so that she could not use her right arm. *Held*, that a verdict for \$6500 was not excessive. *Vredenburgh v. New York C. & H. R. R. Co.*, 34 N. Y. S. R. 953, 58 Hun 607, 12 N. Y. Supp. 18; *affirmed in* 134 N. Y. 597, *mem.*, 31 N. E. Rep. 629, *mem.*

Plaintiff was twenty-nine years old when injured, and earning \$2.30 a day as a flagman. He lost a hand and found it difficult then to get work at which he could earn one dollar a day. *Held*, that a verdict of \$6500 was not excessive. *Wooster v. Western N. Y. & P. R. Co.*, 40 N. Y. S. R. 844.

61 Hun 623, 16 N. Y. Supp. 764; affirmed in 48 N. Y. S. R. 939.

At the time of the accident plaintiff was a healthy, vigorous man, forty-four years of age, and accustomed to hard labor. He was stunned by the fall and his eye was injured. Although eighteen months had elapsed at the time of the trial, he had not recovered, and there was evidence to the effect that his eye was permanently injured, that he would ultimately lose it, and that this might affect the sight of his other eye; that three of his vertebrae were out of line, and that this injury was not curable, but was likely to result in his becoming a hunchback and in paralysis. There was also testimony to the effect that plaintiff was suffering from a slight paralysis of the lower limbs. *Held*, that a verdict for \$6500 was not excessive. *Dallas & G. R. Co. v. Able*, 37 Am. & Eng. R. Cas. 453, 72 Tex. 150, 9 S. W. Rep. 871. See also *Drain v. St. Louis, I. M. & S. R. Co.*, 86 Mo. 574; reversing 10 Mo. App. 531.

Where the injury and loss to plaintiff are merely the loss of a thumb and forefinger of his right hand, and the consequent suffering and inconvenience from such loss, a nominal sum paid for medicines, and some loss of time while the wound was being cured, a verdict for \$8000 is so excessive as to show passion or prejudice on the part of the jury; and even where plaintiff remits \$1500 and takes a judgment for \$6500 the amount is still so grossly excessive that the judgment should not be allowed to stand. *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, 8 Pac. Rep. 780.

65. — \$7000.—A verdict of \$7000 in favor of a passenger who was injured is not excessive where the evidence shows that plaintiff was a man forty-six years old and capable of earning \$100 per month, that he incurred expenses of \$400 for medical treatment, and that he was so injured that he was rendered incapable of performing labor, and still suffered severe mental and physical pain. *Atchison, T. & S. F. R. Co. v. Frier*, (Tex. Civ. App.) 22 S. W. Rep. 6.

Plaintiff, a female passenger, fell while leaving defendant's car and received injuries which resulted in the shortening of one limb, attended with great pain, and she still remained unable to attend to her household duties or to dress herself without assistance; and the evidence showed that she would never be free from pain nor have free use of her limbs. *Held*, that a verdict for \$7000

was not excessive. *Fitch v. Broadway & S. I. R. Co.*, 26 J. & S. 575, 32 N. Y. S. R. 376, 10 N. Y. Supp. 225.

Plaintiff recovered judgment for \$7000 for injuries to his right knee from which he was still suffering at the time of the trial, and was apparently incapacitated from following his vocation of carpenter. The evidence was conflicting as to whether the injury would prove permanent or not. The actual damage suffered by plaintiff was \$1000 for loss of time and \$300 for medical services and nursing. *Held*, that, in consideration on the one side of the possibility of further trouble with plaintiff's knee, and on the other side that he is not incapacitated from performing labor in many other vocations of life than that of a carpenter, a judgment of \$5000 would be ample compensation. *Cogswell v. West St. & N. E. Elec. R. Co.*, 52 Am. & Eng. R. Cas. 500, 5 Wash. 46, 31 Pac. Rep. 411.

66. — \$7500.—Before plaintiff was injured he was a robust man weighing 170 pounds and capable of enduring great hardship. One of his shoulders was bruised and lamed, besides other injuries, and he had not fully recovered at the time of the trial, more than four years afterwards, and he was not able to labor more than half the time, and was reduced to 140 pounds. *Held*, that a judgment for \$7500 will not be set aside as excessive. *Hallack v. Johnson*, 12 Colo. 244, 20 Pac. Rep. 700.

A verdict of \$7500 in favor of a passenger on a street-car—*held*, not excessive when his injuries were painful, severe, and lasting; when he was confined in the hospital for three months under treatment, and will always be lame, with one leg permanently shortened. *Vail v. Broadway R. Co.*, 6 Misc. 20, 26 N. Y. Supp. 59, 58 N. Y. S. R. 124.—DISAPPROVING *Morris v. Eighth Ave. R. Co.*, 68 Hun (N. Y.) 39.

Plaintiff was a brakeman, and was so injured that he lost his entire foot except the stub of the heel. Two operations were necessary, and at the time of the trial, nine months after the injury, his foot had not entirely healed, and his leg was scarred and shriveled nearly to the knee. *Held*, that a verdict for \$7500 would not be set aside as excessive. *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 437, 13 S. W. Rep. 468.

A verdict of \$7500 in favor of a passenger for a personal injury will not be set aside as excessive where two physicians testify that

his collar bone was broken, that his shoulder was badly bruised, that certain ligaments of the joints were strained, and that probably his injuries were permanent; the plaintiff himself testifying that he was a carpenter by trade and was so injured as to have to give up the business, that he had suffered a great deal, had lost nine months' time, and was still weak from the injuries. *Galveston, H. & S. A. R. Co. v. Wesch*, (Tex. Civ. App.) 21 S. W. Rep. 313; affirmed in 21 S. W. Rep. 1014.

67. — \$8000.—Plaintiff was a cooper by trade, but at the time of the injury was employed as a teamster. The injury resulted in the loss of a hand. There was some evidence tending to show that he was not free from fault himself; and he offered but little evidence of his capacity for labor or of his earnings, and none as to the extent of his suffering or as to whether he was then in good health. Held, that a verdict for \$8000 was excessive, and a new trial would be ordered unless he stipulated to reduce the damages to \$6000. *Murray v. Hudson River R. Co.*, 47 Barb. (N. Y.) 196; affirmed in 48 N. Y. 655, 6 Alb. L. J. 198.—REVIEWING *Collins v. Albany & S. R. Co.*, 12 Barb. 492; *Clapp v. Hudson River R. Co.*, 19 Barb. 461; *Hegeman v. Western R. Corp.*, 16 Barb. 353.

In the case of a personal injury caused by gross and reckless negligence, in its nature culpable, and such as to authorize punitive damages, when plaintiff in consequence of the injury lost his hand and was thereby rendered incapable of performing on a musical instrument necessary in his profession as a teacher of music, and compelled to employ an assistant, and to submit to a greatly reduced income, and incurred about \$1000 debt in board, physicians' bills, and attendants, and was unable to attend to business for about six months, a verdict of \$8000 is not excessive. *Chicago & A. R. Co. v. Wilson*, 63 Ill. 167.

Plaintiff, a woman thirty-five years old, earning \$30 a month, received injuries likely to be permanent, which considerably affected her general health, and she had suffered pain. Held, that a verdict for \$8000 should not be set aside as excessive. *Harold v. New York C. & H. R. R. Co.*, 13 Daly (N. Y.) 378; affirmed in 108 N. Y. 664, mem., 15 N. E. Rep. 445, 13 N. Y. S. R. 903.—REVIEWING *Hegeman v. Western R. Corp.*, 16 Barb. (N. Y.) 359.

Where a girl of thirteen receives injuries which result in curvature of the spine, and she becomes a chronic invalid, a verdict for \$8000 is not excessive. *Bennett v. New York C. & H. R. R. Co.*, 40 N. Y. S. R. 948, 16 N. Y. Supp. 765; affirmed in 133 N. Y. 563, mem., 30 N. E. Rep. 1149, 44 N. Y. S. R. 930.

Damages assessed at \$8000 for an injury which rendered a healthy, vigorous, and strong man diseased, feeble, and helpless for life are not excessive. *Cummings v. National Furnace Co.*, 60 Wis. 603, 18 N. W. Rep. 742, 20 N. W. Rep. 665.—QUOTING *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596.

68. — \$8250.—Plaintiff, a farmer sixty-five years old, was so injured through defendant's negligence that several of his ribs were broken in such a manner that they punctured his lung. Six months afterwards he could not raise his left arm above his head, and he injuries seemed to be permanent. Held, that a verdict of \$8250 could not be interfered with on appeal as being excessive. *Reed v. Chicago, St. P. M. & O. R. Co.*, 74 Iowa 188, 37 N. W. Rep. 149.

69. — \$8525.—Where the evidence is sufficient to warrant the jury in finding that plaintiff, a married woman, sustained an injury to her spine of a very serious nature, from which she was still suffering at the time of the trial, a verdict for \$8525 will not be set aside as excessive. *Stouter v. Manhattan R. Co.*, 6 N. Y. Supp. 163, 3 Silv. Sup. Ct. 413, 25 N. Y. S. R. 683; affirmed in 127 N. Y. 661, 3 Silv. App. 472, 38 N. Y. S. R. 162, 27 N. E. Rep. 805.

70. — \$8800.—Plaintiff when injured was about fifty-eight years of age, a book-keeper, earning about \$70 a month. After the accident he was unable to work, suffered great pain, since the injury was steadily under medical treatment for an incurable progressive spinal disease, and was bedridden for several months before the trial. Held, that a verdict of \$8800 was not excessive. *Cooper v. St. Paul City R. Co.*, 58 Am. & Eng. R. Cas. 598, 54 Minn. 379, 56 N. W. Rep. 42.

71. — \$9000.—Plaintiff had been employed as a mason's tender at \$2 per day when he was able to secure work. His right leg was crushed so as to require amputation near the ankle. Held, that a verdict of \$9000 was excessive, and would be set aside unless reduced to \$5000. (O'Brien,

J., dissenting.) *Morris v. Eighth Ave. R. Co.*, 52 N. Y. S. R. 61, 22 N. Y. Supp. 666.

A boy of sixteen who was earning \$8 a week was so injured while a passenger as to be able to earn but very little thereafter. *Held*, that \$9000 damages was not excessive. *Richmond v. Second Ave. R. Co.*, 27 N. Y. Supp. 780.

Where plaintiff was a strong, active man, engaged in the management of a large farm, and had his leg broken in two places, from which he was confined to his bed for three months, suffered great pain, and was permanently injured, one leg being shorter than the other and the knee stiff, a verdict for \$9000 will not be set aside as excessive. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 168, 11 S. W. Rep. 559.

72. — \$10,000.—A verdict of \$10,000 damages in favor of one severely injured by negligence of a company, when plaintiff was only a day laborer, and not wholly disabled, and the negligence was not reckless, is excessive. But a remittitur of \$6000 having been entered, and judgment entered for \$4000—*Held*, that this was not so excessive as to justify a reversal. *Illinois C. R. Co. v. Ebert*, 74 Ill. 399.

In an action for injuries to the person where the sole permanent disability is the loss of a hand, and where there was neither lengthened sickness nor extraordinary suffering, a verdict for \$10,000 is excessive. *Union Pac. R. Co. v. Milliken*, 8 Kan. 647, 5 Am. Ry. Rep. 406. See also *Green v. Southern Exp. Co.*, 41 Ga. 515. *Adams v. Missouri Pac. R. Co.*, 41 Am. & Eng. R. Cas. 105, 100 Mo. 555, 12 S. W. Rep. 637, 13 S. W. Rep. 509. *Taylor v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 206.

Where the jury disregarded the charge and found for the defendant in error, and assessed the damages at \$10,000, although the deceased had been guilty of very gross negligence, the judgment was reversed, the verdict indicating passion or prejudice. *Nashville & C. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174.

Plaintiff, a man seventy years old, was knocked down by a street-car and injured. He was confined to his bed for several months from injuries consisting of some serious impairment of the bones of his left hip, causing shortening of his leg between one and two inches and rendering him permanently lame. There was nothing in the case to allow the recovery of more than

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compensatory damages. *Held*, that a verdict for \$10,000 was excessive. *Chicago W. D. R. Co. v. Haviland*, 12 Ill. App. 561.

Where plaintiff's attending physician testifies that plaintiff's injuries are severe and permanent, that he is a physical wreck, and that death will evidently result, a verdict for \$10,000 is not excessive. *Dalzell v. Long Island R. Co.*, 25 N. Y. S. R. 166, 53 Hun 633, mem., 1 *Silv. Sup. Ct.* 582, 6 N. Y. Supp. 167; *appeal dismissed in* 119 N. Y. 626, mem., 2 *Silv. App.* 531, 23 N. E. Rep. 487, 28 N. Y. S. R. 946.

Plaintiff, a boy seven years old, received an injury necessitating the amputation of his leg at the thigh. *Held*, that a verdict for \$10,000 was not excessive. *Garoni v. Compagnie Nat. de Navigation*, 14 N. Y. Supp. 797, 39 N. Y. S. R. 63; *affirmed in* 131 N. Y. 614, mem., 30 N. E. Rep. 865. *Ft. Worth & D. C. R. Co. v. Robertson*, (Tex.) 16 S. W. Rep. 1093.

It is the province of the jury to estimate the damages for a personal injury; and where the respondent was lamed and deformed in one leg for life and permanently disabled in one shoulder, so that he was rendered unable to perform manual labor, and suffered unnecessarily in mind and body, he having been neglected for more than two days before his wounds were dressed, a verdict for \$10,000 damages will not be disturbed. *Daniels v. Union Pac. R. Co.*, 6 Utah 357, 23 Pac. Rep. 762. See also *Foster v. Missouri Pac. R. Co.*, 115 Mo. 165, 21 S. W. Rep. 916.

There were three verdicts—the first for \$10,000, the second for \$12,000, and the third for \$10,000. *Held*, that the appellate court could with no propriety say that the latter verdict was excessive. *Porter & Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 44, 71 Mo. 66, 36 Am. Rep. 454.—REVIEWED IN *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488 (see also 37 Am. & Eng. R. Cas. 206), 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251.

Up to the time of the injury plaintiff had been a healthy girl, and was engaged in business. Her injuries were incurable, and she was deprived of the power of making a livelihood, and at the time of the trial was still under treatment and supported by friends. *Held*, that a verdict for \$10,000 was not excessive. *Koetter v. Manhattan R. Co.*, 13 N. Y. Supp. 458, 59 Hun 623, 36 N. Y. S. R. 611; *affirmed in* 129 N. Y. 668,

mem., 30 N. E. Rep. 65.—QUOTING Walker v. Erie R. Co., 63 Barb. (N. Y.) 260.

The injuries to plaintiff, a boy ten years old, were of the most serious character, including the loss of an arm and other painful and permanent injuries. *Held*, that a verdict for \$10,000 was not so excessive as to justify a new trial. *Texas & P. R. Co. v. Garcia*, 21 Am. & Eng. R. Cas. 384, 62 Tex. 285.

Plaintiff was employed at the time of his injury in operating machinery owned by defendant. The injury entirely deprived him of health and ability to labor for life. *Held*, that a verdict for \$10,000 was not excessive. *Columbia & P. S. R. Co. v. Hawthorne*, 3 Wash. T. 353, 19 Pac. Rep. 25.

Physicians who examined plaintiff a short time after he was injured testified that they thought his injuries were slight and that he would soon recover. Another physician testified that the symptoms indicated spinal injuries; that in plaintiff's legs there was loss both of motion and of sensation; that when such injuries were slight they resulted in speedy recovery, and the fact that six months had passed without material improvement indicated that the injuries were serious and permanent, and liable at any time to terminate in paralysis. Plaintiff testified that he had not recovered; that he dragged his right leg in walking, could not lie on his right side or back, that he had lost in weight, and suffered continually from headache, to which he had not before been subject. *Held*, that the testimony of the physicians who saw plaintiff only a short time after the injury was not necessarily in conflict with the evidence of plaintiff and of the physician who saw him at a later period, and that a verdict for plaintiff for \$10,000 actual damages was not so excessive as to authorize a reversal. *Missouri Pac. R. Co. v. Johnson*, 37 Am. & Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep. 325.

73. — \$11,000.—The injury to plaintiff, a female, consisted in breaking the fibula above the ankle, which confined her to the house for two months, after which she went on crutches. The injury does not affect her earning capacity, although the ankle will be weak for a long time, and perhaps always. *Held*, that a verdict for \$11,000 is excessive, and will be set aside unless reduced to \$5000. *Bronson v. Forty-second St., M. & St. N. A. R. Co.*, 50 N. Y. S. R. 740, 67 Hun 649, 21 N. Y. Supp. 695.

Plaintiff was injured when advanced in

years, but still engaged in business. His injuries were of the most serious character, entailing confinement to the house and bed for a long period, great suffering of body and anxiety of mind, expensive surgical treatment, besides ordinary attendance of physicians, and the amputation of a large portion of one foot. *Held*, that a judgment for \$11,000 should not be reversed simply because plaintiff was advanced in years. *Jordan v. New York & H. R. Co.*, 16 Daly 130, 9 N. Y. Supp. 506, 30 N. Y. S. R. 670.

74. — \$12,000.—Where a party is ejected from a street-car by the conductor, but receives no injuries that prevent his going about and working as usual, and there is no permanent injury that will disable him from earning a livelihood, \$12,000 damages are grossly excessive. *Chicago City R. Co. v. Henry*, 62 Ill. 142, 6 Am. Ry. Rep. 365.

Twelve thousand dollars damages are excessive for the loss of a foot where the employé injured was twenty years of age and earning \$60 a month. *Kroener v. Chicago, M. & St. P. R. Co.*, 88 Iowa 16, 55 N. W. Rep. 28.—DISTINGUISHING *Funston v. Chicago, R. I. & P. R. Co.*, 61 Iowa 452, 16 N. W. Rep. 518. REVIEWING *Belair v. Chicago & N. W. R. Co.*, 43 Iowa 662; *Collins v. Council Bluffs*, 32 Iowa 324.

A verdict for \$12,000 for injuries causing death is excessive where the deceased was a man fifty-seven years of age, in declining health, suffering from partial paralysis, and had very limited expectation of life, and little and decreasing capacity for labor, and where he died of apoplexy without extraordinary mental or physical suffering, and where there is no evidence of wanton or grossly negligent conduct on the part of defendant, and there is proof of contributory negligence on the part of the deceased. *Louisville & N. R. Co. v. Stacker*, 86 Tenn. 343, 6 Am. St. Rep. 840, 6 S. W. Rep. 737.

A verdict for \$12,000 is not excessive where it is shown that plaintiff was injured by the overturning of a car in which he was employed as a postal clerk, that he was twenty-one years of age and was earning \$1150 a year, and that his injuries were very great. *Richmond & D. R. Co. v. Allison*, 89 Ga. 567, 16 S. E. Rep. 116.

A verdict for \$12,000 in favor of an infant for the loss of a leg and the suffering connected therewith is not excessive. *Akers-lott v. Second Ave. R. Co.*, 27 J. & S. 555.

40 *N. Y. S. R.* 231, 15 *N. Y. Supp.* 864; affirmed in 133 *N. Y.* 676, *mem.*, 31 *N. E. Rep.* 626, *mem.*

Plaintiff was in business when injured, and earning \$1000 per annum. He was confined to his bed for six weeks, suffering great pain, and unable to attend to business for several months, and was left permanently lame, and had to pay from \$1200 to \$1500 for physician's fees and other expenses. *Held*, that a verdict for \$12,000 was not excessive. *Rockwell v. Third Ave. R. Co.*, 64 *Barb. (N. Y.)* 438; affirmed in 53 *N. Y.* 625, *mem.*

Plaintiff was a plumber before he was injured. His left thigh bone was badly fractured, one knee joint entirely stiffened, and he was compelled to go on crutches, and was entirely unfitted for following his trade or doing any other manual labor which required the active use of his limbs. He still suffered great pain, which could only be remedied by a surgical operation resulting in great risk to life. *Held*, that a verdict for \$12,000 would not be set aside as excessive, especially where a former jury had returned a verdict for substantially the same amount. *Texas Mex. R. Co. v. Douglass*, 73 *Tex.* 325, 11 *S. W. Rep.* 333.

An employé thirty-nine years of age, in good health, who was serving as fireman on a locomotive, had his leg and foot crushed, making amputation necessary, and causing great and protracted suffering, impairing his general health, and after a lapse of more than two years the injury occasions him considerable nervous irritation and pain, which will probably increase and continue during his lifetime, is by the jury awarded damages in the amount of \$12,000. *Held*, that the verdict is not so excessive as to lead to a conclusion that the jury were actuated by passion, prejudice, or improper influences, nor to justify the appellate court in setting the verdict aside. *Missouri Pac. R. Co. v. Mackey*, 22 *Am. & Eng. R. Cas.* 306, 33 *Kan.* 298, 6 *Pac. Rep.* 291.

75. — \$12,500.—A verdict for \$12,500 cannot be said to be excessive where it is in favor of an engineer, twenty-three years of age, in good health, and earning from \$500 to \$600 a year, who was so injured by the negligence of his company as to require the amputation of one leg above the knee, and the amputation of the toes of the other foot, and had his heel split open, his hip dislocated, and his chest in-

jured. *Kentucky C. R. Co. v. Ryle (Ky.)* 18 *S. W. Rep.* 938.

76. — \$14,000.—Plaintiff was under treatment in a hospital 145 days. At the time of the trial, twenty-one months after the accident, dead bone was still working out of the wound. His leg was partially stiffened, and was shorter than the other leg, and he was disabled for life. It had been broken, large pieces of skin were torn from the flesh, and he was bruised in many places. *Held*, that a verdict of \$14,000 was not so excessive as to require the court to set it aside. *Galveston, H. & S. A. R. Co. v. Porfert*, 37 *Am. & Eng. R. Cas.* 540, 72 *Tex.* 344, 10 *S. W. Rep.* 207.

77. — \$15,000.—Plaintiff, a practising attorney, before the accident earned from \$1200 to \$1500 per year. His injuries almost totally disabled him, and after the accident he could earn but \$200 or \$300 per year. He incurred much expense and suffered great pain in consequence of his injuries. *Held*, that a verdict for \$15,000 would not be disturbed. *Pence v. Chicago, R. I. & P. R. Co.*, 42 *Am. & Eng. R. Cas.* 126, 79 *Iowa* 389, 44 *N. W. Rep.* 686.

Plaintiff was a house painter, earning \$3 per day, and was so injured as to render him unable to stand erect, and left him physically deformed and incapacitated for labor for life. *Held*, that a verdict for \$15,000 was not excessive. *Schneider v. Second Ave. R. Co.*, 15 *N. Y. Supp.* 556, 39 *N. Y. S. R.* 370, 27 *J. & S.* 536; affirmed in 133 *N. Y.* 583, 44 *N. Y. S. R.* 680, 30 *N. E. Rep.* 752.

Plaintiff, an unmarried woman twenty-seven years of age, sustained a multiple fracture of the lower third of the bones of one leg, which resulted in its shortening and a stiffening of the ankle. The injuries were severe and permanent, and she would continue to suffer great pain, and paid out \$1000 for medical attendance. *Held*, that a verdict for \$15,000 would not be set aside as excessive. *Mitchell v. Broadway & S. A. R. Co.*, 54 *N. Y. S. R.* 116, 70 *Hun* 387, 24 *N. Y. Supp.* 32.

A man forty-two years of age, whose business yields him a profit of \$3000 or \$4000 a year, who is so injured by the negligence of a railroad company as to lose his right leg at the knee, to suffer a fracture of three ribs (causing pleurisy), and a fracture of the right arm (causing permanent injury) may properly receive compensation

from the defendant in the sum of \$15,000. *Specht v. Pennsylvania R. Co.*, 19 *Phil.* (Pa.) 365.

A verdict of \$15,000 in favor of an engineer, thirty-four years old, in good health, endowed with a vigorous constitution, and earning from \$165 to \$195 per month, is not excessive when the effect of the injury has been to incapacitate him for any useful or profitable labor, and to deprive him of the sense of hearing. *Texas Pac. R. Co. v. Johnson*, 42 *Am. & Eng. R. Cas.* 7, 76 *Tex.* 421, 13 *S. W. Rep.* 463.

78. — \$18,000.—A verdict for \$18,000 in favor of a man so injured in the prime of life as to require amputation of one leg and the loss of the use of an arm is not excessive. *Murray v. Brooklyn City R. Co.*, 27 *N. Y. S. R.* 280, 7 *N. Y. Supp.* 900.—**AWPLYING Ransom v. New York & E. R. Co., 15 *N. Y.* 415; *Alberti v. New York, L. E. & W. R. Co.*, 43 *Hun* 421; *Dyke v. Erie R. Co.*, 45 *N. Y.* 113; *Hickinbottom v. Delaware, L. & W. R. Co.*, 15 *N. Y. S. R.* 11; *Voss v. Third Ave. R. Co.*, 17 *J. & S.* 535.**

79. — \$25,000.—The injuries to plaintiff were of a serious and permanent character, rendering him a cripple for life; he suffered great pain and anguish, and was involved in a large expenditure of money, but the evidence failed to disclose any wantonness or wilfulness on the part of defendants. *Held*, that a verdict for \$25,000 was grossly excessive. *Chicago & N. W. R. Co. v. Fillmore*, 57 *Ill.* 265, 10 *Am. Ry. Rep.* 462.

When a child eight years old, injured in a railroad accident, is completely crippled and rendered helpless, both his eyes burned out, both ears burned off, and his hands burned almost to a crisp, a verdict for \$25,000 damages is not excessive. *Dunn v. Burlington, C. R. & N. R. Co.*, 35 *Minn.* 73, 27 *N. W. Rep.* 448. See also *Halt v. Chicago, B. & N. R. Co.*, 46 *Minn.* 439, 49 *N. W. Rep.* 239.

A verdict for \$25,000 in favor of a child, a boy three and a half years old, for the loss of his leg is not excessive. *Ehrman v. Brooklyn City R. Co.*, 38 *N. Y. S. R.* 990, 60 *Hun* 580, 14 *N. Y. Supp.* 336; *affirmed in* 131 *N. Y.* 576, *mem.*, 42 *N. Y. S. R.* 948, 30 *N. E. Rep.* 67.

80. — \$26,000.—Though there be gross negligence in injuring a passenger, yet a verdict of \$26,000 is excessive where the evidence does not show that his injuries

are of a permanent nature. *Louisville & N. R. Co. v. Long*, (Ky.) 22 *S. W. Rep.* 747.

81. — \$30,000.—The evidence of medical experts being conflicting as to the extent and permanency of plaintiff's injury, and there being evidence to show that it was less serious than plaintiff contended, a verdict for \$30,000 is excessive. *Fisher v. Southern Pac. R. Co.*, 89 *Cal.* 399, 26 *Pac. Rep.* 894.

Plaintiff, a strong, well man forty years old, received a concussion of the spine, causing chronic inflammation of the membranes enveloping the spinal cord, besides other injuries; his faculties had already become impaired, and paralysis and premature death would probably result. *Held*, that a verdict for \$30,000 was not excessive. *Harrold v. New York El. R. Co.*, 24 *Hun* (N. Y.) 184.—**NOT FOLLOWED IN** *Furnish v. Missouri Pac. R. Co.*, 102 *Mo.* 438.

c. Remittitur of the Excess.

82. Power of court to allow or order a release of excessive damages.*

—A verdict for excessive damages may be cured by release of the excess in actions for torts as well as in actions on contracts. *Little Rock & Ft. S. R. Co. v. Barker*, 19 *Am. & Eng. R. Cas.* 195, 39 *Ark.* 491.—**QUOTING** *Collins v. Albany & S. R. Co.*, 12 *Barb.* (N. Y.) 492; *Clapp v. Hudson River R. Co.*, 19 *Barb.* 461. **REVIEWING** *Rose v. Des Moines Valley R. Co.*, 39 *Iowa* 246; *Thompson v. Butler*, 95 *U. S.* 694.—**LIMITED IN** *St. Louis, I. M. & S. R. Co. v. Hall*, 42 *Am. & Eng. R. Cas.* 208, 53 *Ark.* 7.—*Collins v. Albany & S. R. Co.*, 12 *Barb.* (N. Y.) 492.—**DISAPPROVED IN** *Nudd v. Wells*, 11 *Wis.* 407. **QUOTED IN** *Little Rock & Ft. S. R. Co. v. Barker*, 39 *Ark.* 491.—*Gulf, C. & S. F. R. Co. v. Redeker*, 41 *Am. & Eng. R. Cas.* 296, 75 *Tex.* 310, 12 *S. W. Rep.* 855.—**REVIEWING** *Gulf, C. & S. F. R. Co. v. Coon*, 69 *Tex.* 730.—*Houston & T. C. R. Co. v. Maddox*, 21 *Am. & Eng. R. Cas.* 625, 2 *Tex. Unrep. Cas.* 312.

While the court has no right to substitute its own estimate of the damages for that of the jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict, and to order a new trial unless plaintiff will consent to re-

* Reducing verdict for tort by remittitur, see note, 19 *AM. & ENG. R. CAS.* 212.

duce the verdict to such amount. *Hutchins v. St. Paul, M. & M. R. Co.*, 44 Minn. 5, 46 N. W. Rep. 79. *Gregg v. San Francisco & N. P. R. Co.*, 59 Cal. 312. *Davis v. Southern Pac. R. Co.*, 98 Cal. 13, 32 Pac. Rep. 646. *Sinclair v. Washington & G. R. Co.*, *MacArthur & M. (D. C.)* 13. *Belknap v. Boston & M. R. Co.*, 49 N. H. 358. *Pendleton St. R. Co. v. Rahmann*, 22 Ohio St. 446.

Where it appears that the verdict is too large, by reason of error of the court in its rulings, or of the jury, and there is nothing necessarily implying passion or prejudice in the jury, the court may, where it can be done, ascertain from the evidence the amount of such excess, and may, on a remittitur of the same being entered, affirm the judgment as modified. *Cleveland & M. R. Co. v. Hinrod Furnace Co.*, 37 Ohio St. 434.

The rule that a remittitur of part of the damages assessed by a jury will not be allowed must be confined to cases in which the amount of an excessive verdict evinces a disregard of the evidence by the jury and shows that prejudice influenced their verdict; to allow a remittitur in such cases would be to permit the court to usurp the province of the jury. But when in view of all the evidence the verdict for damages is clearly warranted by the evidence, and the plaintiff remits a portion of it, judgment may properly be rendered for the remainder. *International & G. N. R. Co. v. Wilkes*, 34 Am. & Eng. R. Cas. 331, 68 Tex. 617, 5 S. W. Rep. 491.—FOLLOWING Texas Cotton Press Co. v. Crowley, Gal. Term 1886 (unreported). REVIEWING *Lake Erie & W. R. Co. v. Fix*, 11 Am. & Eng. R. Cas. 109, 88 Ind. 381; *International & G. N. R. Co. v. Gilbert*, 64 Tex. 536; *International & G. N. R. Co. v. Smith*, Tyler Term 1886; *Thomas v. Womack*, 13 Tex. 580; *Hardeman v. Morgan*, 48 Tex. 103; *Hughes v. Brooks*, 36 Tex. 379; *Heidenheimer v. Schlett*, 63 Tex. 395; *Hoskins v. Huling*, 4 Tex. Law Rev. 183.

But the court should not require plaintiff to remit a portion of damages, and at the same time deprive defendant of the benefit of the reduction unless he shall submit to onerous terms; as by directing judgment to be entered for plaintiff for the whole amount of the verdict upon his filing a stipulation that if defendant shall, within sixty days, pay him a certain smaller sum, with the costs, he will enter a full satisfaction of the judgment. *Schultz v. Chicago, M. &*

St. P. R. Co., 48 Wis. 375, 4 N. W. Rep. 399.

A jury stated the items of damages which they found for plaintiff, and the finding on one of those items was improper. Held, that the error did not vitiate the entire verdict, but that a remittitur should be permitted for the amount of the objectionable item. *Hartman v. Louisville & N. R. Co.*, 48 Mo. App. 619.

In a suit against a railroad for personal injuries plaintiff had a verdict for \$25,000. The court overruled a motion to set it aside as excessive on condition that plaintiff release \$15,000 of the amount. Held, to be within the discretion of the court. *North-eastern Pac. R. Co. v. Herbert*, 24 Am. & Eng. R. Cas. 407, 116 U. S. 642, 6 Sup. Ct. Rep. 590.

83. The power denied.—In an action wherein the damages are incapable of measurement by an exact money standard, such as actions for personal injuries, the defendant's right to object to the verdict as excessive cannot be obviated by a remittitur by the plaintiff of a part of the damages assessed. *Zurfluh v. People's R. Co.*, 46 Mo. App. 636.—REVIEWING *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211, 16 S. W. Rep. 11.

The judge cannot thus invade the province of a jury by measuring the damages for which they should have returned a verdict. *Gulf, C. & S. F. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. Rep. 492.—REVIEWED IN *Gulf, C. & S. F. R. Co. v. Redeker*, 41 Am. & Eng. R. Cas. 296, 75 Tex. 310.

Where the court regards the amount of damages as excessive, it may grant a new trial unless plaintiff reduces the amount as specified; but it is error to overrule the motion for a new trial unless the defendant will agree to accept the reduced amount and not appeal. The court has no right thus to force a compromise. *Nashville, C. & St. L. R. Co. v. Foster*, 11 Am. & Eng. R. Cas. 180, 10 Lea (Tenn.) 351.—CRITICISED IN *Tennessee C. & R. Co. v. Roddy*, 31 Am. & Eng. R. Cas. 340, 85 Tenn. 400, 5 S. W. Rep. 286.

In an action for negligence, unless it appears that the verdict was the result of passion or prejudice, or reached by an utter disregard of the principles of law as laid down by the trial judge, the courts will not interfere to reduce the damages given. *Vail v. Broadway R. Co.*, 6 Misc. 20, 26 N. Y. Supp. 59, 58 N. Y. S. R. 124.

Where the verdict of a jury is so erroneous as clearly to indicate prejudice, partiality, passion, or corruption in arriving at their conclusions, defendant is entitled to a new trial, and it is error to allow plaintiff to elect to take a less sum suggested by the court when there are no data before the court by which said smaller sum can be rightly and definitely ascertained, but which is fixed by the discretion of the court unaided by evidence. *Unfried v. Baltimore & O. R. Co.*, 34 W. Va. 260, 12 S. E. Rep. 512.—FOLLOWING *Nudd v. Wells*, 11 Wis. 415.

A wife sued a company to recover for personal injuries which subsequently resulted in the death of her husband, and obtained a verdict of \$4000. The court regarded this as excessive, and required her to take judgment for \$2500, otherwise a new trial would be granted. *Held*, error as to both parties. If the company was entitled to a new trial, it should have been granted without imposing any terms; if not, plaintiff should have had judgment for the full amount of the verdict. *Louisville & N. R. Co. v. Earl*, 94 Ky. 368, 22 S. W. Rep. 607.

Verdict for \$7500 for personal injuries. On appeal the judgment below was reversed on the ground of the improper admission of the opinion of plaintiff as to his expenses being \$750 or \$800. On motion for rehearing in the court of civil appeals, the appellee offered to remit \$800, and asked judgment for the balance. *Held*, that as the testimony to the amount of expenses occasioned by the injuries may have impressed the jury as to the extent of the injuries, and thus have increased the general verdict, such remittitur could not be allowed to cure the error of admitting the illegal testimony. *Galveston, H. & S. A. R. Co. v. Wesch*, 85 Tex. 593, 22 S. W. Rep. 957.

84. Effect of remission of the excess.—After a motion is made for a new trial on the ground that the damages awarded are excessive, the plaintiff may release enough of the damages to bring them within the evidence, and it is proper then to refuse a new trial. (Jackson, C. J., dissenting.) *Central R. Co. v. Crosby*, 74 Ga. 737.—DISTINGUISHING *Savannah, F. & W. R. Co. v. Harper*, 70 Ga. 119.—*Union Rolling Mill Co. v. Gillen*, 100 Ill. 53. *Williams v. Baltimore & O. R. Co.*, 9 W. Va. 33.

Where the circuit court, deeming a verdict

excessive, announces that it will set it aside and award a new trial unless a remittitur is entered, whereupon plaintiff remits, but excepts to the action of the court as coercive, he is concluded by his election, and cannot assign the action of the court for error. *Alabama & V. R. Co. v. Davis*, 69 Miss. 444, 13 So. Rep. 693.

Where a remittitur is filed, it is only an admission that the verdict was excessive in the amount remitted. *Union Pac. R. Co. v. Byrne*, 2 Wyom. 109.

85. New trial granted on appeal notwithstanding remittitur.—Where the court grants a railroad company a new trial unless plaintiff will write off a portion of the verdict, and in the judgment of the supreme court the grant of the new trial ought to have been unconditional, plaintiff cannot complain that the verdict was reduced by the court. The unconditional grant of the new trial by the supreme court of course operates to set aside the entire verdict, and all modifications thereof. *Central R. Co. v. Moore*, 61 Ga. 151.

Where a verdict for plaintiff in an action of tort has been declared by the trial judge so excessive in amount as to indicate passion or prejudice on the part of the jury, and the supreme court concurs in that opinion, a new trial will be granted by the supreme court, notwithstanding the trial judge refused it upon remittitur of the excess, where the plaintiff entered the remittitur at the court's suggestion, but did so under protest, reserving exception. *Massadillo v. Nashville & K. R. Co.*, 46 Am. & Eng. R. Cas. 666, 89 Tenn. 661, 15 S. W. Rep. 445.

A remittitur "under protest" should not be received by the court, and will be rejected, if entered, in the consideration of the motion for new trial. *Massadillo v. Nashville & K. R. Co.*, 46 Am. & Eng. R. Cas. 666, 89 Tenn. 661, 15 S. W. Rep. 445.

86. Various applications of the rule.—A verdict for \$10,000 in favor of a stout, healthy woman for a broken limb, a dislocated arm, and back, shoulder, and side so injured that she had not fully recovered two years afterwards, was reduced, when presented by intervention as a claim against the receiver of the company, to \$5000. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 42 Am. & Eng. R. Cas. 34, 41 Fed. Rep. 311.

Where a passenger, seeking to enter a car reserved for ladies, was ejected with violence, whereby he suffered severe bodily

injuries and recovered a judgment against the company for \$12,000—*held*, that the amount should be reduced to \$7000. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314.

If the actual value of the animals killed is fixed by the witnesses at sums varying from \$500 to \$650, a verdict for \$750 is not cured by a remittitur of \$100, where the jury were erroneously instructed that they might allow exemplary damages, but the judgment will be affirmed on remitting in the supreme court all in excess of \$500. *Chicago, St. L. & N. O. R. Co. v. Jarrett*, 11 Am. & Eng. R. Cas. 455, 59 Miss. 470.

In an action for injuries to land, trees, grass, and live stock, resulting from an overflow caused by the negligent manner in which the track was constructed, plaintiff received a judgment for \$721.30. This finding was supported by the evidence except as to the sum of \$62.60. *Held*, that the judgment should stand upon the plaintiff's entering, within ten days, a remittitur of the \$62.60. *Sabine & E. T. R. Co. v. Johnson*, (Tex.) 7 S. W. Rep. 378; *former appeal*, 65 Tex. 389.

In an action for negligently carrying plaintiff, defendants withdrew their plea of not guilty, and the jury, after plaintiff's evidence, assessed damages at £6178. Upon motion for a new trial for excessive damages, the court, on the ground that it did not appear that the jury had exercised a sound and reasonable discretion, made the rule absolute upon payment of costs, and upon payment of £500 into court, with leave to plaintiff to accept it without prejudice, etc. *Batchelor v. Buffalo & B. R. Co.*, 5 U. C. C. P. 470.

5. Inadequate Damages.

87. New trial, when granted.—A verdict in plaintiff's favor, clearly inadequate, under the evidence, as respects the amount of damages, may be set aside on that ground. *Henderson v. St. Paul & D. R. Co.*, 52 Minn. 479, 55 N. W. Rep. 53.

Where a statute fixes the amount of damages for wrongfully causing death, and the jury is properly instructed as to the law, a verdict for a little more than half the amount should be set aside. *Rafferty v. Missouri Pac. R. Co.*, 15 Mo. App. 559.

A plaintiff suing for personal injuries who is not entitled to recover at all has no right

to have a verdict in his favor set aside on the ground of inadequacy. *O'Malley v. Chicago City R. Co.*, 30 Ill. App. 309.—*FOLLOWING Garland v. Chicago & N. W. R. Co.*, 8 Ill. App. 571; *Hubbard v. Mason City*, 64 Iowa 245.

In an action for a personal injury a new trial will be granted to the plaintiff if it appears that the damages are so inadequate that the jury must have failed to consider some of the proper elements of damage. *Phillips v. London & S. W. R. Co.*, L. R. 4 Q. B. D. 406, 48 L. J. Q. B. D. 693, 40 L. T. 813, 27 W. R. 797; *affirmed in L. R.* 5 Q. B. D. 78, 41 L. T. 121, 28 W. R. 10.

To justify interference with a verdict awarding damages for personal injuries on the ground that such damages are inadequate, it must appear that they are so grossly disproportionate to the injuries that in awarding them the jury must have been influenced by a perverted judgment. *McDermott v. Chicago & N. W. R. Co.*, 85 Wis. 102, 55 N. W. Rep. 179.—*FOLLOWING Robinson v. Waupaca*, 77 Wis. 544.

88. Illustrations.—Plaintiff, a female, was injured when she was twenty years old, in good health, and dependent upon her own labor, and earning \$4 a week. She incurred expenses on account of the injury amounting to \$3000; the evidence showed that she had suffered great pain from the time of the injury to the time of the trial, three years afterwards, and was yet so weak as to be unable to sit up in bed, and that her injuries were permanent. *Held*, that a verdict for \$1000 should be set aside as inadequate. *Smith v. Dittman*, 11 N. Y. Supp. 769, 34 N. Y. S. R. 303, 16 Daly 427.

Plaintiff, an abutting owner, sued an elevated railroad for damages to his property, and proved by competent witnesses, who were uncontradicted, that his light had been greatly interfered with, and that he had suffered an actual loss of rents. *Held*, that a verdict for six cents damages should be set aside as inadequate. *Jones v. Metropolitan El. R. Co.*, 27 J. & S. 437, 14 N. Y. Supp. 632, 39 N. Y. S. R. 177.

Plaintiff sued for personal injuries, and proved by uncontradicted evidence that he was so injured that he remained insensible for a day, and could not move his feet for ten or twelve days, and was disabled for nearly five months, being confined to his bed most of that time. *Held*, that a verdict for six cents should be set aside as inadequate.

quate, and a new trial granted. *Robbins v. Hudson River R. Co.*, 7 *Bosw. (N. Y.)* 1.

In an action to recover damages to horses while being carried, plaintiff proved positively by four witnesses that the horses were damaged, and by one or more witnesses that some of the injuries were of a permanent character, the damage being assessed at from \$10 to \$75 on each of six horses. The company introduced but one witness, who merely said that he did not notice that any of the horses were much bruised or hurt when unloaded, but admitted that he could not describe the appearance of any of the horses when unloaded. *Held*, that a verdict of \$2.12½ in favor of plaintiff was insufficient and against the weight of evidence. *Eggleston v. Gulf, C. & S. F. R. Co.*, 4 *Tex. App. (Civ. Cas.)* 501, 18 *S. W. Rep.* 137.

An award of \$1000 for serious injuries, which, however, the jury might have found not to be permanent, will not be disturbed as inadequate. *McDermott v. Chicago & N. W. R. Co.*, 85 *Wis.* 102, 55 *N. W. Rep.* 179.

89. Determining the question of inadequacy.—In determining the question of the inadequacy of damages it will be assumed that the jury found every fact going to mitigate or reduce the damages which they could properly find from the proofs. *McDermott v. Chicago & N. W. R. Co.*, 85 *Wis.* 102, 55 *N. W. Rep.* 179.—FOLLOWING *Robinson v. Waupaca*, 77 *Wis.* 544.

6. Newly Discovered Evidence.

90. What newly discovered evidence will warrant a new trial.—Plaintiff subscribed for certain bonds of defendant company and for certain shares of stock on condition that 100 of such bonds should be subscribed for "on like terms." Suit was brought on the subscription, the company averring that the 100 had been subscribed for, when in fact only 92 had been subscribed for; but plaintiff, believing the statement of the company's officers, did not discover the truth for a year or more after judgment. *Held*, a proper case where equity would grant relief by awarding a new trial. *Ennor v. Galena & S. W. R. Co.*, 14 *Ill. App.* 327; reversed in 116 *Ill.* 55, 4 *N. E. Rep.* 762.

Plaintiff, who sued for personal injuries, claimed that he had suffered from fits by

reason of the injury. On motion for a new trial the company offered affidavits that certain persons would testify that plaintiff had suffered from the fits before the injury. *Held*, not good ground for a new trial where the persons themselves filed affidavits denying the fact, or that they would so testify. *Griffith v. Baltimore & O. R. Co.*, 44 *Fed. Rep.* 574.

On a motion for a new trial the question is not whether a jury might be induced to give a different verdict, but whether the legitimate effect of the new evidence would be to require a different verdict. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 *Neb.* 753, 40 *N. W. Rep.* 298.

In an action for the destruction of growing timber by fire, evidence that when the foliage came out in the spring after the trial it appeared that very little of the timber had been killed, and that this fact could not have been so easily and definitely ascertained or positively proved when the case was tried, because forest leaves had then fallen, is not such newly discovered evidence as to warrant a new trial. *Austin v. Northern Pac. R. Co.*, 34 *Minn.* 351, 25 *N. W. Rep.* 798.

Evidence newly discovered, relevant, and material, which appears not to have been undiscovered through the appellant's laches or negligence, consisting of a letter and also a written agreement in respondent's possession during the trial at law, constitutes ground sufficient for staying proceedings on the judgment obtained at law and for ordering a retrial. *Cairo & F. R. Co. v. Titus*, 32 *N. J. Eq.* 397; reversing 30 *N. J. Eq.* 502.

In an action by a brakeman against a railroad to recover for personal injuries, he testified that he received the injuries while in the discharge of his duties. His physicians testified that he told them that he received the injuries by jumping from the train. In rebuttal the plaintiff testified that if he made such statements to the physicians he was not in his right mind at the time. At the time the company was not prepared to prove the state of his mind, but afterwards discovered evidence to prove his sanity. *Held*, that this was such after-discovered evidence as to entitle it to a new trial. *Missouri Pac. R. Co. v. Walker*, (Tex.) 7 *S. W. Rep.* 791.

The right to grant a new trial on the ground of newly discovered evidence does

not rest exclusively within the trial court. The appellate court will revise the action of the lower court when the newly discovered evidence, when considered in connection with the facts developed on the trial, is clearly material to the issue, and might probably produce a different result on another trial. *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171.

91. The diligence required.—Where a new trial is claimed on the ground of newly discovered evidence, and it appears that the evidence could with proper diligence have been produced at the trial, the motion for a new trial is properly refused. *Houston & T. C. R. Co. v. Devainy*, 63 Tex. 172.

A witness testified to declarations made at the wreck by the general manager of the railway reprimanding an employé, the section foreman, for not going over the track in the morning before the wreck occurred. On a motion for new trial it was shown that the general manager would deny said testimony. It was also shown that the manager was out of the state, so that after knowing of the materiality of his testimony it could not be obtained. *Held*, that a new trial should have been granted, and its refusal is ground for reversal. *Texas & P. R. Co. v. Barron*, 78 Tex. 421, 14 S. W. Rep. 698.

A motion for a new trial because of newly discovered evidence is properly overruled where no proper diligence was used to learn what the evidence of the absent witnesses would be. *Missouri Pac. R. Co. v. White*, 48 Am. & Eng. R. Cas. 206, 80 Tex. 202, 15 S. W. Rep. 808.

92. Effect of laches.—In an action for killing animals a new trial on the ground of newly discovered evidence was properly refused defendant when the witnesses relied upon to secure a new trial lived in a situation which would have enabled them, if any one, to know of the horses being in the highway, as claimed by defendant, and yet they were not applied to for information until after the trial, and the only reason assigned for not interviewing them being that defendant had no reason to believe they knew anything about the case, and, further, that said parties had agreed with each other to conceal their information from defendant, and it would have been useless to have consulted them. There was an utter lack of diligence shown. It cannot be presumed in order to relieve de-

fendant from the imputation of negligence that the parties, if consulted, would have wilfully falsified respecting the occurrence. *Chicago & E. I. R. Co. v. McKeenan*, 5 Ind. App. 124, 31 N. E. Rep. 831.

In a suit for personal injuries the complaint alleged that plaintiff had sustained severe injuries, and claimed \$5000 damages. After a verdict for plaintiff defendant moved for a new trial because of newly discovered evidence relating to the extent of plaintiff's injuries. It did not appear that before the trial defendant had made any investigation as to the character or extent of those injuries. The motion was denied. *Rose v. Stephens & C. Transp. Co.*, 20 Blatchf. (U. S.) 465, 19 Fed. Rep. 808.

A new trial will not be granted on the ground of newly discovered evidence where the alleged newly discovered evidence was known to the party long before the trial, and was not offered because of a belief that it was unnecessary for the purposes of the defense. *Van Tassell v. New York, L. E. & W. R. Co.*, 1 Misc. 312, 20 N. Y. Supp. 715, 48 N. Y. S. R. 782.

93. The evidence must be material.—Where the evidence of an eye-witness shows that the animal, the killing of which is complained of, was killed without fault or negligence, and where the testimony of the plaintiff given at a former trial tends to confirm that evidence, and the eye-witness stands unimpeached, new evidence as to tracks made by the animal which can be reconciled with all the other facts without imputing perjury to any witness adds no strength to the plaintiff's case. It follows that the plaintiff could not recover at the second trial, and that a second verdict in his favor should be set aside. *Savannah, F. & W. R. Co. v. Gray*, 85 Ga. 825, 11 S. E. Rep. 1022.

Where a civil engineer sues a railroad for salary, claiming to have been hired at a fixed monthly compensation, which is denied by the company, a verdict for plaintiff will not be set aside on the ground of after-discovered evidence, consisting of a bill for specific services made out and presented by plaintiff, which is inconsistent with a general hiring, when such bill was found after the trial in the papers of the company. *Cook v. St. Louis & K. R. Co.*, 56 Mo. 380.

—QUOTED IN *Iron Mountain Bank v. Armstrong*, 92 Mo. 265.

In an action for personal injuries plaintiff

gave evidence as to her age. On a motion for a new trial the company claimed to have discovered evidence that plaintiff was something like two years older than claimed. *Held*, that such difference ought not to vary the finding, and in all human probability would not; therefore a new trial was properly refused. *Georgia R. Co. v. Kicklighter*, 63 Ga. 708.

A new trial will not be granted on the ground of newly discovered evidence unless it be so decisive in character that it will be productive on another trial of an opposite result. *Schultz v. Third Ave. R. Co.*, 15 J. & S. (N. Y.) 285.

A new trial should not be granted on the ground of newly discovered evidence unless the legitimate effect of such evidence, when considered in connection with that produced on the trial, ought to result in a different verdict or finding. The rule of practice on this subject was not substantially changed by section 297 of Ohio Code of Civil Procedure. *Cleveland, C., C. & I. R. Co. v. Long*, 24 Ohio St. 133.

94. Rule as to cumulative evidence.—The fact of the discovery of new evidence which is only cumulative is not ground for a new trial; but cumulative evidence is additional evidence of the same kind, and it is not cumulative when it is of a different character, and merely tends to prove the former proposition by proof of a new and distinct fact. *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171.

While in rare, exceptional cases a new trial may be granted upon newly discovered evidence that is merely cumulative, it should not be done unless such evidence would in the opinion of the court certainly remove all doubt and lead to a different result. *Leitch v. N. O. & T. R. Co. v. Crayton*, 69 Miss. 132, 12 So. Rep. 271.

At a trial for personal injuries plaintiff offered evidence that his hip was crushed, and that it was impossible for him to do manual work, and that his injuries were permanent, which was uncontradicted, and plaintiff obtained a verdict. Defendant moved for a new trial on the ground of newly discovered evidence, and offered affidavits that plaintiff soon after the trial had engaged in physical labor. This was in the main denied by plaintiff, and that what labor he had done was from necessity and under great pain. The motion was denied, but it was subsequently renewed and

additional affidavits filed stating that after the first motion plaintiff had performed physical feats, requiring severe exercise, for the amusement of a crowd, and had admitted that he had recovered his usual health and strength. *Held*, that this evidence was not merely cumulative, but was proper ground for a new trial. *Cole v. Fall Brook Coal Co.*, 16 N. Y. Supp. 789, 40 N. Y. S. R. 834, 61 Hun 623, *mem.*

95. — evidence to impeach a witness.—A new trial will not be granted on the ground of newly discovered testimony the only effect of which is to impeach the credibility of a witness. *Moore v. Chicago, St. L. & N. O. R. Co.*, 9 Am. & Eng. R. Cas. 401, 59 Miss. 243. *Houston City St. R. Co. v. Sciaccia*, 80 Tex. 350, 16 S. W. Rep. 31.

A new trial will not be granted on account of newly discovered evidence where the object of such testimony is merely to contradict or impeach the credit of a witness who testified upon the trial. But this objection is inapplicable where the testimony goes to prove facts material to the issue in the case, though it may also tend to contradict or lessen the credit of opposing witnesses. *Houston & T. C. R. Co. v. Forsyth*, 49 Tex. 171.

A new trial will not be granted upon the ground of newly discovered testimony impeaching the experience and competency of one of plaintiff's witnesses as a locomotive engineer, and to testify as an expert as to the distance within which a train might be stopped. *Hooker v. Chicago, M. & St. P. R. Co.*, 41 Am. & Eng. R. Cas. 498, 76 Wis. 542, 44 N. W. Rep. 1085.

7. Surprise.

96. New trial, when ordered.—Where a sufficient showing is made that the prevailing party introduced false testimony upon a material issue, which the defeated party could not then contradict, but could upon a new trial prove to be false, a new trial is properly granted. *First Nat. Bank v. Wabash, St. L. & P. R. Co.*, 61 Iowa 700, 17 N. W. Rep. 48.

97. — when refused.—In an action against a carrier for a delay in delivering freights, plaintiff's evidence was confined almost entirely to the question of negligence, and the court ruled that no contract had been established between the parties, and

submitted the case to the jury on the question of negligence. *Held*, that the defendant was in no respect surprised or misled thereby, and had no cause to complain of the action of the court. *Waite v. New York C. & H. R. R. Co.*, 2 *Silv. App.* 85, 110 *N. Y.* 635, *mem.*, 17 *N. E. Rep.* 730, 17 *N. Y. S. R.* 162; *affirming* 39 *Hun* 655, *mem.*

A passenger injured in alighting from a train sued both the company and its conductor. Plaintiff and the conductor were both examined as witnesses, and the interest of each was discussed in the argument to the jury. Upon the jury retiring plaintiff dismissed as to the conductor. This was not known to counsel for the company. There was nothing tending to show that the conductor was made a party for the purpose of affecting his standing as a witness. *Held*, that the company could not complain of such dismissal, and it was no ground for a new trial. *Texas & P. R. Co. v. Miller*, 79 *Tex.* 78, 15 *S. W. Rep.* 264.—FOLLOWED IN *Boggs v. Brown*, 82 *Tex.* 41.

That a witness for the losing party testified at the trial in a way to be misunderstood is no cause for a new trial if the misunderstanding could have been prevented by due diligence in consulting with the witness and conducting his examination. *Crawford v. Georgia Pac. R. Co.*, 86 *Ga.* 5, 12 *S. E. Rep.* 176.

A new trial will not be granted on the ground of surprise because a party assumes that a witness knew more of a transaction than his testimony discloses. *Van Tassell v. New York, L. E. & W. R. Co.*, 1 *Misc.* 312, 20 *N. Y. Supp.* 715, 48 *N. Y. S. R.* 782.

A complainant sought to obtain a new trial in equity on the ground that the attorney of the plaintiffs in the suit at law (defendants in this court) fraudulently concealed a written agreement, which, it was insisted, materially affected the plaintiffs' claim to the great advantage of the defendant. It appeared that before the suit was commenced plaintiffs' attorney handed the agreement to defendant's attorney (not the counsel who tried the cause for it, however) for examination. It appeared, also, that the person who negotiated the transaction (an advance of money) which resulted in the agreement, and who made the agreement, and who professed to have been acting therein as the agent of defendant, was a witness for plaintiffs; that he was ac-

cessible to defendant and its counsel, both before and at the time of the trial, but it did not examine him on the subject of the existence of the agreement, or of any such agreement. Such examination was to be expected, because defendant claimed that in the transaction the witness acted for himself, and not for defendant. It appeared, also, that there was no concealment on the part of plaintiffs of the character of their demand. *Held*, that complainant had no claim to relief. *Cairo & F. R. Co. v. Titus*, 30 *N. J. Eq.* 502; *reversed in* 32 *N. J. Eq.* 397.

Where a party has a defense to an action arising out of the testimony in the case, and omits to present it to the jury, but relies upon a defense involving a different, if not inconsistent, conclusion from the testimony, a new trial will not be granted to enable him to submit the case to another jury upon this untried question unless it clearly appears from the evidence that he is entitled to a verdict on that ground, and then only upon the payment of the costs of the first trial. *McCune v. Northern Pac. R. Co.*, 15 *Am. & Eng. R. Cas.* 172, 9 *Sawy. (U. S.)* 551, 18 *Fed. Rep.* 875.

II. THE APPLICATION, AND HOW DISPOSED OF.

98. Jurisdiction—Place to move.

—That the verdict of the jury is not sustained by the evidence is a wrong which the appellate court has no power to redress, the only remedy therefor being a motion for a new trial in the primary court. *Alabama G. S. R. Co. v. Powers*, 19 *Am. & Eng. R. Cas.* 502, 73 *Ala.* 244.

If there is no conflict in the evidence, then its sufficiency becomes a question of law to be determined by the court, and may be considered on a motion for a new trial, which should be granted if the evidence is found insufficient; and it is not necessary to have raised the point at the trial, either by a motion to dismiss or by directing the jury to find a verdict for the complaining party. *Halpin v. Third Ave. R. Co.*, 8 *J. & S. (N. Y.)* 175.

99. Power to grant—Second and third new trials.—The controversy being one of fact only, a third verdict for the plaintiff not being excessive in amount, and the evidence, taking it in its utmost force, letter, and spirit, in favor of the plaintiff,

being sufficient to warrant a recovery, a fourth trial should be denied. *Savannah, F. & W. R. Co. v. Smith*, 86 Ga. 229, 12 S. E. Rep. 579.

The supreme court dismissed an appeal, for want of jurisdiction, from the refusal of the trial judge to grant a new trial, in an action against a railroad company, taken upon the ground that the verdict was for excessive damages. A succeeding circuit judge granted an application for a new trial based upon the same ground. *Held*, that he had no power to do so. *Steele v. Charlotte, C. & A. R. Co.*, 14 So. Car. 324.

A trial judge may grant a new trial of a case tried by his predecessor on the ground of insufficient evidence, whether the instructions to the jury were correct or not, although the evidence was substantially conflicting, and the court which granted the new trial had not heard the evidence. *Wilson v. California C. R. Co.*, 55 Am. & Eng. R. Cas. 625, 94 Cal. 166, 29 Pac. Rep. 861.

The Tenn. statute providing that "not more than two new trials shall be granted to the same party in an action at law, or upon trial by jury of an issue of fact in equity," deprives the trial judge of any power to set aside a third verdict upon the sole ground that the evidence is insufficient to support it, where two former verdicts in the same case have been set aside upon motion of the same party for that cause alone. But this statute has no application to a case in which there is no evidence to support the verdict, and in such case the trial judge may set aside even a third or any subsequent verdict in the same case and upon motion of the same party. *East Tenn. V. & G. R. Co. v. Mahoney*, 89 Tenn. 311, 15 S. W. Rep. 652.

100. Sufficiency of moving affidavits.—Where objection is made to the ruling of a trial court in the giving or refusing to give instructions to the jury, the instructions given or refused must be pointed out in the motion for a new trial in some way, either by number or other means of identifying the same. *Weir v. Burlington & M. R. Co.*, 19 Neb. 212, 26 N. W. Rep. 627. —FOLLOWING *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb. 129.

To support a motion for a new trial on the ground of newly discovered evidence, and to show negligence on the part of the defendant in the breaking of certain rods

on an engine, plaintiff filed affidavits of two section men that on the day of the accident they picked up the broken pieces, but neither they nor plaintiff, who examined them, described their condition at the time, but only after being exposed to the air and dirt for several months. *Held*, that a new trial was properly refused. *Beery v. Chicago & N. W. R. Co.*, 73 Wis. 197, 40 N. W. Rep. 687.

101. Jurors' affidavits and testimony.—An affidavit by a juror that a verdict was arrived at by each juror setting down the amount he regarded as just, and aggregating them, and then dividing by twelve, it having been agreed that the amount so ascertained should be the verdict, ought not to be received or considered on a motion for a new trial. *Chesapeake & O. R. Co. v. Patton*, 9 W. Va. 648.

Although the practice of admitting affidavits of jurors to impeach their verdict is not to be favored or extended, yet it is frequently the only means by which the court can be apprised of the misconduct of the jury; and such affidavits will be considered where it appears therefrom that the fairness and purity of the jury trial has been tainted by such methods as gambling verdicts. *East Tenn. & W. N. C. R. Co. v. Winters*, 85 Tenn. 240, 1 S. W. Rep. 790.

What is done in the jury room, and what is known to all the jury to exist, and what relates to matters not connected with their individual consciences in arriving at or determining their verdict, may be testified to by a juror; but where it is sought to show the reasons for a verdict, or any of the elements which go to make up a verdict, or the particular ideas of a juror in determining the verdict, these are beyond the province of inquiry. *Leroy & W. R. Co. v. Anderson*, 41 Kan. 528, 21 Pac. Rep. 588.

Affidavits of jurors will not be received for the purpose of impeaching or avoiding their verdict in respect to a matter which essentially inheres in the verdict itself. *Cowles v. Chicago, R. I. & P. R. Co.*, 32 Iowa 515, 10 Am. Ry. Rep. 36. —FOLLOWING *Stewart v. Burlington & M. R. R. Co.*, 11 Iowa 62.

102. The hearing, and what will be considered.—Where a motion is made for a new trial on the ground of excessive damages, the fact that a former jury awarded the same damages has no force in sustaining the verdict, where it appears that the former jury were authorized to award

exemplary damages, which was denied the second jury under the instructions of the court. *Bass v. Chicago & N. W. R. Co.*, 39 Wis. 636, 13 Am. Ry. Rep. 414.

103. Review of motion in appellate court.—When a motion is made for a new trial because of the insufficiency of the evidence, and the testimony is conflicting, the granting or refusing a new trial is largely in the discretion of the trial court, and its acts will not be overruled unless there is a clear abuse of discretion. *White v. Union Pac. R. Co.*, 8 Utah 56, 29 Pac. Rep. 1030.

Where a motion for a new trial does not allege that the damages are excessive, such objection cannot be urged on appeal. *Peoria, D. & E. R. Co. v. Booth*, 11 Ill. App. 358.

Where plaintiff's testimony is material upon the question whether his view of the track was obstructed by cars standing on the side track, and by reason of his physical disability he is unable to submit to cross-examination, whereupon his direct examination is stricken out on motion of defendant's attorney, and the jury in answer to a special question find that there were no cars standing on said side track at the time of the accident, which finding is claimed to conflict with their general verdict in favor of plaintiff, and a motion for judgment in favor of defendant on such special finding is denied, and judgment rendered on the general verdict, after which plaintiff is granted a new trial upon affidavits of his physicians giving assurance that he would be able to give his testimony on a second trial, there is no abuse of discretion in granting such new trial. *Chicago & G. T. R. Co. v. Newton*, 89 Mich. 549, 50 N. W. Rep. 879.

The first grant of a new trial will not be reversed unless it plainly and manifestly appears that there was an abuse of discretion by the court below, and the supreme court will not closely scrutinize the facts in evidence or endeavor to balance with great exactness the testimony on both sides with a view to detecting an abuse of discretion by the trial judge. The exercise of that discretion in favor of granting new trials should be encouraged. *So held*, in an action against a railroad for personal injury. *Georgia M. & G. R. Co. v. Curry*, 90 Ga. 250, 15 S. E. Rep. 751.

There being sufficient evidence to uphold

the verdict, and the new trial judge being satisfied therewith, his discretion in refusing a new trial will not be interfered with. *So held*, in an action against a railroad by a brakeman for injury resulting from a defective brake wheel. *East Tenn., V. & G. R. Co. v. Smith*, 90 Ga. 558, 16 S. E. Rep. 950.

The trial judge has a right to use his discretion in setting aside a verdict where he believes a verdict to be the result of mistaken sympathy for a poor man. *McGinigal v. Grand Trunk R. Co.*, 33 U. C. Q. B. 194.

NEWLY DISCOVERED EVIDENCE.

As ground for new trial, see NEW TRIAL, 90-95.

NEW YORK.

Aid to railways by the state, see STATE AID, 27.

Assessment and levy of taxes in, see TAXATION, 276.

Conditions exempting carrier from liability to person riding on free pass in, see PASSES, 26.

Consent of city to use of steam power in streets, see STREETS AND HIGHWAYS, 68.

Constitutionality of statutes of, as to municipal aid for railways, see MUNICIPAL AND LOCAL AID, 44.

— — — relative to condemnation of land, see EMINENT DOMAIN, 40.

— — — tax laws of, see TAXATION, 40.

Crossing of streets and highways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 5.

Decisions particularly applicable to city of, see MUNICIPAL CORPORATIONS, 49.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 747.

Duty to locate station under statutes of, see STATIONS AND DEPOTS, 20.

Examination of parties before trial in, see DISCOVERY, ETC., 8.

Grade crossings under statutes of, see CROSSINGS OF RAILROADS, 68.

Grants by, to railroads, see LAND GRANTS, 124.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, 272.

Laying out streets across railways under statutes of, see CROSSING OF STREETS AND HIGHWAYS, 48.

Liability of company to laborers employed by contractors in, see CONSTRUCTION OF RAILWAYS, 93.

Local assessment upon steam railroads in, for repairs, paving, etc., see STREETS AND HIGHWAYS, 352.

Occupation of streets by steam roads under legislative grants of, see STREETS AND HIGHWAYS, 53.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 28.

Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 62.

Power of city to grant use of streets for railway, see STREET RAILWAYS, 19, 20, 49.

Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 450.

Right to sue in, for causing death in foreign state, see DEATH BY WRONGFUL ACT, 121.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 19.

— in, allowing liability for negligence to be limited, see CARRIAGE OF LIVE STOCK, 75, 76; CARRIAGE OF MERCHANDISE, 475-477; EXPRESS COMPANIES, 66; LIMITATION OF LIABILITY, 33.

— — — as to measure of damages for causing death, see DEATH BY WRONGFUL ACT, 387.

— — — preliminary payments for stock, see SUBSCRIPTIONS TO STOCK, 140.

Statutes of, against riding on platform, see STREET RAILWAYS, 419.

— — — as to stoves and furnaces in cars, see CARRIAGE OF PASSENGERS, 190.

— — — regarding flagmen at crossings, see CROSSINGS, INJURIES, ETC., AT, 83.

— — — relative to condemning right of way through streets, see STREETS AND HIGHWAYS, 118.

— — — connecting lines, see CONNECTING LINES, 2.

— — — distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 65.

— — — intersection of railways, see CROSSINGS OF RAILROADS, 13.

Statutory duty to fence in, see FENCES, 32.

— provisions in, limiting amount recoverable for causing death, see DEATH BY WRONGFUL ACT, 370.

— — — relative to abandonment of stations, see STATIONS AND DEPOTS, 53.

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1. Construction and effect of charter.—The charter of the company, obtained from the general government, does not exempt its right of way from the operation of the laws of the state of Minnesota, and forbid a railroad company organized under the general law of the state to exercise the right of eminent domain. *Northern Pac. R. Co. v. St. Paul, M. & M. R. Co.*, 1 *Am. & Eng. R. Cas.* 12, 1 *McCrory* (U. S.) 302, 3 *Fed. Rep.* 702.

2. — of acts of congress, generally.—The act of congress granting public lands to aid in the construction of the road was a conveyance of said lands which took effect upon the location of the line of the road, and after such location the company could sell the lands and protect its possession of the same by actions of ejectment. *Northern Pac. R. Co. v. Lilly*, 24 *Am. & Eng. R. Cas.* 111, 6 *Mont.* 65, 9 *Pac. Rep.* 116.—**DISTINGUISHING** *Northern Pac. R. Co. v. Majors*, 5 *Mont.* 111.

The railroad having been made a United States government and post road by act of congress, its franchise carries with it everything useful and necessary to its operation; and an office safe at one of its depots, in which daily receipts of money and valuable papers are kept, cannot be seized on execution, whether a law of the territory authorizes such seizure or not. *Northern Pac. R. Co. v. Shimmell*, 24 *Am. & Eng. R. Cas.* 1, 6 *Mont.* 161, 9 *Pac. Rep.* 889.

3. — act of July 2, 1864.—Under the original Act of Congress of July 2, 1864, the company is not authorized to construct a branch from its main line via Columbia river valley to Portland and thence to Puget sound, and by locating such branch the company acquired no right to government lands along the road; but under the resolution of May 31, 1870, authorizing it to locate and construct its main road to some point on Puget sound via the valley of Columbia river, with a right to locate its branch from some convenient

point on its main line across the Cascade mountains to Puget sound, it did acquire a right to such lands, but did not acquire the right to lands which had been disposed of after the act of 1864. *United States v. Northern Pac. R. Co.*, 152 *U. S.* 284, 14 *Sup. Ct. Rep.* 598.—**QUOTING** *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 *U. S.* 1.

Act of Congress of July 2, 1864, incorporating the company, and the acts amendatory thereof, are a grant by the public to a private corporation, and must therefore be construed most strictly against the latter, so that no authority, right, or privilege can be held to pass thereby unless the same is therein plainly expressed or clearly implied. *Hughes v. Northern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 157, 9 *Sawyer*. (U. S.) 313, 18 *Fed. Rep.* 106.

Plaintiffs based their title to the land in controversy, for which they brought ejectment, upon a deed from the company. That corporation, it was claimed, had acquired its title by virtue of a selection of certain lands (in which the tract in dispute was included), and the entry and acceptance thereof by the United States land office at Bozeman, Montana. *Held*, under the Act of Congress of July 2, 1864, § 3, relating to the Northern Pacific railroad company, that, until the selection of the lands aforesaid had been examined and approved by the secretary of the interior, through the land office at Washington, D. C., no title to said land could vest in the company, and that therefore plaintiffs could not recover. *Elting v. Thexton*, 7 *Mont.* 330, 16 *Pac. Rep.* 931.

The company was authorized by said acts "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railway" from Lake Superior to Portland, Oregon, "with all powers, privileges, and immunities necessary to carry into effect the purpose" of said acts, the same "to be constructed in a substantial and workmanlike manner, with all the necessary draws, *** bridges, etc., *** equal in all respects to railways of the first class." It was necessary to cross the Wallamet river with such road in order to reach Portland from the eastward. *Held*, that the right of the company to build and maintain a drawbridge across said river or other navigable waters without causing any unnecessary injury or obstruction to the usefulness thereof is clearly implied, but that, congress not having prescribed the ex-

act location or particular character of said bridge, the right of the corporation to construct it is subject to the judgment of the proper court as to whether it is being constructed without unnecessary injury to the navigability of such water, upon the complaint of any one specially injured thereby or likely to be. *Hughes v. Northern Pac. R. Co.*, 13 *Am. & Eng. R. Cas.* 157; 9 *Sawyer*. (U. S.) 313; 18 *Fed. Rep.* 106.—REVIEWING *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

4. — act of May 31, 1870.—Act of Congress of May 31, 1870, authorizing the company to locate and construct under the provisions, and with the privileges and grants, provided in its act of incorporation of July 2, 1864, its main line to Puget sound via the Columbia river is an approval and confirmation of the location of its line theretofore made by the company from Lake Superior via the Columbia river and Portland to Puget sound. *United States v. Northern Pac. R. Co.*, 14 *Sawyer*. (U. S.) 401, 41 *Fed. Rep.* 842.

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I. WHAT CONSTITUTES A NUISANCE.

1. *In General.*

1. Power to declare what is a nuisance.*—Under provisions in a town charter giving the board of trustees the control and supervision of highways, streets, alleys, public grounds, and parks within its limits, and power "to define and declare what shall be deemed nuisances, and to prevent and abate the same, and to provide for the punishment of offenders against any order or

* Legislature may authorize business which would otherwise be nuisance, see note, 9 L. R. A. 713.

How far legislative authorization will exempt from liability to suit for creating nuisance, see note, 26 AM. & ENG. R. CAS. 558.

ordinance passed concerning the same, by fine or imprisonment, or both," the town authorities are warranted in passing an ordinance declaring the use of steam as a motive power to propel any street-car or other vehicle upon any street or horse railway in the town to be a nuisance, and to prohibit under penalties, for the violation of such an ordinance, in the absence of any legislative grant authorizing it, the use of steam as a motive power in propelling street-cars. *North Chicago City R. Co. v. Lake View*, 11 Am. & Eng. R. Cas. 42, 105 Ill. 207.

The power to declare nuisances and provide for their removal does not include the doing of an act which may be a nuisance. It is confined to stationary nuisances, such as can be removed. *State v. Mayor, etc., of Jersey City*, 29 N. J. L. 170.

An ordinance declaring the running of any locomotive or train in the city at a greater rate than one mile in six minutes, or declaring the stopping of a train upon the track of a railroad authorized by law, where the track does not cross a street or public square, a removable nuisance, is not a fair or legal exercise of the power to declare nuisances and provide for their removal. *State v. Mayor, etc., of Jersey City*, 29 N. J. L. 170.—RECONCILED IN *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439.

The common council may not declare anything a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience, as stopping a train for one moment on a track where it does not cross a street or public square, and even then not where the thing complained of is expressly authorized by the legislative power of the state. *State v. Mayor, etc., of Jersey City*, 29 N. J. L. 170.

A municipal corporation cannot treat a particular thing as a nuisance without general legislation declaring all things of its kind to be such. *Laviosa v. Chicago, St. L. & N. O. R. Co., (La.)* 4 Am. & Eng. R. Cas. 128.

Whether the construction of a railroad in a street will operate beneficially or injuriously to the public right of way, and whether it will prove a public benefit or a public nuisance, are questions to be determined by the legislature and by the city council. If the road prove an obstruction to the street, and a public inconvenience and injury, it is not punishable as a nuisance if constructed as prescribed by the charter. *Hinchman v.*

Paterson Horse R. Co., 17 N. J. Eq. 75.—FOLLOWED IN *Fogg v. Nevada C. O. R. Co.*, 43 Am. & Eng. R. Cas. 105, 20 Nev. 429, 23 Pac. Rep. 840. QUOTED IN *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530; *Morris & E. R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384.

2. What may be deemed a nuisance.—(1) *Generally.*—The construction and maintenance of a street railway by an individual or corporation without legislative authority constitute a public nuisance, and subject such individual or corporation to an action in favor of any person sustaining special injury. *Fanning v. Osborne*, 25 Am. & Eng. R. Cas. 252, 102 N. Y. 441, 7 N. E. Rep. 307, 2 N. Y. S. R. 64; *affirming in part* 34 Hun 121. *Forty-second St. & G. S. F. R. Co. v. Thirty-fourth St. R. Co.*, 20 J. & S. (N. Y.) 252; *appeal dismissed in* 102 N. Y. 691, *mem.*—FOLLOWING *Davis v. Mayor, etc.*, of N. Y., 14 N. Y. 506; *Milhau v. Sharp*, 27 N. Y. 611.—*Attorney-General v. Lombard & S. St. Pass. R. Co.*, 10 Phila. (Pa.) 352.

But a private individual cannot maintain an action to abate an unauthorized act as a nuisance unless he is specially injured thereby. *Astor v. New York Arcade R. Co.*, 3 N. Y. S. R. 188.

A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property, which violates the rights of another, is a nuisance. *George v. Wabash Western R. Co.*, 40 Mo. App. 433.

Where a person or corporation is vested with authority by the legislature to do an act, it will be protected from all responsibility, and liable to no suit at law or in equity, provided what it is authorized to do is done carefully and skilfully, though without such authority it would have been a nuisance; but if done carelessly and unskilfully, and damages result from such carelessness and want of skill, it will be responsible. *Taylor v. Baltimore & O. R. Co.*, 39 Am. & Eng. R. Cas. 259, 33 W. Va. 39, 10 S. E. Rep. 29.—QUOTING *Spencer v. Point Pleasant & O. R. Co.*, 23 W. Va. 427.

A company is liable to an action as for a nuisance for using its rights so as to injure a neighboring landowner where it might use them without such injury. *Nor on v. London & N. W. R. Co.*, 9 Ch. D. 623, 47

L. J. Ch. D. 859, 13 *Ch. D.* 268, 3 *Ry. & C. T. Cas.* xxix.

It seems that the powers granted to railroad corporations are to be exercised in strict conformity to private rights, and under the same responsibility, save in some exceptional cases, as if the acts done in execution of such powers were done by an individual. *Booth v. Rome, W. & O. T. R. Co.*, 140 *N. Y.* 267, 35 *N. Y. S. R.* 656, 35 *N. E. Rep.* 592; *reversing* 44 *N. Y. S. R.* 9.—FOLLOWING *Cogswell v. New York, N. H. & H. R. Co.*, 103 *N. Y.* 10. NOT FOLLOWING *Bellinger v. New York C. R. Co.*, 23 *N. Y.* 42.

(2) *Illustrations.*—A coal shed for the loading, unloading, and storing of coal by the use of machinery, though not a nuisance *per se*, may be such from the particular locality in which it is situated, as in a thickly populated part of a city. *Wylie v. Elwood*, 134 *Ill.* 281, 25 *N. E. Rep.* 570.

It is the duty of a railroad company to cause signals to be given where the safety of travelers on intersecting roads demands that a warning should be given of approaching trains, and a habitual failure to give such signals or warnings is an offense against the public, an indictable nuisance. *Louisville & N. R. Co. v. Com.*, 13 *Bush (Ky.)* 388.—FOLLOWED in *Louisville, C. & L. R. Co. v. Com.*, 14 *Am. & Eng. R. Cas.* 613, 80 *Ky.* 143, 44 *Am. Rep.* 468. REVIEWED in *Grand Trunk R. Co. v. Ives*, 144 *U. S.* 408.

Branches of trees standing upon land adjoining a right of way of a company, which overhang it to such an extent as to obscure the view of its engineers in maintaining a lookout, are a nuisance which may be abated by the company by trimming the branches off to the line of the division fence without notice to the landowner. *Hickey v. Michigan C. R. Co.*, 96 *Mich.* 498, 55 *N. W. Rep.* 989.—QUOTING *Earl of Lonsdale v. Nelson*, 2 *B. & C.* 302.

The fact that the company's road-master orders the landowner \$10 to remove the trees, which he refuses to accept, will not confer upon him the right to exact further notice before the removal of the overhanging branches by the company. *Hickey v. Michigan C. R. Co.*, 96 *Mich.* 498, 55 *N. W. Rep.* 989.

Where a company has constructed an embankment in such a way as to be a nuisance, a subsequent statute which ratifies and confirms "the location" of the railroad

"as actually laid out and constructed" does not relieve the company from liability for the nuisance already created. *Salem v. Eastern R. Co.*, 98 *Mass.* 431.

The power granted to the city of St. Louis by its charter to regulate the use of streets extends to public uses only, and does not authorize an ordinance permitting a private corporation to build a track and run trains on the streets for the transaction of private business; and such track constitutes a public nuisance. *Glaessner v. Anheuser Busch Brew. Assoc.*, 100 *Mo.* 508, 13 *S. W. Rep.* 707.—DISTINGUISHING *Porter v. North Mo. R. Co.*, 33 *Mo.* 128; *Randle v. Pacific R. Co.*, 65 *Mo.* 325; *Cross v. St. Louis, K. C. & N. R. Co.*, 77 *Mo.* 318.

Defendant corporation maintained and operated a street railway since 1875 for the transportation of freight in connection with its private business under a contract with a street-railway company which had formerly operated said railway as a branch line. *Held*, that the contract is no defense to an action by an abutting property owner, and that the transfer of the franchise of the street-railway company as a common carrier for the purpose of enabling the grantee to operate the road for private purposes was invalid. *Fanning v. Osborne*, 25 *Am. & Eng. R. Cas.* 252, 102 *N. Y.* 441, 7 *N. E. Rep.* 307, 2 *N. Y. S. R.* 64 affirming in part 34 *Hun* 121.

Defendant company erected an engine house and coal bins for its road on a lot adjoining plaintiff's dwelling house. The smoke, soot, cinders, and coal dust filled plaintiff's house, rendering the air offensive and unwholesome and the house untenable. *Held*, that the engine house as used was a nuisance, and that the authority conferred upon the company by *N. Y. Act* of 1848, ch. 143, § 6, to run its trains over the Harlem railroad was not a legislative sanction to the committing of such a nuisance. *Cogswell v. New York, N. H. & H. R. Co.*, 103 *N. Y.* 10, 3 *N. Y. S. R.* 56, 8 *N. E. Rep.* 537; *reversing* 16 *J. & S.* 31.

3. What is not a nuisance.—(1) *Generally.*—A public nuisance must be occasioned by acts done in violation of law. A work which is authorized by law cannot be a nuisance. *Hinchman v. Paterson Horse R. Co.*, 17 *N. J. Eq.* 75. *New Albany & S. R. Co. v. Higman*, 18 *Ind.* 77. *Payne v. Kansas City, St. J. & C. B. R. Co.*, 112 *Mo.* 6, 20 *S. W. Rep.* 322. *Attorney-General ex*

rel. v. New York & L. B. R. Co., 24 N. J. Eq. 49. *Sargent v. Ohio & M. R. Co.*, 1 Handy (Ohio) 52. *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. (N. Y.) 313. *Sixth Avenue R. Co. v. Gilbert El. R. Co.*, 11 J. & S. (N. Y.) 292, 3 Abb. N. Cas. 372; reversing 9 J. & S. 489. *Carson v. Central R. Co.*, 35 Cal. 325.

A railroad is not a public nuisance, and no right of action can arise against the company until by negligence or improper management it does or suffers to be done something injurious to the abutting proprietor which the permission to occupy the street would not justify. *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62.

A railroad company has not such property in its workmen, or in their services, that it can, under the ordinary jurisdiction of the court of chancery, maintain a suit, as for a nuisance, against a saloon keeper at whose place the men voluntarily buy intoxicating liquors and thereby get so drunk as to be unfit for work; and there is nothing in the provisions of the Code of Washington Territory which enlarges the equitable jurisdiction in this respect. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. Rep. 822.

Plaintiff commenced suit to restrain defendant company from using a lot adjoining his dwelling house for depot purposes in a city. It was found as a fact that defendant's use of the lot interferes with the beneficial use of plaintiff's house, and is a disturbance and injury thereto; but it was also found that such use is confined entirely to the ordinary operation and maintenance of a depot for passengers and freight, and a yard for the accommodation of incoming and outgoing trains, and to such drilling operations as are absolutely necessary to the proper transaction of its business and to none other; that proper skill and care had been observed, having a due regard to the neighboring property. *Held*, that he was not entitled to the relief sought on the ground that it constituted a nuisance. *Briesen v. Long Island R. Co.*, 31 Hun (N. Y.) 112.—DISAPPROVING *Bellemont & O. Co. v. Fifth Baptist Church*, 27 Alb. L. J. 488.

(2) *Nuisance per se*.—A railroad through a populous village or city is not *per se* a nuisance. *Hents v. Long Island R. Co.*, 13 Barb. (N. Y.) 646.—FOLLOWING *Drake v. Hudson River R. Co.*, 7 Barb. 508.—*Ander-*

son v. Rochester, L. & N. F. R. Co., 9 How. Pr. (N. Y.) 553.—APPROVING *Hamilton v. New York & H. R. Co.*, 9 Paige (N. Y.) 171; *Lexington & O. R. Co. v. Applegate*, 8 Dana (Ky.) 289; *Drake v. Hudson River R. Co.*, 7 Barb. 508.—*Geiger v. Filor*, 8 Fla. 325. *Peterson v. Navy Yard, B. S. & F. R. Co.*, 5 Phila. (Pa.) 199.

An authorized railroad in a city is not *per se* a nuisance. But it is otherwise when the railroad is constructed without requisite authority. *Wetmore v. Story*, 22 Barb. (N. Y.) 414. *Randle v. Pacific R. Co.*, 65 Mo. 325.—DISTINGUISHING *Fitch v. Pacific R. Co.*, 45 Mo. 322.—DISTINGUISHED IN *Cross v. St. Louis, K. C. & N. R. Co.*, 14 Am. & Eng. R. Cas. 123, 77 Mo. 318; *Glaessner v. Anheuser-Busch Brew. Assoc.*, 100 Mo. 508, 13 S. W. Rep. 707.

The annoyance arising from the necessary use of a railroad is not a nuisance *per se*. *Bell v. Ohio & P. R. Co.*, 25 Pa. St. 161.

The construction, by a railroad corporation, whose road crosses a highway below grade, of a bridge of less width than the highway, is not *per se* a nuisance. *People v. New York, N. H. & H. R. Co.*, 10 Am. & Eng. R. Cas. 230, 89 N. Y. 266.

Prior to the passage of New York Act of 1891, ch. 367, which prohibits barbed wire railroad fences, such a fence along a railroad track was not *per se* a nuisance. It would depend upon the circumstances and facts of the case. *Guilfoos v. New York C. & H. R. R. Co.*, 69 Hun 593, 53 N. Y. S. R. 538.

A railroad is not *per se* a nuisance. Nor is the use of a street in a city, for a railroad track, in such a manner as not to abridge or obstruct the right of passage and repassage for other purposes, such an exclusive appropriation of the street as to amount to a nuisance or a purpresture. *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508.—APPROVED IN *Anderson v. Rochester, L. & N. F. R. Co.*, 9 How. Pr. (N. Y.) 553. FOLLOWED IN *Hentz v. Long Island R. Co.*, 13 Barb. 646.

2. Particular Instances.

4. Things obnoxious to comfort, generally.—Where the use of steam engines to draw trains over the streets of a city is authorized by the legislature and by the ordinances of the city, the running of trains cannot be abated as a public nuisance under Georgia Code, even though it tend

to the immediate annoyance of the citizens in general. *Vason v. South Carolina R. Co.*, 42 Ga. 631.

The power to a company to build its road into a city and to construct such works as are necessary for the completion and maintenance of its road—held, not to confer the right to construct shops so as to interfere with and disturb the enjoyment of others in their property. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 11 Am. & Eng. R. Cas. 15, 108 U. S. 317, 2 Sup. Ct. Rep. 719. —APPROVED IN *Cogswell v. New York, N. H. & H. R. Co.*, 3 N. Y. S. R. 56. QUOTED IN *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363.

Defendant was a tramway company, empowered to construct two lines of tramway according to deposited plans, together with the works and conveniences connected therewith. The act gave no compulsory power for taking lands, and made no special mention of building stables. Defendant built large blocks of stables near plaintiff's house for the horses employed in drawing the cars. Plaintiff complained of the smell caused by the stables, and brought an injunction to restrain defendant from using the stables. Held, that although horses were necessary for the working of the tramways, the company was not justified in using the stables so as to be a nuisance to its neighbors, and that it was no sufficient defense to say that it had taken all reasonable care to prevent it. *Rapier v. London Tramways Co.*, [1893] 2 Ch. 588.

5. Dust, noise, odors, smoke, etc.* —(1) *Generally.* — At common law, mere noise in the immediate vicinity of the premises, and especially of the dwelling house of the landowner, may be of such a character as to constitute an actionable nuisance, remediable by an action on the case for damages, or by injunction. *Chicago, M. & St. P. R. Co. v. Darke*, 148 Ill. 226, 35 N. E. Rep. 750.

A railway corporation, having a chartered right to run its trains, has necessarily the right to make all reasonable and usual noises incident thereto, whether occasioned by the escape of steam, rattling of the cars, or other causes. *Whitney v. Maine C. R. Co.*, 69 Me. 208.—QUOTED IN *Stanton v.*

Louisville & N. R. Co., 91 Ala. 382.—*Morgan v. Norfolk Southern R. Co.*, 98 N. Car. 247, 3 S. E. Rep. 506. *Abbot v. Kalbus*, 39 Am. & Eng. R. Cas. 594, 74 Wis. 504, 43 N. W. Rep. 367. *Moshier v. Utica & S. R. Co.*, 8 Barb. (N. Y.) 427. *Mumford v. Oxford, W. & W. R. Co.*, 1 H. & N. 34, 25 L. J. Ex. 265. *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. Rep. 570.

Although noise may amount to a nuisance, and is also actionable, yet it must be a very special case in which real estate can be injured by a mere noise, so as to sustain an action for the injury. (Per Hand, J.) *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. (N. Y.) 313.

It is only where railroad employes make unusual and unnecessary noises in the running of trains that the company is liable for injuries resulting therefrom. *Morgan v. Central R. Co.*, 77 Ga. 788.—DOUBTED AND DISTINGUISHED IN *East Tenn., V. & G. R. Co. v. Markens*, 88 Ga. 60.

Injuries which are unavoidable in the operation of a railroad in the transaction of its business, such as the sounding of whistles, the emission of smoke and sparks from locomotives, the noise and vibrations incident to the moving of trains, annoyances from the character or condition of freight transported, and the like, are the necessary concomitants of the use of the franchises granted. *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810.—APPROVING *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235. REVIEWING *Bordentown & S. A. Turnpike Road v. Camden & A. R. & T. Co.*, 17 N. J. L. 314.—*Parrot v. Cincinnati, H. & D. R. Co.*, 10 Ohio St. 624. *Smith v. Midland R. Co.*, 37 L. T. 224. *Norton v. London & N. W. R. Co.*, 9 Ch. D. 623, 47 L. J. Ch. D. 859, 3 Ry. & C. T. Cas. xviii.

The emission of smoke and noxious vapor during the operations of cleaning the engines and relighting the engine fires, annoying the owner of a mansion house adjoining the railway tracks, is not a necessary evil to the proper working of the line, or a reasonable user for the purposes of the railway within the Railways Clauses Act, 1845, and such a nuisance will be enjoined. *Smith v. Midland R. Co.*, 37 L. T. 224, 25 W. R. 861.

If the engines of a railway company are constructed on the principle of consuming their own smoke, as required by section 114 of the Railways Clauses Act, 1845, the com-

* When conduct of business is nuisance; emission of smoke, soot, cinders, coal dust, etc., see note, 9 L. R. A. 712.

pany is not liable for the failure of the engines to consume their smoke, caused by the negligence of employes. *Manchester, S. & L. R. Co. v. Wood*, 6 Jur., N. S. 70, 29 L. J. M. C. 29, 2 El. & El. 344.

(2) *Illustrations*.—An engine house erected by a company adjacent to plaintiff's dwelling house, and so used as practically to deprive him of the use of the house as a residence, and by filling it with smoke and dust, and corrupting the air with offensive gases, making life therein uncomfortable and unsafe, is a nuisance, for which an action for damages will lie, and a court of equity will enjoin the same. *Cogswell v. New York, N. H. & H. R. Co.*, 27 Am. & Eng. R. Cas. 376, 103 N. Y. 10, 8 N. E. Rep. 537, 4 Cent. Rep. 225; reversing 16 J. & S. 31.—APPROVING *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317. QUOTING *Radcliff v. Mayor, etc., of Brooklyn*, 4 N. Y. 195. REVIEWING *Bellinger v. New York C. R. Co.*, 23 N. Y. 42.—APPLIED IN *Abendroth v. Manhattan R. Co.*, 19 Abb. N. Cas. (N. Y.) 247, 22 J. & S. 417. FOLLOWED IN *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 268, 10 N. E. Rep. 528, 4 N. Y. S. R. 340. QUOTED IN *Morton v. Mayor, etc., of N. Y.*, 65 Hun (N. Y.) 32; *Hudson River Tel. Co. v. Watervliet T. & R. Co.*, 48 N. Y. S. R. 417.

Maintaining a power house to propel cable cars on a lot adjoining plaintiff's dwelling whereby it is constantly shaken and injured, and the premises covered with soot, and the inhabitants annoyed by the continuous noise, constitutes a nuisance notwithstanding the fact that the road to be so operated is licensed by the municipality. *Tuebner v. California St. R. Co.*, 19 Am. & Eng. R. Cas. 147, 66 Cal. 171, 4 Pac. Rep. 1162.

If one is injured in the enjoyment of his residence in a populous part of a city from the erection and operation of a large coal shed, by noises from the use of machinery, and the grinding of coal in being moved, loaded, or unloaded, and from deposit of dust, etc., he may have an action, and it is no defense to show that the same act inflicts a like injury upon many others. *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. Rep. 570.

Railroad repair shops and engine houses erected so near a church edifice that the smoke, noise, and odors therefrom render the church uncomfortable and quite unendurable, and less valuable as a place of worship, is a nuisance, rendering the company

liable in damages. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 11 Am. & Eng. R. Cas. 15, 108 U. S. 317, 2 Sup. Ct. Rep. 719.—APPROVED IN *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 8 N. E. Rep. 537, 4 Cent. Rep. 225. REVIEWED IN *Cumberland T. & T. Co. v. United Elec. R. Co.*, 43 Am. & Eng. R. Cas. 194, 42 Fed. Rep. 273.

An action may be maintained for a nuisance caused by running cars and engines, ringing bells, blowing off steam, etc., in the neighborhood of a church during public worship, where the noises annoy and molest the congregation worshipping there, so as greatly to depreciate the value of the house, and render the same unfit for religious worship. *First Baptist Church v. Schenectady & T. R. Co.*, 5 Barb. (N. Y.) 79.—REFERRED TO IN *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. 313.

And an action to abate such nuisance may be brought by the church in its corporate capacity, and not by the individuals worshipping therein, and against the railroad company in its corporate capacity, and not its agents who operate the road. *First Baptist Church v. Schenectady & T. R. Co.*, 5 Barb. (N. Y.) 79.

6. Things dangerous to health, generally.—(1) *Diverting or polluting water*.—If a railroad company contributes essentially to the creation of a nuisance, as by the erection of a dam which renders water stagnant, or produces its overflow so as to cause it to gather in pools and become stagnant, or by raising it so as to cause the decay of vegetable matter, whereby unwholesome gases are developed, the company is liable, although natural causes combine to produce the result. *Ft. Worth & D. C. R. Co. v. Scott*, 2 Tex. App. (Civ. Cas.) 137.

Plaintiff complained that defendant company had constructed pits or ditches along its road, which filled with water and in hot weather became stagnant and offensive, creating a nuisance which impaired the rental value of his adjoining lands, and prevented sales of lands for building purposes. The company claimed that a nuisance was not created, inasmuch as there was no house on the land occupied by plaintiff or others. *Held*, that this would only render the measurement of damages more difficult, but would not impair the right to abate the nuisance. *Busch v. New York, L. & W. R. Co.*, 34 N. Y. S. R. 7, 12 N. Y. Supp. 85.

The fact that defendant opened a culvert whereby the water was carried from one side of its right of way to the other will not render it liable unless by so doing the volume of water which would run into plaintiff's pond would be thereby increased. It appearing that such was not the fact, but that, by reason of the nature of the ground, the water would have found its way into the pond if the culvert had not been built, a nonsuit was properly awarded. *Brimberry v. Savannah, F. & W. R. Co.*, 78 Ga. 641, 3 S. E. Rep. 274.—DISTINGUISHING *Smith v. Atlanta*, 75 Ga. 110; *Central R. Co. v. English*, 73 Ga. 366.

A railway bridge over a highway which collects rain-water and allows it to drip on persons passing underneath is not a nuisance injurious to health within the meaning of 18 & 19 Vict. c. 121, § 8, and the justices are wrong in ordering its abatement. *Great Western R. Co. v. Bishop*, L. R. 7 Q. B. 550, 41 L. J. M. C. 120, 20 W. R. 969, 26 L. T. 905.—CONSIDERED IN *Malton Board of Health v. Malton Farmers M. & T. Co.*, L. R. 4 Ex. D. 302, 49 L. J. M. C. 90, 44 J. P. 155. DISTINGUISHED IN *Bishop Auckland Local Board v. Bishop Auckland I. & S. Co.*, L. R. 10 Q. B. D. 138, 52 L. J. M. C. 38, 48 L. T. 223, 31 W. R. 288, 47 J. P. 389.

(2) *Dead animals*.—When an animal is killed on the right of way, it is the duty of the company, acting through its agents, to make such a disposition of the carcass as will not constitute a public nuisance. *Baxter v. Chicago, R. I. & P. R. Co.*, 87 Iowa 488, 54 N. W. Rep. 350.

Where a railroad company is sued for creating a nuisance by throwing dead animals in a stream whence plaintiff obtained his water, he is not guilty of contributory negligence in failing to lessen the effect of the nuisance by removing the animals, and especially is this so where the animals are on lands belonging to the company. *Gulf, C. & S. F. R. Co. v. Reed*, (Tex. Civ. App.) 22 S. W. Rep. 283.

In an action for a nuisance created by leaving the carcass of an animal insufficiently buried on premises adjacent to those of plaintiff, the loss of health and comfort of plaintiff and his family by reason thereof are items of damages. That plaintiff might have abated the nuisance and did not will not prevent his recovery, and will not necessarily mitigate his damages. *Jarvis v. St. Louis, I. M. & S. R. Co.*, 26 Mo. App. 253.

Where a company kills an animal in the operation of its trains and allows it to remain on its right of way so near a dwelling house as to cause sickness to the occupants, it thereby creates a private nuisance and becomes liable to the persons occupying the house. And where a husband is in possession he may recover for sickness of his wife; but if he dies the cause of action does not survive to the wife. *Ellis v. Kansas City, St. J. & C. B. R. Co.*, 63 Mo. 131, 20 Am. Ry. Rep. 411.

The yard master at a neighboring station in employ of defendant company caused carcasses of dead cattle to be cast into a bayou near the residence of plaintiff, thereby polluting the water and the atmosphere. *Held*, that defendant is responsible for actual damages, but in the absence of proof of authority or ratification it is not liable for exemplary damages. *Gulf, C. & S. F. R. Co. v. Reed*, 48 Am. & Eng. R. Cas. 423, 80 Tex. 362, 15 S. W. Rep. 1105.

Tex. Penal Code, art. 390, makes any one polluting a watercourse guilty of an offense punishable by fine not exceeding \$500. *Held*, that the servant would be liable both civilly and criminally, the master only civilly and for actual damages. *Gulf, C. & S. F. R. Co. v. Reed*, 48 Am. & Eng. R. Cas. 423, 80 Tex. 362, 15 S. W. Rep. 1105.

7. *Cattle pens and stock-yards*.—Where a company erects cattle pens upon its right of way, it should keep them clean, and if, by reason of negligence, they are suffered to become a nuisance, rendering the homes of those in the vicinity uncomfortable and unwholesome, the company must respond in damages. *Illinois C. R. Co. v. Grabbill*, 50 Ill. 241.—APPROVED IN *Rosenthal v. Taylor, B. & H. R. Co.*, 79 Tex. 325. QUOTED IN *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.

Stock-yards are not of themselves nuisances, yet, under some circumstances, even when well kept and cared for, they would be so considered, as where they are located and operated alongside of plaintiff's residence, and necessarily produce much discomfort and quite destroy the reasonable enjoyment of his property. *Bielman v. Chicago, St. P. & K. C. R. Co.*, 50 Mo. App. 151.

* Liability of railroad companies for maintaining nuisances in the form of coal sheds, stock-yards, machine shops, etc., see 46 AM. & ENG. R. CAS. 521, *abstr.*

Defendant erected stock-yards so near to plaintiff's dwelling, and so kept them that the odors therefrom were not only an annoyance, but were unwholesome, threatening the health of plaintiff and his family. *Held*, that defendant could not escape liability on the ground that the yards were necessary to the operation of its railroad, and that the odors could not be avoided, there being no showing of such facts in defense. *Shively v. Cedar Rapids, I. F. & N. W. R. Co.*, 74 Iowa 169, 7 Am. St. Rep. 471, 37 N. W. Rep. 133.—DISTINGUISHING *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182.

Plaintiff alleged that he was the owner and occupier of a certain hotel, and that defendant company had erected and maintained cattle pens adjoining, wherein a large number of cattle and hogs were confined, and that the same were kept in a filthy condition, and that the noises therefrom and the filthy condition injured the comfort and health of plaintiff and his family and guests, and thereby destroyed his business and the use and enjoyment of his property. *Held*, on demurrer, that this was sufficient to constitute a nuisance, and to give a cause of action. *Ohio & M. R. Co. v. Simon*, 40 Ind. 278.

A company was authorized among other things to carry cattle, and also to purchase any lands not exceeding fifty acres, in such places as should be deemed eligible, for the purpose of additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed; or to sell such additional lands and to purchase in lieu thereof other lands which it should deem more eligible for said purposes. The act contained no provision for compensation in respect of lands so purchased by agreement. Under this power the company bought land adjoining one of its stations and used it as a yard or dock for cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the act, would have been actionable. There was no negligence in the mode in which the company conducted the business. *Held*, that the purpose for which the land was acquired being expressly authorized by the act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company was authorized to do what it did, and was not bound to choose a site more convenient to other persons;

and that the adjoining occupiers were not entitled to an injunction. *London, B. & S. C. R. Co. v. Truman*, 25 Am. & Eng. R. Cas. 116, L. R. 11 App. Cas. 45; reversing 25 Ch. D. 423.—DISTINGUISHING *Metropolitan Asylum Dist. v. Hill*, L. R. 6 App. Cas. 193.

8. Things dangerous in character.—Where the legislature grants a right of way to a railroad through a small town, and afterwards when the population and business of the town have materially increased, thereby increasing the danger from moving cars, a court of equity will not for such cause enjoin the further running of trains thereon as a nuisance. *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25.—QUOTING *Illinois C. R. Co. v. Grabill*, 50 Ill. 244.

The keeping of explosives unsafely guarded in such quantities as to be dangerous to persons and property, in such a place and under such circumstances as to threaten calamity to the persons and property of others, the consequence being an explosion which causes damage to the person or property of another, gives a right of action. *Wright v. Chicago & N. W. R. Co.*, 27 Ill. App. 200.—QUOTING AND DISTINGUISHING *Toledo, W. & W. R. Co. v. Muthersbaugh*, 71 Ill. 573.

9. Obstructions in streets and highways.*—Where, in front of a lot in a city, there is a public street in a condition to be used as such, and an obstruction is placed on the street by which its use as a highway is impeded, and which prevents the owner of the lot from having free access to the street, he may maintain an action to abate it as a nuisance and to recover damages. And it is not material by whom the street was improved, whether by the public or by private persons. *Schulte v. North Pac. Transp. Co.*, 50 Cal. 592.—DISTINGUISHING *George v. North Pac. Transp. Co.*, 50 Cal. 589.

The obstruction of access to private property by a public road need not be *ex adverso*, but it must be proximate and not remote or indefinite to entitle the owner of

* Railroads in streets as nuisances, see note, 36 AM. & ENG. R. CAS. 37.

Abutting owner cannot enjoin the construction of a private railroad in the street, though it be a nuisance, see 25 AM. & ENG. R. CAS. 257, *abstr.*

Nuisance caused by embankment in highway. Damages for depreciation of property, see 46 AM. & ENG. R. CAS. 51, *abstr.*

the property to compensation for the loss of it. It is a question whether a mere change of gradient alone would be a proper subject for compensation. *Caledonian R. Co. v. Walker*, 6 Am. & Eng. R. Cas. 518, L. R. 7 App. Cas. 259.—DISTINGUISHING *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229. FOLLOWING Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. Cas. 243. REVIEWING *Chamberlain v. West End of London & C. P. R. Co.*, 2 B. & S. 617; *Beckett v. Midland R. Co.*, L. R. 3 C. P. 82; *Rickett v. Metropolitan R. Co.*, L. R. 2 H. L. Cas. 175; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. Cas. 171.

The placing of a permanent obstruction in any street of an incorporated city without proper authority creates a public nuisance, and courts of equity have power to enjoin such a work. *Savannah, A. & G. R. Co. v. Shiels*, 33 Ga. 601.

If a heap of earth placed in a highway is of such a nature as to be dangerous by causing horses passing on the highway to shy, it is a public nuisance. *Brown v. Eastern & M. R. Co.*, 37 Am. & Eng. R. Cas. 558, 22 Q. B. D. 391.

Where a railway company gains lawful possession of private land as a right of way, the land being located outside a municipal corporation, the subsequent annexation of such land to a city does not render the company's possession unlawful, nor does the subsequent acceptance of such land as a public street or highway by the city render the occupation and possession of said street by the company a nuisance subject to be abated by mere resolution of the city council. *Denver v. Denver & S. F. R. Co.*, 17 Colo. 583, 31 Pac. Rep. 338.—APPROVING *Omaha & N. N. R. Co. v. Redick*, 16 Neb. 313.

By virtue of Me. Rev. St. of 1857, ch. 51, § 15, a railroad crossing not made in the "manner determined in writing by the county commissioners" is a nuisance. *State v. Portland, S. & P. R. Co.*, 58 Me. 46.

An allegation of negligence on the part of defendants in the operation and management of a train, which the complaint alleges caused the special injury, is not necessary, as the unauthorized and continuous obstruction of the highway is a public nuisance, and a person sustaining a special injury therefrom is entitled to recover damages, irrespective of the question of negligence at the time of the injury. *Lanning v. Ga-*

lusha, 135 N. Y. 239, 31 N. E. Rep. 1024, 47 N. Y. S. R. 831; reversing 63 Hun 32, 28 Civ. Pro. 16, 43 N. Y. S. R. 592, 17 N. Y. Supp. 328.

A canal excavated by a corporation without lawful authority in a street shown upon a defectively executed plat is a private nuisance to owners of lots abutting on such street who had purchased according to the defective plat, and had at least a private way over the street, and there can be no prescription for such nuisance. *Taylor v. Chicago, M. & St. P. R. Co.*, 83 Wis. 636, 53 N. W. Rep. 853.

A city passed an ordinance granting a company the right to own and operate a railway on certain streets for a time extending beyond the corporate life of the company. Afterwards an ordinance was passed limiting the time to the lifetime of a new corporation which had succeeded to the property. Held, that the company was liable as for a public nuisance if it continued to use the streets after the time fixed, and might be restrained by injunction. *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867.

A railroad company which places large quantities of cotton on a public street in a city in such a manner as to obstruct the street and to expose surrounding property to the danger of fire is guilty of creating a nuisance, although the street is used solely by travelers on foot, and a passage is left for their use. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 Am. & Eng. R. Cas. 79, 41 Fed. Rep. 643.

A railroad company using, for the purposes of a terminal yard, a portion of a street over which it has only a right of way is responsible for any nuisances, public or private, thereby created. *Pennsylvania R. Co. v. Angel*, 26 Am. & Eng. R. Cas. 559, 41 N. J. Eq. 316, 7 Atl. Rep. 432, 56 Am. Rep. 1.—DISTINGUISHED IN *Beseman v. Pennsylvania R. Co.*, 33 Am. & Eng. R. Cas. 107, 50 N. J. L. 235.

10. Obstructions in public grounds.—A railroad unlawfully constructed in a public park is a purpresture; and if it unlawfully obstructs the free passage or its use in the customary manner by the public, it is a nuisance and may be abated by a court of equity. If it is not a nuisance, the remedy is not by the people, who are not injured, but by the holder of the legal title. *People v. Park & O. R. Co.*, 76 Cal. 156, 18 Pac. Rep. 141.

A city leased to defendant for "depot purposes" ground dedicated to the general public, but reserving a right of way to and over a bridge at the mouth of a river; also the right to use so much of said grounds as may be necessary in the repair of the same or for rebuilding the bridge; the right to provide by resolution for the necessary repair and good condition of the road leading to the bridge, and to provide that the same shall be kept in good repair and condition by the railroad company for public travel. Defendant built a round house and turntable on the ground in such a way as to interfere with the customary travel over said ground to plaintiffs' place of business. *Held*, that it was the intent of the city that defendant and the general public should jointly use and occupy the grounds for highway purposes, and that the round house and turntable constituted a nuisance for which plaintiffs were entitled to damages, and which the court properly ordered to be removed. *Platt v. Chicago, B. & Q. R. Co.*, 74 Iowa 127, 37 N. W. Rep. 107.

11. Obstructions to navigation.—

The obstruction of a navigable stream by a railroad bridge is a public nuisance. *South Carolina R. Co. v. Moore*, 28 Ga. 398.

The extension of a railroad across an arm of the sea which is constantly used by schooners, small boats, and other vessels for purposes of trade and commerce is a public nuisance. *O'Brien v. Norwich & W. R. Co.*, 17 Conn. 372.

"Healy slough," a branch of the Chicago river, is not a navigable stream, in the sense in which the term is used in the law. So the public has not an easement over it of a character to render a railroad bridge over the same a public nuisance. *Joliet & C. R. Co. v. Healy*, 94 Ill. 416.

The shores of navigable rivers and streams and the lands under the waters thereof belong to the state within whose territorial limits they lie; it may authorize the construction of bridges, piers, wharves, or other obstructions in navigable waters, and when such obstructions are not obnoxious to the regulations of congress and do not conflict with the paramount authority of the United States, they are not nuisances. *Kerr v. West Shore R. Co.*, 127 N. Y. 269, 27 N. E. Rep. 833, 37 N. Y. S. R. 913; *affirming* 53 Hun 634, 25 N. Y. S. R. 1036, 6 N. Y. Supp. 958.

The state may also grant or confer an ex-

clusive privilege in tide water provided it does not trench upon the powers granted to congress. *Kerr v. West Shore R. Co.*, 127 N. Y. 269, 27 N. E. Rep. 833, 37 N. Y. S. R. 913; *affirming* 53 Hun 634, 25 N. Y. S. R. 1036, 6 N. Y. Supp. 958.

A dam erected in a floatable stream to furnish power to operate a mill useful to the public, under authority from a county court, is not a public nuisance, though without sluice, and though it obstruct navigation; and a railroad company which, by an unlawful act in the construction of its road, inflicts injury upon the mill cannot excuse itself for the wrong by the plea that such dam is a public nuisance. *Watts v. Norfolk & W. R. Co.*, 57 Am. & Eng. R. Cas. 694, 39 W. Va. 196, 19 S. E. Rep. 521.

A party who suffers injury from a public nuisance—e. g., in having his raft, boat, or barge stopped by the building of a railroad bridge across a navigable stream—may have his action against the nuisance for damages. *Little Rock, M. R. & T. R. Co. v. Brooks*, 17 Am. & Eng. R. Cas. 152, 39 Ark. 403.

3. Continuance of Nuisance.

12. Generally.—A party in whose possession and control a railroad is placed with power to continue its use is equally liable with the original owner for a nuisance arising from the manner of its construction. *Tate v. Missouri, K. & T. R. Co.*, 64 Mo. 149, 17 Am. Ry. Rep. 191.

Where a party is not the original creator of a nuisance, he must have notice of it and be requested to abate it before he may be made liable by reason thereof. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 58 Am. & Eng. R. Cas. 642, 57 Fed. Rep. 441.

But to make a lessee company liable for continuing a nuisance erected by the lessor it is not necessary to show that the former was notified of the nuisance and requested to abate it. It is sufficient if it appears that it knew of the nuisance. *Dickson v. Chicago, R. I. & P. R. Co.*, 2 Am. & Eng. R. Cas. 538, 71 Mo. 575.—FOLLOWING *Pinney v. Berry*, 61 Mo. 359. NOT FOLLOWING *Penruddock's Case*, 5 Coke 100.

Where the grantee of an easement discovers a nuisance in connection therewith and abates it, but afterwards permits it to arise again, he is liable without notice to abate it, even though it was created originally by his grantor. *Drake v. Chicago, R.*

I. & P. R. Co., 17 *Am. & Eng. R. Cas.* 45, 63 *Iowa* 302, 30 *Am. Rep.* 746, 19 *N. W. Rep.* 215.—**DISTINGUISHING** *Slight v. Gutzlaff*, 35 *Wis.* 675.

It is not necessary in order to maintain an action for a nuisance which has been erected by the predecessor of defendant to allege that defendant had knowledge or notice of the nuisance. It is not necessary to allege or prove that notice of the nuisance has been given providing you allege and prove knowledge of its continuing existence. *McGowan v. Missouri Pac. R. Co.*, 23 *Mo. App.* 203.

Making an excavation under a railroad track, and thereby diverting the waters of a creek and emptying them upon land theretofore dry and tillable, constitutes a nuisance, and the maintenance of said excavation and its results is a continuing nuisance. *George v. Wabash Western R. Co.*, 40 *Mo. App.* 433.

Plaintiff brought an action to recover damages to his crops caused by defendant company in maintaining certain piles and trestle work so as to cause water to overflow plaintiff's land. *Held*, that if the trestle was improperly and unlawfully constructed, then its continuance constituted a breach of duty, and each injury resulting therefrom constituted a new cause of action. *St. Louis A. & T. H. R. Co. v. Brown*, 34 *Ill. App.* 552.—**QUOTING** *Ohio & M. R. Co. v. Wachter*, 123 *Ill.* 440; *Chicago, B. & Q. R. Co. v. Schaffer*, 124 *Ill.* 112.

13. Works no prescriptive right to maintain.—There is no such thing as a prescriptive right or any other right to maintain a public nuisance. *Philadelphia, W. & B. R. Co. v. State*, 20 *Md.* 157. *Louisville & N. R. Co. v. Hays*, 14 *Am. & Eng. R. Cas.* 284, 11 *Lea (Tenn.)* 382, 47 *Am. Rep.* 291. *Werges v. St. Louis, C. & N. O. R. Co.*, 35 *La. Ann.* 641.

A right to maintain a strictly private nuisance upon the land of another may be acquired by prescription, and the time necessary to perfect a prescriptive right in Indiana is twenty years. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 *Ind.* 22, 14 *West. Rep.* 843, 17 *N. E. Rep.* 171.

Prescription may transfer what was originally a nuisance into a right; but the use must be adverse, continuous, and uninterrupted and with the acquiescence of the owner for ten years, and bringing suits for damages for such use shows sufficiently

the want of acquiescence. *Buntin v. Chicago, R. I. & P. R. Co.*, 50 *Mo. App.* 414.—**DISTINGUISHING** *Bird v. Hannibal & St. J. R. Co.*, 30 *Mo. App.* 365.

No acquiescence short of twenty years will bar one from complaining of a nuisance, unless by some act or omission he has induced the party causing the nuisance to incur large expenditures, or to take some action upon which an estoppel may be based. *So held*, where plaintiff sued to recover damages, and for equitable relief against the operation of an elevated railroad in the street in front of his property, and where the company relied upon the ordinary statute of limitations as a defense. *Knox v. Metropolitan El. R. Co.*, 58 *Hun* 517, 36 *N. Y. S. R.* 2, 12 *N. Y. Supp.* 848; *affirmed* in 128 *N. Y.* 625, *mem.*, 40 *N. Y. S. R.* 157, 28 *N. E. Rep.* 485.—**DISTINGUISHING** *Hentz v. Long Island R. Co.*, 13 *Barb.* 655; *McAulay v. Western Vt. R. Co.*, 33 *Vt.* 311; *Goodin v. Cincinnati & W. Canal Co.*, 18 *Ohio St.* 169.

And in such case the plaintiff is not prevented from recovering damages because the structure is authorized by law; but he must rely upon a failure of the company to offer him due compensation, or to condemn his property under the right of eminent domain. *Knox v. Metropolitan El. R. Co.*, 58 *Hun* 517, 36 *N. Y. S. R.* 2, 12 *N. Y. Supp.* 848; *affirmed* in 128 *N. Y.* 625, *mem.*, 40 *N. Y. S. R.* 157, 28 *N. E. Rep.* 485.

II. REMEDIES.

1. In General.

14. Abatement by public officers.

—Under Mass. Gen. St. ch. 26, § 8, an order of a board of health to a railroad company for the removal of a nuisance reciting that the company, by filling up parts of a certain pond without supplying suitable culverts or other means of drainage, have created and are maintaining a nuisance sufficiently informs the company of the nature and locality of the nuisance. *Salem v. Eastern R. Co.*, 98 *Mass.* 431.

New Jersey Act of March 12, 1880, making animals with contagious or infectious diseases common nuisances, and authorizing their destruction by certain officials, and the further act of March 12, 1884, making horses affected by glanders common nuisances, and authorizing their destruction, are within the police powers of the state; and are not within the fourteenth amend-

ment of the federal constitution, granting equal protection of the law, because they authorize the abatement of such nuisances in advance of a judicial determination of the fact of the nuisance. *So held*, where a street-railway company sued for the killing of certain horses belonging to it. *Newark & S. O. Horse Car R. Co. v. Hunt*, 50 N. J. L. 308, 11 Cent. Rep. 219, 12 Atl. Rep. 697.

15. Action to abate.—A private individual cannot maintain an action to abate an alleged nuisance caused by obstructing a navigable stream, unless he suffers some damages peculiar to himself, and differing from the damages suffered by the public generally. *Jarvis v. Santa Clara Valley R. Co.*, 52 Cal. 438. *Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa 165, 2 L. R. A. 282, 40 N. W. Rep. 701.

A public nuisance cannot be tolerated on the ground that the community may realize some advantages from its existence. *Works v. Junction R. Co.*, 5 McLean (U. S.) 425.—FOLLOWING *Wheeling Bridge Case*, 9 Western L. J. 335.

An abutting owner who expressly assents to the occupancy of a street cannot maintain an action for the abatement of a nuisance by the removal of a railroad track. *Burkam v. Ohio & M. R. Co.*, 43 Am. & Eng. R. Cas. 153, 122 Ind. 344, 23 N. E. Rep. 799.

Where plaintiff files a bill to prevent the continuance of a nuisance in allowing cars loaded with cattle to stand an unreasonable time on the street in front of his house, an averment in the company's answer that plaintiff's house was built after the tracks were laid should be stricken out as immaterial. *Angel v. Pennsylvania R. Co.*, 17 Am. & Eng. R. Cas. 128, 38 N. J. Eq. 58.

16. Ejectment.—A city cannot maintain an action against a railroad company as for a nuisance caused by driving piles in ground claimed as a street, but which the company claims is not a street, but which it owns in fee. The proper remedy is ejectment. *Covington v. Chesapeake & O. R. Co.*, (Ky.) 20 S. W. Rep. 538.

17. Indictment.—A declaration stated that defendant, in constructing its railway, built a bridge across a river so as to impede navigation; that plaintiff owned land on the river above the bridge, and by reason thereof was entitled to the free use of the river; that vessels had been accustomed to pass up and down to his land, but could no longer

do so; and that the trade of the river had been destroyed, and his land in consequence diminished in value. *Held*, that it did not state any injury peculiar to plaintiff which would entitle him to maintain an action. The proper remedy is by indictment. *Small v. Grand Trunk R. Co.*, 15 U. C. Q. B. 283.

2. Injunction.

18. Jurisdiction of equity, generally.—Under Mass. Gen. St. ch. 145, § 16, the remedy by application for leave to file an information in the nature of a *quod warrant* to redress an injury to private rights or interests by the exercise by a private corporation of a franchise or privilege not conferred by law does not deprive the supreme court of its jurisdiction in equity in case of a private nuisance. *Fall River Iron Works Co. v. Old Colony & F. R. R. Co.*, 5 Allen (Mass.) 221.

A court of equity has jurisdiction to a certain extent in cases of public nuisances, although it has rarely been exercised. *Attorney-General v. New Jersey R. & T. Co.*, 3 N. J. Eq. 136.—QUOTED IN *Attorney-General v. Chicago & N. W. R. Co.*, 35 Wis. 425.

An individual may come into an equity court if he is about to be injured by a public nuisance, and obtain an injunction to prevent it, but the court must be satisfied that it will be a public nuisance or it will not interpose. *Gilbert v. Morris C. & B. Co.*, 8 N. J. Eq. 495.

Except for special and urgent reason equity will not interfere to redress a public nuisance where the object sought may be as well attained in the ordinary tribunals; and where the grievance is a misdemeanor, subject to indictment, equity will interfere with great reluctance, even though its intervention be sought by the attorney-general, and then only to prevent a very serious public injury. *Raritan Tp. v. Port Reading R. Co.*, 50 Am. & Eng. R. Cas. 169, 49 N. J. Eq. 11, 23 Atl. Rep. 127.

If the use of a railroad in the streets of a city becomes a nuisance, or the aggression proves to be permanent and without any adequate remedy at law, then the court will administer its equitable relief by injunction to prevent its continuance, or for its removal. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify an injunction as a precautionary and preventive

remedy. *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508.—QUOTED IN Wetmore v. Story, 22 Barb. (N. Y.) 414.

10. When equity will enjoin a public nuisance.—Equity will not interpose to restrain a public nuisance on the application of a private individual, unless he sustains special and material damage therefrom beyond what the public at large may sustain. *Sargent v. Ohio & M. R. Co.*, 1 Handy (Ohio) 52. *Wilcken v. West Brooklyn R. Co.*, 1 N. Y. Supp. 791, 49 Hun 609, 17 N. Y. S. R. 654. *Astor v. New York Arcade R. Co.*, 3 N. Y. S. R. 188. *Gates v. Kansas City, B. & T. R. Co.*, 111 Mo. 28, 19 S. W. Rep. 957.

Where the court has already found that the extension of a railroad on certain city streets is a public nuisance, the people are entitled to an injunction without proof of damages. *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63, 30 How. Pr. 121; affirmed (P) 31 How. Pr. 637.

But in such case an attempt on the part of the company to exercise a franchise which is not authorized by law is sufficient proof of damage to uphold a perpetual injunction. *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63, 30 How. Pr. 121; affirmed (P) 31 How. Pr. 637.

Where a complaint charges a company with maintaining a railroad on a street without right, a demurrer admits that the company is maintaining the road without authority, and it follows that such occupation of the street is a nuisance, and any one specially injured thereby may have a remedy for its abatement. *Wilcken v. West Brooklyn R. Co.*, 1 N. Y. Supp. 791, 49 Hun 609, 17 N. Y. S. R. 654.

Where a corporation for purely private purposes enters upon land used for a wharf and begins the construction of a log-way and raised platform, and threatens to use a steam engine in the prosecution of its business, one who lives in the immediate vicinity of the wharf, his complaint showing injury to the use and enjoyment of his dwelling house therefrom and consequent depreciation in its value, and the interference of its comfortable enjoyment by dust, smoke, and offensive odors. The common council of a city cannot authorize such an obstruction of the wharf. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. Rep. 57.

In such case it is not necessary to a right

of action that plaintiff's dwelling house will be injured by the proposed use of the wharf, but if its comfortable enjoyment will be essentially interfered with, relief by injunction will be awarded. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. Rep. 57.

Plaintiff has no right of action on account of the deprivation of the right which he in common with the general public has to use and drive over that part of the wharf occupied by the obstruction. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. Rep. 57.

Where it does not appear in the complaint that plaintiff's taxation will be increased either directly or indirectly by the alleged wrongful use and obstruction of the wharf, there is nothing to show that he will suffer injury as a taxpayer on that account. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. Rep. 57.

20. — and when not.—A court of equity will not enjoin an offense against the public at the instance of an individual, unless he suffers some private, direct, and material damage beyond the public at large, as well as damage otherwise irreparable. Mere diminution of the value of his property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530.—QUOTING Attorney-General v. New Jersey R. Co., 3 N. J. Eq. 136; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75.—FOLLOWED IN *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130.—*Astor v. New York Arcade R. Co.*, 3 N. Y. S. R. 188.

A steam railway in a street which is, not occupied by complainant company, although in itself a public nuisance, and intended for carrying passengers in the manner pursued by complainant, is not a special injury to complainant's road which equity will enjoin. *Denver & S. R. Co. v. Denver City R. Co.*, 2 Colo. 673, 20 Am. Ry. Rep. 339.

Plaintiffs who own lands abutting on a public street are not entitled to an action for a nuisance caused by the obstruction of another portion of the same street not on or opposite their lands, and by which access to such lands is not cut off. *Barnum v. Minnesota Transfer R. Co.*, 33 Minn. 365, 23 N. W. Rep. 538.—FOLLOWING *Shaubert v. St. Paul & S. C. R. Co.*, 21 Minn. 502.

Where the charter of a city empowers it to direct and control the construction of bridges, the erection in a street of a pier authorized by the city is not a nuisance

which can be enjoined by an owner whose property abuts on the street. *Gates v. Kansas City B. & T. R. Co.*, 111 Mo. 28, 19 S. W. Rep. 957.

The court refused to interfere by way of injunction at the suit of a neighboring landowner to restrain a railway company from depositing on a siding manure which was occasionally not proper manure, and which the company occasionally allowed to remain longer than it ought. *Swaine v. Great Northern R. Co.*, 4 De G., J. & S. 211.

Where the proceeding is to abate the use of steam engines in drawing trains on the streets of a city, the question whether the court will restrain the unreasonable exercise of the privilege granted by the legislature to use such engines, and whether property holders upon the street who are damaged may recover damages cannot be passed upon. *Vason v. South Carolina R. Co.*, 42 Ga. 631.

In determining upon the right to injunctive relief against nuisances the court will be influenced against ordering an abatement by the facts that the structure from which the nuisance arises is useful to defendant and the public, and the injury to plaintiff trifling. *Brown v. Carolina C. R. Co.*, 83 N. Car. 128.

A special injunction to restrain the erection of an abattoir and slaughtering house on railroad land will not be granted where the affidavits do not establish the fact that they will be a nuisance; proper filters, basins, or equivalent appliances being used. *Sellers v. Pennsylvania R. Co.*, 10 Phila. (Pa.) 319.

Where it is the duty of a street-railway company to keep the streets on which its track is laid in repair, but it fails to do so, the municipal authorities may stop the running of cars in order to make the repairs, and neither the company nor private individuals who live near the road and depend upon it as a means of travel have any standing in a court of equity to restrain the interference by injunction. *Philadelphia & G. F. Pass. R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358.

21. When equity will enjoin a private nuisance.—A private nuisance which equity will abate by injunction must be one occasioning a constantly recurring grievance from its nature and not susceptible of adequate compensation in damages. *Brown v. Carolina C. R. Co.*, 83 N. Car. 128.

—REVIEWING *Raleigh & A. A. L. R. Co. v. Wicker*, 74 N. Car. 220.

To justify an injunction to restrain the

erection of a nuisance, or to abate it after it is erected, it must appear not only that complainant's rights are clear, but that the thing sought to be enjoined is prejudicial to his rights. The fact of the nuisance must be clearly established. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 321.

Where a railway company owning a reservoir holds a regatta with aquatic sports thereon, and runs cheap excursion trains thereto, so that a great crowd is collected, who trespass on the park of an owner adjoining the reservoir, and injure his reserved right of fishing and sporting over it, the company is guilty of maintaining a nuisance, and will be enjoined from holding further regattas. *Bostock v. North Staffordshire R. Co.*, 5 De G. & S. 584.

22. — and when not.—Where a complaint fails to state a cause of action in equity, a general demurrer thereto will be sustained notwithstanding it may contain allegations which, if standing by themselves, would constitute a cause of action at law. So where an action is brought to perpetually enjoin a company from diverting a stream of water from its course so as to overflow land in the possession of plaintiff, and for general relief, and the complaint merely alleges possession in plaintiff under a contract of sale, and is silent as to what title the company has, it does not constitute facts sufficient for equitable relief, and is therefore demurrable, though the facts stated might give relief at law. *Denner v. Chicago, M. & St. P. R. Co.*, 11 Am. & Eng. R. Cas. 503, 57 Wis. 218, 15 N. W. Rep. 158.

23. Matters of defense.—That a building was erected after a railroad was laid out and constructed, is no impediment to relief against any nuisance arising from operating the road. The owner of a lot does not lose the right of using it for any lawful purpose, by reason of any erection on adjoining property, or any use to which the same was put while the lot was vacant. *King v. Morris & E. R. Co.*, 18 N. J. Eq. 397.

A railroad company cannot justify a condition of things which directly renders a dwelling house in the neighborhood unfit for a place of residence, upon the ground that the nuisance necessarily results from the convenient transaction of the company's lawful business, and such a nuisance will be prohibited by injunction. *Pennsylvania R.*

Co. v. Angel, 26 *Am. & Eng. R. Cas.* 559, 41 *N. J. Eq.* 316, 7 *Atl. Rep.* 432, 56 *Am. Rep.* 1. — FOLLOWED IN Pennsylvania *R. Co. v. Thompson*, 45 *N. J. Eq.* 870.

An individual who maintains a bridge for his own private business over a railroad track cannot avoid liability to a brakeman who is injured thereby, by showing that the company consented to the construction of the bridge, where it further appears that the company, before the accident, had notified the owner that the bridge was dangerous and must be removed. *Dukes v. Eastern Distilling Co.*, 51 *Hun* 605, 4 *N. Y. Supp.* 562.

24. The relief granted. — A decree declaring a private railroad a nuisance, and enjoining its further operation, cannot be avoided by getting a charter and organizing a company with the usual powers, where the only stock in the company is held by the former owner of the private road, and paid for by a transfer of the road. *McCandless's Appeal*, 70 *Pa. St.* 210. — DISTINGUISHED IN *Western Pa. R. Co.'s Appeal*, 104 *Pa. St.* 399.

Where the nuisance complained of is in part the loading and unloading of freight cars in a street from a side track, it is proper to grant an injunction to restrain such loading and unloading in the street generally, including the main track as well as the side track. *Kavanagh v. Mobile & G. R. Co.*, 78 *Ga.* 803, 4 *S. E. Rep.* 113.

25. Excuses for disobedience. — Where a railroad company is directed to abate a nuisance, the court of chancery will not entertain the excuse that its agents and servants have disobeyed the instructions given them to remove it. The company must obey the order of the court even if it has to discontinue the running of trains upon its road. Until the injunction is modified or removed, the company must conform to it. *Pennsylvania R. Co. v. Thompson*, 49 *N. J. Eq.* 318, 24 *Atl. Rep.* 544; reversing 48 *N. J. Eq.* 105, 21 *Atl. Rep.* 182. — REVIEWING *Spokes v. Banbury Board of Health*, L. R. 1 *Eq.* 42.

But if the employé of the company exercises his authority in good faith, with an intention and purpose to the best of his ability to enforce obedience to the order of the court, he will not be in contempt. *Pennsylvania R. Co. v. Thompson*, 49 *N. J. Eq.* 318, 24 *Atl. Rep.* 544; reversing 48 *N. J. Eq.* 105, 21 *Atl. Rep.* 182.

6 D. R. D.—57

3. Action for Damages.

26. When an action will lie. — It is the general rule that a private action does not lie for a public injury; but it also is a firmly established doctrine that he who suffers from a common nuisance some special injury different from that sustained by the rest of the public, shall have his remedy therefor. *Mehrfhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 *N. J. L.* 56, 16 *Atl. Rep.* 12. *Platt v. Chicago, B. & Q. R. Co.*, 74 *Iowa* 127, 37 *N. W. Rep.* 107. — FOLLOWING *Park v. Chicago & S. W. R. Co.*, 43 *Iowa* 636.

Where the injuries sustained by reason of a nuisance consist in the destruction of crops from year to year, plaintiff will not be limited to a single action, but may sue from time to time as often as the damage occurs. *Dickson v. Chicago, R. I. & P. R. Co.*, 2 *Am. & Eng. R. Cas.* 538, 71 *Mo.* 575. — FOLLOWING *Van Hoozier v. Hannibal & St. J. R. Co.*, 70 *Mo.* 145. NOT FOLLOWING *Stodghill v. Chicago, B. & Q. R. Co.*, 53 *Iowa* 341, 5 *N. W. Rep.* 495.

An unguarded excavation in a street where a track is below the surface is a nuisance, the continuing of which will render receivers of the road liable to pay, out of the fund in their hands, damages for a personal injury of which it is the proximate cause. *Morgan v. Illinois & St. L. Bridge Co.*, 5 *Dill. (U. S.)* 96.

27. When no action will lie. — To enable individual property owners to recover damages for the erection of railroad tracks so as to be a nuisance, it must appear that they have sustained, or will sustain, a special and peculiar injury, irreparable in its nature, and different in kind from that sustained by the public generally. *Fogg v. Nevada C. O. R. Co.*, 43 *Am. & Eng. R. Cas.* 105, 20 *Nev.* 429, 23 *Pac. Rep.* 840. *Whitsett v. Union D. & R. Co.*, 10 *Colo.* 243, 15 *Pac. Rep.* 339. *Shanbut v. St. Paul & S. C. R. Co.*, 21 *Minn.* 502, 19 *Am. Ky. Rep.* 223. *McLauchlin v. Charlotte & S. C. R. Co.*, 5 *Rich. (So. Car.)* 583. *Nottingham v. Baltimore & P. R. Co.*, 3 *MacArth. (D. C.)* 517.

A person whose lot does not abut on the right of way of a railroad, and whose dwelling house is ninety-three feet from a coal chute on the right of way, cannot recover damages of the railway company on account of the annoyance occasioned to him by dust

and smoke from the coal chute blowing upon, in, and around his house, and by the noises arising from the operation of the chute, there being no complaint that the chute is carelessly constructed or improperly operated. *Dunsmore v. Central Iowa R. Co.*, 72 Iowa 182, 33 N. W. Rep. 456.—DISTINGUISHED IN *Shively v. Cedar Rapids, I. F. & N. W. R. Co.*, 74 Iowa 169, 7 Am. St. Rep. 471, 37 N. W. Rep. 133.

Where a statute requires railroad companies to maintain bridges over navigable rivers so that boats may pass, and makes them liable for any expense which a steamboat may incur in lowering its smokestack so as to enable it to pass, and a steamboat company sues to recover for a special injury resulting from the bridge as an obstruction, the special remedy provided by the statute is not available. *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 So. Car. 539, 4 L. R. A. 209, 9 S. E. Rep. 650.

28. Who may sue.—A tenant may maintain an action for injuries resulting from a nuisance. *Lockett v. Ft. Worth & R. G. R. Co.*, 78 Tex. 211, 14 S. W. Rep. 564.

The lessee of a hotel and grounds adjoining a railroad may recover damages for the unlawful management of the road, and for obstructing a road which furnishes access to the grounds, and which is appurtenant thereto. *Avery v. New York C. & H. R. R. Co.*, 26 N. Y. S. R. 279, 7 N. Y. Supp. 341; reversed in 121 N. Y. 649, mem., 24 N. E. Rep. 24.

Any person having the right of possession but not the absolute ownership of real estate may maintain an action for personal annoyances resulting from a nuisance committed in an unlawful use of the public street upon which the property abuts. *Hopkins v. Baltimore & P. R. Co.*, 6 Mackey (D. C.) 311.—REAFFIRMED IN *Glick v. Baltimore & O. R. Co.*, 8 Mackey 412.

A tenant rented certain land for the year 1877 knowing that a railroad company maintained a nuisance thereon in the shape of a pond of water, which affected the health of his family. With this knowledge he rented the place for the year 1878, when it became more sickly, so much so that he was unable to gather his crops; and an action was brought against the railroad. Held, that the landlord had the right to use and occupy the place, and under his lease the tenant had the same right, and he could

presume that the company would abate the nuisance. The law did not require him to move away, but did require the company to abate such nuisance; and it was, therefore, not error to refuse to charge that if plaintiff could have avoided the injury to himself he could not recover. *Central R. Co. v. English*, 29 Am. & Eng. R. Cas. 530, 73 Ga. 366.—DISTINGUISHED IN *Brimberry v. Savannah, F. & W. R. Co.*, 78 Ga. 641, 3 S. E. Rep. 274.

Persons who suffer special damages by the obstruction of a navigable river by a railroad company, different from that sustained by the rest of the public, may maintain an action against the company. *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 N. J. L. 56, 16 Atl. Rep. 12.

An action may be maintained by a reversioner for the mere maintenance of an erection of a permanent character prejudicial to the right of the reversioner, although no actual damage has been sustained by loss of tenants or diminution of rents. *Tinsman v. Belvidere Del. R. Co.*, 25 N. J. L. 255.

New York Code of Civ. Pro. § 448, preserves the old chancery rule that where the question is one of a common or general interest of many persons, or where the persons who might be made parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue for the benefit of all. *Astor v. New York Arcade R. Co.*, 3 N. Y. S. R. 188.

In an action by the trustees of a religious society against a railroad company, the declaration alleged that the society had been disturbed, during divine worship, in the church edifice, by the noise made by defendant in the use of its road, by which the property had become very much depreciated in value and rendered unfit for use as a church or house of religious worship, and claimed damages therefor. Held: (1) on demurrer, that although the injuries complained of might amount to a public nuisance, yet no action could be sustained by plaintiffs, as owners of the building, for the depreciation in the value thereof, the consequences being too remote; (2) that if plaintiffs could not recover on account of the depreciation of their property they could not recover at all, the congregation or society worshipping in the church, and not plaintiffs, being the persons molested. *First Baptist Church v. Utica & S. R. Co.*, 6 Barb. (N. Y.) 313.—APPROVED IN *Chapman*

v. Albany & S. R. Co., 10 Barb. 360. RE-
VIEWED IN *Hatch v. Vermont C. R. Co.*, 25
Vt. 49.

29. Parties defendant.—The fact
that a railroad company issues through
bills of lading in exchange for the receipts
of a compress company for cotton stored in
the sheds of the compress company or in
the street does not render it liable for a
nuisance resulting from the manner in which
the cotton is kept by the compress com-
pany; neither does it, by so issuing bills of
lading, take possession of the cotton, nor
make the compress company its agent to
hold it. *St. Louis, I. M. & S. R. Co. v.*
Commercial Union Ins. Co., 49 Am. & Eng.
R. Cas. 137, 139 U. S. 223, 11 Sup. Ct. Rep.
554.

Where the nuisance consists of a work or
erection which is permanent and necessa-
rily injurious, the whole injury arises gen-
erally upon its completion, and the entire
damage, present and prospective, accrues
at once, and is the subject of a single
action, which must be brought within the
period of limitations; but if such erection
is on one's own land, and does not of itself
work the injury when erected, then the lim-
itation will not begin to run until the first
injury happens, and he who owns or main-
tains it at that time will be liable. *Buntin*
v. Chicago, R. I. & P. R. Co., 50 Mo. App.
414.

A former company diverted water from
a stream, which caused the channel off the
right of way to fill up and overflow land.
Held, that if at the time defendant became
owner of the property the removal of ob-
structions on its right of way would not
have relieved such filling of the channel off
its right of way it would not be liable for
any injury resulting from such obstructed
channel, but its predecessor alone would be
liable therefor. *Buntin v. Chicago, R. I. &*
P. R. Co., 50 Mo. App. 414.

30. Notice or demand.—Where one
company erects a nuisance, and its road is
subsequently leased to another company,
which continues to maintain such nuisance,
if the owner of the property on which it is
situated notifies the president and officers
of the lessee company of it, and his tenant
also notifies the section master, this is suf-
ficient notice and demand for abatement,
and the tenant can bring an action for inju-
ries resulting to him without more. Notice
of the nuisance is sufficient. *Central R. Co.*

v. English, 29 Am. & Eng. R. Cas. 530, 73
Ga. 366.

In order to render a company liable for
maintaining an embankment and bridge
which were erected by a company previously
owning the road so as to constitute a
nuisance, it is necessary to show that the
present company, before the beginning of
the action, had notice of the existence of
the nuisance, but it is not necessary to prove
a request to abate it. *Conhocton Stone Road*
v. Buffalo, N. Y. & E. R. Co., 51 N. Y. 573,
10 Am. Rep. 646; reversing 52 Barb. 390.—
EXPLAINING *Brown v. Cayuga & S. R. Co.*,
12 N. Y. 486; *Irvine v. Wood*, 51 N. Y. 224.
—REVIEWED IN *Woran v. Noble*, 1 N. Y. S.
R. 499.

A company is not liable for maintaining
a dam built by another company so as to
create a nuisance, before defendant acquired
title, in the absence of notice and a request
to abate the same, unless it has done some-
thing to increase it, which of itself is a fresh
nuisance. *Fenter v. Toledo, St. L. & K. C.*
R. Co., 29 Ill. App. 250.

31. Pleading.—An action cannot be
maintained by an individual for any obstruc-
tion of a public highway unless special dam-
ages are alleged. A declaration must, there-
fore, show that the way is private, or the
damage is special. *Lamphier v. Worcester*
& N. R. Co., 33 N. H. 495.

Where an action is brought for damage
to crops for three successive years because
of the negligent construction of a railroad
bridge, the destruction of each crop consti-
tutes a separate cause of action, and if united
in the same petition should be separately
stated. *Buntin v. Chicago, R. I. & P. R.*
Co., 50 Mo. App. 414.

A statement of a claim for damages
against a railway company for depressing
streets, thereby injuring the approach to de-
fendant's store, stating that the work was
"unlawfully, negligently, and wrongfully"
done, is sufficient, because it alleges that
the work was negligently done, and thus
gives a cause of action, though the work
itself may have been lawful. *Quillinan v.*
Canada Southern R. Co., 20 Am. & Eng. R.
Cas. 31, 6 Ont. 567.

The obstruction of a navigable river is a
public nuisance; but an individual cannot
maintain an action to recover damages un-
less he alleges and proves some special in-
jury to himself, independent of the general
injury to the public. *Alabama S. R. Nav.*

Co. v. Georgia Pac. R. Co., 87 Ala. 154, 6 So. Rep. 73. *South Carolina Steamboat Co. v. South Carolina R. Co.*, 30 So. Car. 539, 4 L. R. A. 209, 9 S. E. Rep. 650. *Clark v. Chicago & N. W. R. Co.*, 70 Wis. 593, 36 N. W. Rep. 326.

32. Defenses.—It is no objection to an action by a reversioner that the act complained of is also an injury to the tenant in possession, nor is it an answer that the cause of the alleged injury may by possibility be removed, or the nuisance abated, before the determination of the tenancy for years. *Tinsman v. Belvidere Del. R. Co.*, 25 N. J. L. 255.

33. What evidence is admissible.—In a suit for damages for creating a nuisance in the vicinity of a dwelling house, evidence of the difference between its rental value during the existence of the nuisance and prior to it is proper for the jury. *Illinois C. R. Co. v. Grabill*, 50 Ill. 248.

In an action to recover damages from the operation of a coal shed, and the handling of coal by machinery propelled by steam, in a populous part of a city, many owners and occupants of buildings in the vicinity were admitted to testify that they also were annoyed and injured by the noise and dust. *Held*, admissible to show the character and extent of plaintiff's injury, and as tending to prove that the nuisance was capable of inflicting the injury complained of. *Wylie v. Elwood*, 134 Ill. 281, 25 N. E. Rep. 570.—*FOLLOWING Cooper v. Randall*, 59 Ill. 317.

In an action for a nuisance for unlawfully constructing and operating a railroad over defendant's land, proof that it increased the danger of fire to plaintiff's buildings is proper. *Harrington v. St. Paul & S. C. R. Co.*, 17 Minn. 215 (Gil. 188), 4 Am. Ry. Rep. 216, 8 Am. Ry. Rep. 247.

Where the nuisance is permanent, witnesses are permitted to give their opinion as to the value of the property just before and just after the creation of the nuisance. *Wallace v. Kansas City & S. R. Co.*, 47 Mo. App. 491.

34. What evidence is inadmissible.—Evidence of the damage to adjoining property by a side track and turnout is irrelevant, in a suit to abate such track as a nuisance and recover damage, until it be shown that such track is not necessary, and consequently is not authorized by law and constitutes a private nuisance. *Carson v. Central R. Co.*, 35 Cal. 325.

Where the action is to recover special damages for erecting a nuisance in the street-opposite plaintiff's residence, and the damages are limited to those which occurred before the suit is brought, evidence that plaintiff's land would sell for less on account of the nuisance is not admissible. *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, 12 Am. Ry. Rep. 176.

In such case the measure of damages is the decreased market value of plaintiff's property, and it is error to admit evidence of the decreased value of the property "as a family residence." *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, 12 Am. Ry. Rep. 176.

35. Burden of proof.—Where a railroad track is on a public street, owners of property in the vicinity, to sustain a complaint for constructing and maintaining it, must establish that it is a public nuisance, and that they have sustained special damage. *Black v. Philadelphia & R. R. Co.*, 58 Pa. St. 249. *Dilley v. Wilkes-Barre & K. P. R. Co.*, 2 Pa. Dist. 91.

36. Instructions.—A nuisance growing out of acts not authorized by law must be presumed to be of a temporary character, because there is a legal mode of removing it. It is not error therefore to refuse an instruction based upon the theory of the permanent depreciation of plaintiff's property by such a nuisance. *Neitzey v. Baltimore & P. R. Co.*, 26 Am. & Eng. R. Cas. 553, 5 Mackey (D. C.) 34.

37. Damages recoverable, generally.—Annoyances caused by the shouting and noises made by those having charge of stock in pens cannot be regarded as an element of damages in an action against a railroad for a nuisance, such persons not being in a position to be controlled by the company or its agents, nor being supposed to be encouraged by them. *Illinois C. R. Co. v. Grabill*, 50 Ill. 241. *Illinois C. R. Co. v. Grabill*, 50 Ill. 248.

When the injuries are the result of causes which may be removed, or a nuisance which may be abated, the measure of damages is not the difference in the value of the land before and after the injury, but its comparative productiveness. *Adams v. Durham & N. R. Co.*, 110 N. Car. 325, 14 S. E. Rep. 857.

In an action by a religious society against a railroad for maintaining a nuisance near its church edifice, the damages are not

limited to the depreciation of the property, but may include damages for the discomfort to the congregation when assembled. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 11 *Am. & Eng. R. Cas.* 15, 108 *U. S.* 317, 2 *Sup. Ct. Rep.* 719.—APPLIED IN *Lahr v. Metropolitan El. R. Co.*, 104 *N. Y.* 268, 10 *N. E. Rep.* 528, 4 *N. Y. S. R.* 340. DISTINGUISHED IN *Besel v. Pennsylvania R. Co.*, 33 *Am. & Eng. R. Cas.* 107, 50 *N. J. L.* 235. FOLLOWED IN *Fifth Nat. Bank v. New York El. R. Co.*, 28 *Fed. Rep.* 231, 118 *U. S.* 608, 7 *Sup. Ct. Rep.* 23. QUOTED IN *Pennsylvania R. Co. v. Angel*, 41 *N. J. Eq.* 316.

And the jury cannot consider, for the purpose of reducing the damages, former judgments recovered for the same nuisance at earlier periods. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 *U. S.* 568, 11 *Sup. Ct. Rep.* 185.—FOLLOWING *Troy v. Cheshire R. Co.*, 23 *N. H.* 83; *Warner v. Bacon*, 8 *Gray (Mass.)* 397; *Fowle v. New Haven & N. Co.*, 107 *Mass.* 352, 112 *Mass.* 334.

38. Depreciation in value of premises.—The depreciation in the market value of land arising from a permanent injury thereto resulting from a nuisance is the proper measure of damages to the owner. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 30 *Ill. App.* 552. *Baugh v. Texas & N. O. R. Co.*, 46 *Am. & Eng. R. Cas.* 105, 80 *Tex.* 56, 15 *S. W. Rep.* 587.

Where the evidence shows that plaintiff was actually endeavoring to sell his property, and at that time there was a certain market price for it were the obstruction removed, but with it remaining only a certain lower price, the jury may render their verdict for the difference between the two prices, with legal interest from the time plaintiff was so deprived, subject to the statute of limitations. *Hetzel v. Baltimore & O. R. Co.*, 6 *Mackey (D. C.)* 1.

But an essential element of this method of measuring the damages is that the jury shall find not only that an attempt to sell was made and defeated, but the time when it was so defeated; for otherwise they cannot determine the extent to which plaintiff has been deprived of the enjoyment of the difference of prices. *Hetzel v. Baltimore & O. R. Co.*, 6 *Mackey (D. C.)* 1.

The right to recover for the diminution of the value of the use of one's premises on

account of a nuisance permitted on an adjoining lot must be limited to the time during which the nuisance has existed. *Quinn v. Chicago, B. & Q. R. Co.*, 17 *Am. & Eng. R. Cas.* 63, 63 *Iowa* 510, 19 *N. W. Rep.* 336.

The measure of damages to a dwelling house caused by a temporary nuisance is the depreciation in rental value during the time the nuisance is maintained. *Shively v. Cedar Rapids, I. F. & N. W. R. Co.*, 74 *Iowa* 169, 7 *Am. St. Rep.* 471, 37 *N. W. Rep.* 133.

In estimating the damages resulting from a nuisance in maintaining unwholesome cattle pens, it is proper to consider the depreciation in the value of plaintiff's property occasioned thereby, and in addition the injury and annoyance to plaintiff while occupying the premises. *Illinois C. R. Co. v. Grabill*, 50 *Ill.* 241.—NOT FOLLOWED IN *Carl v. Sheboygan & F. du L. R. Co.*, 46 *Wis.* 625.

39. Future and consequential damages.—Under *Minn. Gen. St.* 1878, ch. 75, § 44, plaintiff may recover damages arising from a nuisance both direct and consequential. If necessary to a complete and effectual abatement of the nuisance, an injunction against its continuance may properly be adjudged for that purpose. *Colstrum v. Minneapolis & St. L. R. Co.*, 33 *Minn.* 516, 24 *N. W. Rep.* 255.

An adjoining owner cannot recover prospective damages for the continuance of a nuisance which consists of a railroad which has been abandoned, and a building which has burned down. *Advance E. & W. Co. v. Eddy*, 23 *Ill. App.* 352.

40. Damages, when limited to commencement of suit.—Where deterioration of the value of land is occasioned by a nuisance created by the construction of a railroad, such nuisance is a permanent one, so that all damage for past and future injury to the property may be recovered in one suit. *Kankakee & S. R. Co. v. Horan*, 41 *Am. & Eng. R. Cas.* 13, 131 *Ill.* 288, 23 *N. E. Rep.* 621; *affirming* 22 *Ill. App.* 145.

Where a nuisance is permanent and continuing the damages resulting from it should all be litigated in one suit, but when it is not permanent, but depends upon accidents and contingencies, so that it is of a transient character, successive actions may be brought for injury as it occurs; and an action for such injury would not be barred by the statute of limitations unless the full period

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of the statute had run against the special injury before the suit. *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427, 15 S. W. Rep. 484.—QUOTING *Houston Water Works v. Kennedy*, 70 Tex. 233.

Where the action is to recover special damages for erecting a nuisance in the street in front of plaintiff's property, the company is liable only for the damages actually sustained prior to the commencement of the suit; and every injury caused by the continuance of the nuisance affords a new cause of action. *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190, 12 Am. Ry. Rep. 176.

If a railroad company lawfully located upon a street in a city, under its charter and by permission of its local government, uses the street beyond what is necessary for the proper running of its trains, and this substantially destroys the easement of way and of ingress and egress appurtenant to an abutting lot, the owner of such lot can maintain successive actions for such nuisance, recovering the damages that have accrued up to the time each action was brought; and a recovery in one action will not bar a subsequent one brought for a continuance of such wrongs. *Harmon v. Louisville, N. O. & T. R. Co.*, 87 Tenn. 614, 11 S. W. Rep. 703.—QUOTING *Uline v. New York C. & H. R. R. Co.*, 101 N. Y. 98.

When nuisances complained of are of a temporary character, such as may be voluntarily removed or avoided by the wrongdoer, or such as the injured party may cause to be abated, only such damages as have accrued up to the trial can be recovered. For such damages depreciation in the value of the property affected is not the meas-

ure. *Baugh v. Texas & N. O. R. Co.*, 46 Am. & Eng. R. Cas. 105, 80 Tex. 56, 15 S. W. Rep. 587.

Judgments refer to the situation of the parties at the commencement of the suit, and, as a general rule, damages are allowed in personal actions only to that date. In the case of continuing injuries, as here, from destruction of a lot owner's right of way, compensation for subsequent loss must be sought in another suit after the damage is sustained. *Brewster v. Sussex R. Co.*, 40 N. J. L. 57.

41. Judgment, and order of abatement.—The court in an action for nuisance rendered judgment on the verdict for damages, and on motion ordered the nuisance abated. Although the verdict did not necessarily determine the continued existence of the obstruction, it was conceded on the trial. *Held*, that the order of removal was not erroneous. *Platt v. Chicago, B. & Q. R. Co.*, 74 Iowa 127, 37 N. W. Rep. 107.—FOLLOWING *Miller v. Keokuk & D. M. R. Co.*, 63 Iowa 680.

NUMBER.

- Of directors of corporations, see DIRECTORS, ETC., 1.
- jurors, see EMINENT DOMAIN, 535; TRIAL, 28.
- shares to be definitely fixed before assessment levied, see SUBSCRIPTIONS TO STOCK, 49.
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OATH.

To arbitrators in Canadian expropriation proceedings, see EMINENT DOMAIN, 1257.

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OBJECTIONS.

Allowing witness to answer without, effect of, see WITNESSES, 63.

Construction of road with, effect on landowner's right to sue in ejectment, see EJECTMENT, 5.

Disregarding objections not properly taken below, see APPEAL AND ERROR, 90-107.

Effect of failure to make, at trial, see NEW TRIAL, 8.

For defect of parties, see PARTIES TO ACTIONS, 16.

How to be taken at trial, see EMINENT DOMAIN, 900-919; JUSTICE OF THE PEACE, 23; TRIAL, 52-56.

Necessity of making, at trial, see ELEVATED RAILWAYS, 193.

To defect in pleading, waiver by failure to make, or by delay, see PLEADING 177, 178.

- To evidence, waiver of, see APPEAL AND ERROR, 67.
- jurisdiction, see JURISDICTION, 10.
 - questions to experts, form of, see ELEVATED RAILWAYS, 116.
 - regularity of condemnation proceedings, see EMINENT DOMAIN, 341-361.
 - report of commissioners in condemnation proceedings, time to make, see EMINENT DOMAIN, 812.
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- Waiver of, by going on with hearing, see EMINENT DOMAIN, 361.
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- Failure to discover, when contributory negligence, see EMPLOYÉS, INJURIES TO, 355.
- In public ground, when deemed nuisances, see NUISANCE, 10.
- street, at night, unlighted, see CROSSINGS, INJURIES, ETC., AT, 35.
- Near track, alleging the existence of, see EMPLOYÉS, INJURIES TO, 523.
- contributory negligence in being struck by, see EMPLOYÉS, INJURIES TO, 357-361.
 - effect of notice or knowledge of, see EMPLOYÉS, INJURIES TO, 228.
 - — — on duty to look and listen, see CROSSINGS, INJURIES, ETC., AT, 295.
 - negligence in allowing, a question for jury, see EMPLOYÉS, INJURIES TO, 674-680.
- Of access to eating house, see REFRESHMENT ROOMS, 3.
- — — highway, see BRIDGES, ETC., 47.
 - — — premises, as an element of land damages, see EMINENT DOMAIN, 713-716.
 - — — by embankments, see EMBANKMENTS, 3.
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 - bridges and waterways, when limitation begins to run in actions for, see LIMITATIONS OF ACTIONS, 30.
 - flow of surface water, see FLOODING LANDS, 33-39; WATERS AND WATERCOURSES, 28.
 - — — water, see BRIDGES, ETC., 48.
 - highways, as an element of land damages, see EMINENT DOMAIN, 718.
 - at railway crossings, see CROSSING OF STREETS AND HIGHWAYS, 60.
 - prosecution for, see CRIMINAL LAW, 32.
 - navigation, see BRIDGES, ETC., 82-88; CONSTRUCTION OF RAILWAYS, 8; CRIMINAL

- LAW, 33; EMINENT DOMAIN, 904; NUISANCE, 11; RIPARIAN RIGHTS, 9; WATERS AND WATERCOURSES, 4, 5.
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 - — — as nuisances, see NUISANCE, 9.
 - — — prosecutions for, see CRIMINAL LAW, 36.
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 - — — as an element of damages to abutting owner, see STREETS AND HIGHWAYS, 288.
 - — — by cars, ordinance forbidding, see STREETS AND HIGHWAYS, 309.
 - — — hacks, see HACKS AND HACK LINES, 5.
 - — — throwing snow from track, see STREET RAILWAYS, 174.
 - — — liability for, see STREETS AND HIGHWAYS, 168-175, 403-412.
 - the mail, prosecutions for, see CRIMINAL LAW, 37.
 - tracks, arrests for, see ARREST, 4.
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I. IN GENERAL.

1. Election.—Under 1 N. Y. Rev. St. 603, § 5, authorizing any person who "may be aggrieved by, or may complain of, any election" of directors of a corporation to make application to the supreme court to compel a new election, only some person whose rights have been infringed and who is justly entitled to complain may institute the proceedings. *In re Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1.

Where application is made under the above statute for a new election by one who was not a stockholder at the time of the election complained of, but who has subsequently received a certificate of stock from one who took part therein, he does not occupy such a position as to authorize the court to interfere. *In re Syracuse, C. & N. Y. R. Co.*, 91 N. Y. 1.

2. Powers, generally.—An officer of a railroad company has no power by virtue of his office simply to let a contract on behalf of the company for the construction of a portion of its road, when the same is included in a part already being constructed by other parties under a contract made with the board of directors. *Blanding v. Davenport, I. & D. R. Co.*, 57 Am. & Eng. R. Cas. 428, 88 Iowa 225, 55 N. W. Rep. 81.

There is nothing to prevent an officer of a railroad company from being trustee in a mortgage executed by the company to secure its bonds, and from taking and holding title to the property. *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.

The managing officers of a company have power to employ attorneys without any special authorization to that effect from their board of directors. *Turner v. Chillicothe & D. C. R. Co.*, 51 Mo. 501, 3 Am. Ry. Rep. 248.

Where a statute authorizes a company to appoint a committee of three as commissioners of a sinking fund, and authorizes them to exchange old bonds for new ones, in effecting such exchange all three must act together, and an exchange made by two without consultation or concurrence of the other member is utterly void. *North Carolina R. Co. v. Sweeney*, 71 N. Car. 350.

An officer of a railroad cannot without authority of law bind the state in regard to the boundary of a right of way granted to the state for the use of the railroad, such boundary having been definitely fixed, by

any agreement or negotiation with a purchaser of a part of such right of way. *Dougherty v. Western & A. R. Co.*, 53 Ga. 304.

Where an officer of a railroad company loans funds belonging to the company which it is unable to collect, and which it charges to such officer and assigns the demand to him, this will not enable him to sue for it under 1 N. Y. Rev. St. 603, § 4, prohibiting the assignment or transfer of corporate property to officers thereof, if the loan was made in the company's business, or in aid of a work auxiliary thereto. *Cheever v. Gilbert El. R. Co.*, 11 J. & S. (N. Y.) 478.

A railway company being indebted to a bank, the officers of the company arranged that the bank should garnish certain debts due to the company, the costs of which as between attorney and client the railway company was to pay. *Held*, that the officers of the company had authority without a resolution of the directors to enter into such an agreement, and that the same need not be under the corporate seal. *Hamilton & P. D. R. Co. v. Gore Bank*, 20 Grant's Ch. (U. C.) 190.

3. Fiduciary relation with company.*—An officer of a corporation cannot bind the latter where he professes to represent only himself, and to deal with the company as if he had no official relation to it. *Winchester v. Baltimore & S. R. Co.*, 4 Md. 231.

The officers of a railroad corporation are directly responsible to its stockholders upon the general principles of equity for losses and defalcations occasioned as well by their neglect as by their positive misconduct and breach of trust. *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

4. Acts of, when bind corporation.†—Neither the reports of officers of a corporation made to its stockholders, nor reports made to its directory, in which certain claims for which the corporation is not

* Fiduciary relations of officers and directors, see note, 1 AM. & ENG. R. CAS. 435.

Fiduciary capacity of officers; contracts with corporations, see notes, 13 AM. & ENG. R. CAS. 93, 119.

Officer making fraudulent use of position, see note, 16 AM. & ENG. R. CAS. 509.

Officers of corporations dealing with company, see notes, 4 AM. & ENG. R. CAS. 306; 16 *Id.* 93.

† Authority of railroad officers and employees to bind company for medical services, see notes, 44 AM. & ENG. R. CAS. 461; 11 *Id.* 30.

bound are estimated as liabilities of the corporation. It binds the corporation to pay either principal or interest of debt, or prevent it from changing its purpose with regard thereto. *Hall v. Mobile & M. R. Co.*, 58 Ala. 10.

Where suit is brought in the name of a railroad corporation by an executive officer without authority, and the corporation with knowledge fails to object within a reasonable time, it will be bound by the act of the officer. And any evidence is admissible which tends to prove either a previous authority or a subsequent ratification. *Westbrook's Appeal*, 57 Conn. 95, 16 Atl. Rep. 724.

The promises of officers of a company to pay for land occupied by the company cannot be received in evidence to bind the company without proof of their authority to make them. *James v. Indianapolis & St. L. R. Co.*, 91 Ill. 554.

5. When personally liable.—The evidence showed that plaintiff, as an officer of a railroad company, made a false certificate to the effect that ten per cent. of the capital stock of the company had been subscribed and paid in. A statute of the state of Illinois, where the company was organized, provided that if any officer of such company made a false certificate or report he should be liable for the debts of the company contracted while he was an officer. The company became indebted to plaintiff for salary, which he was unable to collect directly, and brought suit against defendant, a subscriber to the stock of the company. *Held*, that the prohibition of the statute applied and prevented his collecting the amount. *Wait v. Ferguson*, 14 Abb. Pr. (N. Y.) 379.

Plaintiff and a railroad company agreed to arbitrate certain litigation, and that both should abide by the award; whereupon certain officers of the company guaranteed the performance of the contract on the part of the company. *Held*, that they were liable for a breach of the contract, and were estopped from denying the existence of the corporation. *Mason v. Nichols*, 22 Wis. 376.

6. Official bonds.*—Suit was brought on the bond of a railroad official, dated in

1857, and it was alleged in the declaration that the bond had been broken by the failure of the official to account before and up to the time of his death, which took place in 1868. On the calling of the case defendant moved to dismiss because the affidavit was not filed as to the payment of taxes. *Held*, that it did not appear that the debt sued on was contracted or implied before June 1, 1865. *Sirrine v. South Western R. Co.*, 43 Ga. 280.

Though the officer of a railroad is bound to know the by-laws of the corporation, it does not follow that the sureties to his bond are presumed to know them unless there be a reference to them in the bond. The obligation of the sureties is confined to the words of their bond, and cannot be extended beyond them. *Atlantic & N. C. R. Co. v. Cowles*, 69 N. Car. 59.

The sureties on the bond of a railroad official who is elected for one year are not liable where he is continued beyond the time without a new bond, and for a default after the expiration of the one year, notwithstanding the provision of Tenn. Code, § 148, that officers of a private corporation shall hold until the election and qualification of their successors. *Cincinnati, C. G. & C. R. Co. v. Murrell*, 11 Heisk. (Tenn.) 715.

The securities on the bond of an officer of an incorporated company for the faithful performance of his duties are not relieved from liability by the fact that the officer was already a defaulter when the bond was given, provided the officers of the corporation had no knowledge of the default. Mere negligence in them in failing to detect the fraud will not relieve the securities. *Bennett v. S. A. R. E. B. & L. Assoc.*, 57 Tex. 72.—**DISTINGUISHING** *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23.

A local agent of a railroad company delivered freights without collecting the charges, which was known to the president of the company. He did not settle his accounts promptly, and the deficit grew for eighteen months, when he was dismissed. There was no fraudulent concealment of these facts by the officers of the company, though the sureties of the agent were not informed. *Held*, that the sureties were not released from their liability. *Richmond & P. R. Co. v. Kasey*, 30 Gratt. (Va.) 218.

The rules and regulations of a corporation, made for the government of the con-

* Notice of default, see note, 16 AM. & ENG. R. CAS. 544.

Official bonds; liability of surety where there is increase of capital stock, business, etc., see note, 26 AM. & ENG. R. CAS. 94.

duct of its officers, do not become terms and conditions of the bond of its officers, unless such an intention is expressed on the face of the bond. *Richmond & P. R. Co. v. Kasey*, 30 *Gratt. (Va.)* 218.

7. Compensation.—A railroad company may pay its officers without violating any principle of public policy. *McDowell v. New York & S. B. R. Co.*, 12 *N. Y. S. R.* 877, *mem.*, 46 *Hun* 680.

The salary allowed the president of a corporation is presumed to be for services to be performed; and where all the property business, and franchises of the corporation are sold, with his co-operation, so that he has no further services to perform, the contract as to salary will be treated as canceled although the corporation itself is not dissolved. *Long Island Ferry Co. v. Terbell* 48 *N. Y.* 427.

An officer of a corporation cannot recover salary or compensation for services rendered unless such salary or compensation has been fixed by the proper corporate authorities in some authorized manner anterior to the performance of the services. *Austin City R. Co. v. Swisher*, 1 *Tex. App. (Civ. Cas.)* 33.

This principle is not affected by a subsequent resolution agreeing to pay for such past services. A recovery at law cannot be had on such agreement. *Austin City R. Co. v. Swisher*, 1 *Tex. App. (Civ. Cas.)* 33.

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8. Auditor.—Under the Companies Clauses Act 1845, § 91, auditors cannot recover any other remuneration than that fixed at a general meeting of the company. *Page v. Eastern & M. R. Cos.*, 1 *C. & E.* 280.

9. Cashier.—The rules of a company required from the cashier monthly reports and payments; the bond of the cashier and his securities was conditioned that he should faithfully discharge his duties as required by the rules, "a copy of which he acknowledged to have received." He neglected to account and pay over for six months, when he was dismissed, and the sureties were not notified of his default for three months afterwards. *Held*, that they were not discharged. *Pittsburg, Ft W. & C. R. Co. v. Shaeffer*, 59 *Pa St.* 350.

* General powers of president and vice-president of corporations, see note, 14 *L. R. A.* 356.

10. Chief engineer.—(1) *In general.*—The office of chief engineer of a railroad is not a public office. The true test of a public office is that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power, and only an information in the nature of a *quo warranto* will lie to recover the same. *Eliason v. Coleman*, 9 *Am. & Eng. R. Cas.* 433, 86 *N. Car.* 235.

Where the charter and by-laws of a railroad company provide that the chief engineer could only be appointed by the president and directors, but the vice-president and superintendent were charged with the management of the affairs of the corporation—*held*, that they had the implied authority to employ an engineer where there was no chief engineer and the services of an engineer were necessary for the proper conduct of the business. *Lewis v. Albemarle & R. R. Co.*, 95 *N. Car.* 179.

(2) *Power to contract.*—It is not within the scope of the authority of a chief engineer of a railway company to enter into contracts on behalf of his employer with subordinate agents or servants in respect to their wages. *Gillis v. Wilmington, O. & E. C. R. Co.*, 108 *N. Car.* 441, 13 *S. E. Rep.* 11, 215. *Willis v. Toledo, A. A. & N. M. R. Co.*, 72 *Mich.* 160, 40 *N. W. Rep.* 205. *Egton v. European & N. A. R. Co.*, 59 *Me.* 520.

No presumption can arise of any power in the chief engineer of a railroad company which is constructing its road to make a contract for building depots, the definite location of which is one of the most important duties of the company, and belongs to its board of directors unless clearly delegated elsewhere. *Bond v. Pontiac, O. & P. A. R. Co.*, 26 *Am. & Eng. R. Cas.* 571, 62 *Mich.* 643, 29 *N. W. Rep.* 482.

A railroad company will be liable to an engineer for services performed under a contract with the company's chief engineer, where the contract was entered into and the services performed without any knowledge that the chief engineer did not have power to employ assistants. *Gillis v. Duluth, N. S. & S. W. R. Co.*, 34 *Minn.* 301, 25 *N. W. Rep.* 603.

Plaintiff, who was employed by a contractor on a railroad, proposed to discontinue work on account of the contractor's inability to pay him. Thereupon an engineer of the company stated that if the men,

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including plaintiff, would go on and complete the work the company would see them paid. *Held*, there being nothing to show that the engineer was authorized to make such promise, that an action against the company will not lie thereon. *Powrie v. Kansas Pac. R. Co.*, 1 *Colo.* 529.

A railroad company directed its engineer to procure the signatures of certain contractors to a contract for work that they had proposed to do. The advertisements for bids on the work provided that the contractors should be required to enter into contract and commence the "work without delay," but no particular time was fixed for the execution of the contract, and no special limitation as to time was imposed upon the engineer. The engineer agreed to a delay of three or four weeks. *Held*, that this was within his power, and that the company could not repudiate the contract. *Pratt v. Hudson River R. Co.*, 21 *N. Y.* 305.

A chief engineer of a railroad company cannot be made the possessor by delegation of the double power of locating and contracting for the erection of depot buildings (if he can be at all) without the authority of the board, on which the law imposes the duty of conducting the corporate business, which cannot be derived from anything but their concurrent doings; and no one has a right to rely on the statements of an agent concerning his own authority. *Bond v. Pontiac, O. & P. A. R. Co.*, 26 *Am. & Eng. R. Cas.* 571, 62 *Mich.* 643, 29 *N. W. Rep.* 482.

11. General manager.—Part payment by order of the managing officer of a corporation of a claim of one of its officers for salary for service previously rendered is an acknowledgment of liability on the part of, and binding upon, the corporation. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 40 *Am. & Eng. R. Cas.* 525, 37 *Kan.* 606, 15 *Pac. Rep.* 544.

12. Paymaster.—The paymaster of a railway company, whose duty it was to receive and pay out large sums of money, gave a bond conditioned that he would faithfully perform the duties required of him, "and promptly pay over and account for all moneys belonging to the company," and deliver to the company all property belonging to it when required. *Held*, that the clause relating to faithful performance covered the whole ground, and that which followed was nothing more than a mere specification of the principal duties of his

employment, and did not make him insurer of the moneys in his hands against theft or robbery without his fault or negligence. *Chicago, B. & Q. R. Co. v. Bartlett*, 120 *Ill.* 603, 11 *N. E. Rep.* 867, 9 *West. Rep.* 465, affirming 20 *Ill. App.* 96.

So where the company required such paymaster to keep the moneys in a room not properly protected against thieves or burglars, and which was occupied by other employes jointly with such paymaster, one of whom had access to the safe, and a large sum was stolen during the absence of the paymaster, without any negligence or want of care on his part, he was not liable on his bond to the company. *Chicago, B. & Q. R. Co. v. Bartlett*, 120 *Ill.* 603, 11 *N. E. Rep.* 867, 9 *West. Rep.* 469; affirming 20 *Ill. App.* 96.

The office of a traveling paymaster of a railway company is simply to pay the indebtedness specified upon the roll, which limits his authority, and he has no power to contract for his principal; he cannot accept orders drawn upon it. *Stebbins v. Union Pac. R. Co.*, 2 *Wyom.* 71.

13. Purchasing agent.—The by-laws of defendant provided that "the purchasing agent shall, under the direction of the executive committee or some one authorized by them, buy all materials and supplies in general use in every department of the service, excepting such articles or materials the purchase of which may be specially entrusted to other parties. He shall order for and furnish supplies various departments on written requisitions of the heads thereof or such other officers of the company as may be designated by the president or first vice-president. Such requisition to be examined and approved by the auditing committee, to whom he shall certify all bills for purchases made by him." *Held*, that the purchasing agent had authority to make contracts to supply defendant with all blank books and printed blanks that it would require in its business. *Levey v. New York C. & H. R. R. Co.*, 53 *N. Y. S. R.* 579, 4 *Misc.* 415; affirmed in 144 *N. Y.* 649, 39 *N. E. Rep.* 493.

Following the usual method of business, plaintiff's assignor put in bids both for the supply of blank books and printed blanks as above stated, which were accepted by the chief clerk of the purchasing agent. The jury found, on sufficient evidence, that the relations of the chief clerk to the pur-

chasing agent were such as to make his action in legal effect the purchasing agent's. *Held*, that a verdict for plaintiff for an undisputed breach of the contract by defendant should be affirmed. *Levey v. New York C. & H. R. R. Co.*, 53 N. Y. S. R. 579, 4 Misc. 415; affirmed in 144 N. Y. 649, 39 N. E. Rep. 493.

14. Secretary.—(1) *In general.*—The office of secretary of a railroad company confers no authority upon the incumbent to bind the company by a paper evidencing on its face a liability on the part of the company to a third person for the construction of part of its road which is already under contract by its board of directors. *Blanding v. Davenport, I. & D. R. Co.*, 57 Am. & Eng. R. Cas. 428, 88 Iowa 225, 55 N. W. Rep. 81.—REVIEWING St. Louis, I. M. & S. R. Co. v. Camden Bank, 47 Ark. 541, 1 S. W. Rep. 704.

Where the secretary of a company is authorized by a board of directors to execute a mortgage to secure a specific debt, he has not the power to insert a provision in the mortgage agreeing to pay in addition to the debt an attorney's fee, and a ratification of the mortgage will not be deemed a ratification of this provision where it appears that the directors had no special knowledge of its contents, but acted on their former vote authorizing it. *Pacific Rolling Mill Co. v. Dayton, S. & G. R. R. Co.*, 7 Sawy. (U. S.) 61, 5 Fed. Rep. 852.

Plaintiff sued for the conversion of a note and mortgage which he had executed to a railroad company, and which he testified that he delivered in escrow either to defendant or the secretary of the company. *Held*, that if he delivered it to the secretary it was a delivery to the company. *Patterson v. Ball*, 19 Wis. 243.

The secretary of a railroad company bought a set of books with his own funds, and entered in them the minutes of the proceedings of the corporators and received in them the subscriptions of stock. *Held*, that the possession of the secretary was the possession of the company; that in going out of office he had no right to the books; that he had no lien on them either for the purchase money, or for his services as secretary, or for the use and occupation of his premises by the company while he was secretary; and that the company was entitled to a peremptory mandamus. *State ex rel. v. Goll*, 32 N. J. L. 285.

Knowledge possessed by the secretary of a corporation touching his business and coming within the scope of his duties as such secretary is the corporation's knowledge. That such secretary, for his private gain, and without collusion with, or the knowledge of, the person dealing with him, fails to impart his knowledge to the corporation is immaterial in an action against the corporation. *Carroll v. People's R. Co.*, 14 Mo. App. 490.—FOLLOWED IN *Meagher v. People's & T. G. R. Co.*, 14 Mo. App. 499.

A decree foreclosing a lien of the state on a road reserved the right of the company to collect certain claims against the secretary for a defalcation while acting as financial agent of the contractor constructing the road and to apply the proceeds to the debts of the company. *Held*, that a bill in the name of the company against the secretary will lie, and the company will be deemed a trustee for the benefit of the creditors of the company. *Cincinnati, C. G. & C. R. Co. v. Murrell*, 11 Heisk. (Tenn.) 715.

Under an agreement between a railroad company and its contractors, the company was to retain a certain per cent. of the cost of the work until completion. During the progress of the work the contractors applied to plaintiffs for a loan on the security of the money so retained. Plaintiffs addressed an inquiry to the railroad company as to the amount of money retained, and was answered by its secretary that there was a certain amount retained which would be payable on completion of the work, whereas in fact the amount stated had not been retained. The loan was made on the faith of the statement made by the secretary, but there was no evidence that he had authority to make such statement. *Held*, in an action against the railroad company, that it was not within the scope of the secretary's authority to make such statement, and that the company was not estopped from denying that the amount of money represented by him was due the contractors, or those claiming under them. *Barnett v. South London Tramways Co.*, L. R. 18 Q. B. D. 815.

A bank having executions against a railway company in the hands of the sheriff, its secretary signed a letter agreeing that the bank, out of moneys of the company coming to their hands from certain garnishee proceedings, might retain, after paying the garnishee's debts, "the surplus, if any, to apply

to your executions against us." This letter was signed without authority from the board of directors, although two members were aware of it, and one of them, the vice-president of the company, authorized it. *Held*, that this was not such an act as the officers of the company were authorized to perform, and that although the bank granted the time asked for it could not enforce payment of the amounts stipulated for. *Hamilton & P. D. R. Co. v. Gore Bank*, 20 *Grant's Ch. (U. C.)* 190.

(2) *Salary of*.—The value of the services of a clerk of a corporation is not to be determined by the value of the mere clerical services he renders in keeping so many pages or folios. Where the compensation of such officer is not fixed by law or by contract, he may recover such sum as he may prove that his services are worth. *Missouri River R. Co. v. Richards*, 8 *Kan.* 101.

A person who has personal knowledge of the services rendered by such clerk, and has knowledge of the value of the services and what is usually paid for such services, is competent to testify as to what they are worth, though he may not know the established price of such services in the vicinity where rendered. *Missouri River R. Co. v. Richards*, 8 *Kan.* 101.

When the by-laws of a corporation provide that the officers shall receive such compensation as the board of directors shall fix, and the board has not fixed any compensation, a clerk or secretary who has rendered services is entitled to recover what they are worth, unless there was an understanding that they were to be rendered without compensation. *Missouri River R. Co. v. Richards*, 8 *Kan.* 101.

Plaintiff was elected secretary and treasurer of a company at a salary fixed by a by-law, and discharged the duties of that office until his successor was chosen. *Held*, in an action to recover his salary, that plaintiff is not required to show that such services as appertained to the office were performed, where the answer of defendant admits that the duties were discharged and offers no evidence to support any objection to the manner and kind of service rendered. *Abbott v. Georgia & N. C. R. Co.*, 90 *N. Car.* 462.

The by-law constitutes the contract between the parties, and under a stipulation contained therein the compensation, though measured by the day, is continuous during

the term of service, and not dependent upon each day's work. *Abbott v. Georgia & N. C. R. Co.*, 90 *N. Car.* 462.

To entitle a person appointed secretary of a corporation, who is not a director or stockholder, to charge a reasonable compensation for his services, it is not essential that a rate of compensation should be agreed upon, or that there should be an express agreement to pay a compensation. *Smith v. Long Island R. Co.*, 102 *N. Y.* 190, 6 *N. E. Rep.* 397, 1 *N. Y. S. R.* 403; *reversing in part* 32 *Hun* 38.

It is a necessary conclusion from the fact of the election by the board of directors of the corporation, the acceptance of the office and the discharge of its duties, that the services were rendered at the request of the corporation, and these circumstances *prima facie* raise an implied obligation on the part of the corporation to make compensation; and to rebut that presumption there should be clear evidence that the services were to be gratuitous. *Smith v. Long Island R. Co.*, 102 *N. Y.* 190, 6 *N. E. Rep.* 397, 1 *N. Y. S. R.* 403; *reversing in part* 32 *Hun* 38.

Under 8 & 9 *Vict. c. 16*, § 91, it is no answer to an action by the secretary of a company for his salary that no determination as to such salary had ever been exercised at any general meeting of the company. *Bill v. Darent & Valley R. Co.*, 1 *H. & N.* 305, 2 *Jur. N. S.* 595, 26 *L. J. Ex.* 81.

15. Treasurer.—(1) *In general.*—Money of a company deposited by its treasurer as such is the money of the corporation in the hands of the banker. *Penrose v. Erie Canal Co.*, 3 *Phila. (Pa.)* 198.

Where the treasurer of a railroad company fraudulently issues stock to a party for whom he acts as agent in a pretended purchase, knowledge of the fraud cannot be imputed to the company. *Allen v. South Boston R. Co.*, 150 *Mass.* 200, 5 *L. R. A.* 716, 22 *N. E. Rep.* 917.—**DISTINGUISHED IN** *Farrington v. South Boston R. Co.*, 150 *Mass.* 406.

A payment by the treasurer of a corporation of a foreign state, dependent for its validity upon the laws of that state, will not be held a violation of his duty and the amount thereof set off against his claim for salary, where the laws are not put in evidence, in an action in Massachusetts for such salary. *Sears v. Kings County El. R. Co.*, 156 *Mass.* 440, 31 *N. E. Rep.* 490.

Plaintiff was elected treasurer of defenu-

ant, which was incorporated as an association for the purpose of leasing and operating railroads; but after his election the leased roads consolidated with others and a new corporation was formed, and plaintiff was made assistant treasurer at an increased salary, after which the labor required as treasurer of defendant was but small. *Held*, that he was, nevertheless, entitled to the stipulated salary as treasurer. *Rodney v. Southern R. Assoc.*, 14 *Daly* 70, 3 *N. Y. S. R.* 564.

The treasurer of a corporation received moneys belonging to the company, but by entries on the books made it appear that his liability to the company was extinguished and that it was indebted to him. *Held*, under such circumstances, that it was not necessary to make a demand on him for the money before bringing suit. *East N. Y. & J. R. Co. v. Elmore*, 5 *Hun* (N. Y.) 214.

(2) *Power to make contracts.*—The by-laws of a corporation did not authorize its treasurer to borrow money and to sign notes for the corporation by himself as treasurer, but for a number of years he had been allowed to do so, some of the obligations being indorsed by the directors and passed into circulation. *Held*, that so far as the public was concerned the directors had made the treasurer the fiscal agent of the company with authority to make and indorse notes. *Page v. Fall River, W. & P. R. Co.*, 31 *Fed. Rep.* 257.

The purchase of bonds and the paying for them were within the ordinary business of defendant. Its treasurer was authorized to make such purchases for defendant and to make payment. *Held*, that he was also authorized to determine the amount unpaid, even to the extent of compromising a dispute in regard to it. *Gafford v. American M. & I. Co.*, 77 *Iowa* 736, 42 *N. W. Rep.* 550.

In an action on drafts accepted on behalf of defendant by its treasurer where there was *prima facie* evidence that defendant's records gave the treasurer authority to accept the drafts, which record was not disputed—*held*, that the testimony of a witness for defendant that he found nothing of record in the books of defendant to show that the treasurer had such authority was properly stricken out. *Gafford v. American M. & I. Co.*, 77 *Iowa* 736, 42 *N. W. Rep.* 550.

Whatever may be true of trading corpo-

rations, there is nothing in the nature of the business of a horse-railroad company, or of the duties of the treasurer thereof, which implies that he, by virtue of his office, is authorized to borrow money for the company and give its notes therefor. *Craft v. South Boston R. Co.*, 150 *Mass.* 207, 28 *Am. & Eng. Corp. Cas.* 579, 22 *N. E. Rep.* 920, 5 *L. R. A.* 641.

The treasurer of such company borrowed money from plaintiff and gave a note in the name of the company signed by him alone as treasurer. As a matter of fact the treasurer could not sign notes of the company except as the directors might require, when they should be countersigned by the president; but plaintiff was ignorant of this and acted in good faith. At the time the treasurer was a defaulter, and used the money to pay debts of the company to cover his own default. *Held*, that plaintiff could not recover from the company, either upon the note, or for money had and received. *Craft v. South Boston R. Co.*, 150 *Mass.* 207, 28 *Am. & Eng. Corp. Cas.* 579, 22 *N. E. Rep.* 920, 5 *L. R. A.* 641.

An officer of a corporation, such as a treasurer or assistant treasurer, who does not possess the power directly to create a debt against his corporation cannot do so indirectly, as by sending out statements of accounts showing a balance due the persons to whom they are sent. *Harvey v. West-Side El. R. Co.*, 13 *Hun* (N. Y.) 392.

One who is treasurer, secretary, and transfer agent of a street-railway company, and is authorized to sign, countersign, and seal certificates of stock, may bind the company by issuing a spurious but apparently genuine certificate of stock, he acting at the time within the apparent scope of his authority. *Hellman v. Forty-second St. & G. S. F. R. Co.*, 74 *Hun* 529, 26 *N. Y. Supp.* 553, 57 *N. Y. S. R.* 223.

16. — his bond and liability of sureties.—A condition of a treasurer's bond that he "shall faithfully discharge the duties of the office, and well behave therein," only binds him to an honest, diligent, and competently skilful effort to keep the money. Hence, where he deposits the money of the company to his credit as such in a banking house which was at the time in good standing and credit, and considered by the community a safe place of deposit, he and his sureties are not responsible for its loss by the sudden and unexpected failure of the

bank. *Atlantic & N. C. R. Co. v. Cowles*, 69 N. Car. 59.

Defendant was described in a bond as treasurer of a railroad company, and signed it with the word "treasurer" affixed to his name. The court below found that there was no evidence that he had any power to bind the company, and then added, "I find that he had no such power." *Held*, that it was not to be inferred that the court found the want of power merely from the absence of evidence that he had it, as there might have been no evidence to show affirmatively such power, while at the same time there might have been much evidence to negative its existence. *Etna Nat. Bank v. Hollister*, 55 Conn. 188, 10 Atl. Rep. 550.

No formal vote of a corporation accepting its treasurer's bond needs to be shown in order to entitle it to maintain an action upon it. *Lexington & W. C. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

An indorsement by the treasurer of a corporation, upon notes signed by himself, and running to the corporation, is sufficient evidence to render the sureties upon his bond liable for the amount indorsed, as for moneys received by him in his official capacity, without any further evidence of actual payments of money. *Lexington & W. C. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

If the treasurer of a corporation appropriates to his own use money received from a certain source during the time covered by his official bond, and other sums received from the same source after the bond has expired, and he afterwards enters upon the books a sum as received from that source, and such sum is not in fact received at the date of the entry, and there is nothing to show when the same, or the items of which it was composed, should have been entered, it is proper, in an action upon the bond, to apply one half of it to the time covered by the bond. *Lexington & W. C. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

A corporation is not estopped to maintain an action upon its treasurer's bond by having accepted a report of an auditing committee who had approved his accounts, nor by making a report founded thereon to the legislature. *Lexington & W. C. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

The sureties on the bond of a treasurer, the condition of which provides for his faithful discharge of the duties of the office "during his continuance in office, during

the present year, and for such further periods as he may from time to time be elected to said office," are not liable for defaults which occur after an omission to re-elect him at a regular meeting, and after such further time as may be reasonably sufficient for the election and qualification of his successor, although he continues to act as treasurer, and is re-elected at the next regular meeting thereafter; but they are not discharged from their liability by a vote of the corporation postponing for five weeks the time of the regular meeting for the election of officers, and the consequent postponement of an election for that period, nor by the corporation's assuming the entire management of the railroad after having leased it to another corporation. *Lexington & W. C. R. Co. v. Elwell*, 8 Allen (Mass.) 371.

17. Vice-president.—As a general rule, in the absence of the president, or where a vacancy occurs in the office, the vice-president may act in his stead and perform the duties which devolved upon the president. Where a charter did not mention a vice-president as an officer of the company, but, after providing for certain officers, it authorized the company to create other officers, and the company, in its by-laws, declared there should be a vice-president and prescribed his duties—*held*, that he might perform the duties imposed upon the president as though his office had been created by the charter. *Smith v. Smith*, 62 Ill. 493.

A board of directors by a resolution directed the president of the company to sell a tract of land and to execute the necessary deed therefor under the corporate seal, but the president refused to act. The vice-president assumed to discharge the duties of president, and, in accordance with the resolution, conveyed the land, signing as vice-president and acting president of the company, but the deed was not countersigned by the secretary, as required in the by-laws of the company. *Held*, that the deed was well executed and sufficient to convey the title of the company. *Smith v. Smith*, 62 Ill. 493.

A jury will be warranted in finding that a vice-president had authority to employ plaintiff, for his company on proof showing that he was employed through the vice-president to operate certain electric lights for the purpose of examining baggage at night and for

other purposes, the fact that he engaged in the services under the contract being notorious, and that bills sent in by him for such services had been paid by the company after being certified by the vice-president. *Shim-mel v. Erie R. Co.*, 5 *Daly* (N. Y.) 396.

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OHIO.

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Constitutionality of statutes of, as to condemnation of land, see EMINENT DOMAIN, 41.

— — — — — municipal aid for railways, see MUNICIPAL AND LOCAL AID, 46.

— — — — — removal of causes, see REMOVAL OF CAUSES, 3.

— — — — — tax laws of, see TAXATION, 43.

Constitutional provisions in, relative to condemnation of land, see EMINENT DOMAIN, 18.

Deductions for benefits under condemnation laws of, see EMINENT DOMAIN, 749.

Injuries to animals running at large in, see ANIMALS, INJURIES TO, 254, 274.

Local assessment upon steam railways in for repairs, paving, etc., see STREETS AND HIGHWAYS, 354.

Mechanics' lien law of, see LIENS, 13.

Plaintiff's pleadings need not negative contributory negligence in, see CONTRIBUTORY NEGLIGENCE, 64.

Review of town bonding proceedings by mandamus in, see MUNICIPAL AND LOCAL AID, 451.

Rule as to imputed negligence in, see IMPUTED NEGLIGENCE, 20.

Statutes of, relative to distribution of damages for causing death, see DEATH BY WRONGFUL ACT, 68.

Statutory duty to fence in, see FENCES, 33.

Taking land for streets and laying out roads in, see STREETS AND HIGHWAYS, 26.

Taxation in aid of railways in, see MUNICIPAL AND LOCAL AID, 423.

OIL CARS.

Patents for, see PATENTS FOR INVENTIONS, 44.

OKLAHOMA.

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ONTARIO.

Operation of statute of, giving right of action for causing death, see DEATH BY WRONGFUL ACT, 30.

Statutes of, relative to damages for injuries to employes, see EMPLOYÉS, INJURIES TO, 734.

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OPEN AND CLOSE.

Discretion of judge as to right to, see EMINENT DOMAIN, 572.

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— — — — — for failure to build or repair cattle-guards, see CATTLE-GUARDS, 29.

— — — — — injuries caused by fire, see FIRES, 214.

— — — — — to children, see CHILDREN, INJURIES TO, 170.

— — — — — employes, see EMPLOYÉS, INJURIES TO, 585, 586.

— — — — — elevated railway cases, see ELEVATED RAILWAYS, 115-126.

— — — — — proceedings for the intersection of railways, see CROSSING OF RAILROADS, 35.

— — — — — stock-killing cases, see ANIMALS, INJURIES TO, 413-421.

OPINIONS.

As to amount of damages, see EMINENT DOMAIN, 636.

— — — — — incompetency of fellow-servants, see FELLOW-SERVANTS, 481.

— — — — — sufficiency of fences, see FENCES, 80.

— — — — — value of land taken, see EMINENT DOMAIN, 633-636.

— — — — — on question of damages, see FIRES, 357.

Certificate of division of, see FEDERAL COURTS, 22.

Conjectural and speculative, see ELEVATED RAILWAYS, 123.

Expressions of, in instructions, see DEATH BY

- WRONGFUL ACT, 328; TRESPASSERS, INJURIES TO, 123; TRIAL, 121, 146.
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ORAL AGREEMENTS.

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 — — manner of driving teams over crossings, see CROSSINGS, INJURIES, ETC., AT, 222.
 — — rate of speed, construction and validity of, see STREETS AND HIGHWAYS, 321-329.
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 Homesteads in public lands in, see **PUBLIC LANDS**, 10.
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- Averment and proof of, in actions against carriers of goods, see **CARRIAGE OF MERCHANDISE, 726, 749.**

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"OWNER'S RISK."

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- Damages for future, *see* **DAMAGES, 44.**
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 Expressions indicating present, evidence of, see **EVIDENCE, 211.**
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PARALLEL AND COMPETING LINES.

Discrimination between, see DISCRIMINATION, 22-24.

Judicial notice of, see EVIDENCE, 100.
Leases of, see LEASES, ETC., 30.

1. What are.—Where a new road parallels an existing one for only a short distance, in determining whether the two roads are parallel or competing lines, a traffic contract between the existing road and another road whereby the existing road virtually extends its line may be taken into consideration. *Pennsylvania R. Co. v. Com., (Pa.) 29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368.*

The phrase "a parallel or competing line" as used in Pennsylvania constitution and statutes includes a projected road, surveyed, laid out, and in process of construction, which when completed and in operation would actually compete with the other road. Before completion it is a parallel road, and when completed it is a competing road. *Pennsylvania R. Co. v. Com., (Pa.) 29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368.*

Mo. Rev. St. § 2569, prohibiting railroads within the state from owning, operating, or managing parallel or competing roads, only applies where both the roads are within the state, and the competition must be such as to have an appreciable effect on the rates. *Kimball v. Atchison, T. & S. F. R. Co., 46 Fed. Rep. 888.*

Railway companies by reason of their relation with or control or management of other lines than their own may become within the meaning of the law competing lines, though the railways owned by them may not in fact connect. *East Line & R. R. Co. v. State, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.*

The question whether any two railroads are parallel or competing is a mixed question of law and fact. The Lehigh Valley and the Philadelphia & Reading railroads are not so clearly parallel or compet-

ing that the court, on motion for a preliminary injunction, can at once reach a conclusion to that effect. *Gummere v. Lehigh Valley R. Co., 1 Pa. Dist. 585.*—DISTINGUISHING *Pennsylvania R. Co. v. Com., 4 Cent. Rep. 495.*

2. Purchase of competing road.—Under Ga. Constitution of 1877, art. 4, § 2, par. 2, which forbids one corporation to make any contract with another tending to defeat or lessen competition in their respective businesses, the purchase by defendant of a road which ran parallel to its own road is illegal and void. *Hamilton v. Savannah, F. & W. R. Co., 52 Am. & Eng. R. Cas. 130, 49 Fed. Rep. 412.*—FOLLOWING *Central Transp. Co. v. Pullman Palace Car Co., 139 U. S. 24, 11 Sup. Ct. Rep. 478.*

The president of defendant road entered into a contract with the president of a competing road by which the latter road was to be put into the hands of persons named by defendant's president, bonds therefor to be given and guaranteed by defendant. The evidence showed that the contract was for the benefit of defendant. Held, that defendant would be considered as the real party to the contract, and therefore it is in violation of Pa. Const. art. 17, § 4, prohibiting one road from controlling another parallel or competing road. *Pennsylvania R. Co. v. Com., (Pa.) 29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368.*

Such contract provided that the stock assigned by the competing company should be sufficient "to insure the control of the corporation," and that all the directors and officers of the company should resign, to be succeeded by other persons to be named by defendant's president. Held, that the contract would have the effect of giving defendant "control" of the company within the meaning of the above provision of the constitution, and the position taken by defendant that the control of the majority of the stock did not give control of the corporation could not be sustained. *Pennsylvania R. Co. v. Com., (Pa.) 29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368.*

3. — or of stock therein — The purchase by defendant, an existing road, of a controlling interest in another road which competes with roads leased by defendant is in violation of Pa. Const. art. 17, § 4, prohibiting one road from controlling a competing road, and will be enjoined, although the assignment of stock is in the name of

a third person, where the purchase is confessedly for the interest of defendant. *Pennsylvania R. Co. v. Com.*, (Pa.) 29 Am. & Eng. R. Cas. 154, 7 Atl. Rep. 374.

The right of stockholders to sell their stock cannot be exercised so as to prevent a court from granting an injunction to prevent one company from securing a controlling interest in another, in violation of the above provision of the state constitution. *Pennsylvania R. Co. v. Com.*, (Pa.) 29 Am. & Eng. R. Cas. 145, 7 Atl. Rep. 368.

4. Right to construct—Enjoining construction.—The terminal points of a railroad company chartered under the general law (Ga. Code, § 1689) being Macon in Bibb county and Dublin in Laurens county, and the terminal points of another railroad company subsequently chartered under the same law being Sofkee in Bibb county and Savannah, and the former not having constructed its roadbed by about thirteen miles, it is error to enjoin the latter from constructing its railroad within ten miles of the former. The legislative intention in the above section is to apply the same to a new railroad where there is another railroad which had already been constructed at the time of the passage of the act, and the words "now constructed" and "already constructed" in that section mean the same thing. *Macon & A. R. Co. v. Macon & D. R. Co.*, 47 Am. & Eng. R. Cas. 315, 86 Ga. 83, 13 S. E. Rep. 157.

Under the laws of Ill. an existing railway corporation cannot enjoin another such corporation, organized under the same general railroad act, from building a rival road between the same *termini* and parallel with the track of the former, although its main and lateral tracks and switches may be intersected and crossed by the proposed new road, no continuous portion of its track being sought to be taken. The fact that the construction of the new road may damage the business of the old one, and cause delay in operating its trains, affords no ground for enjoining it. Legal damages assessed as is provided by law will afford the old company an adequate remedy for all the injury it may sustain. *East St. Louis Connecting R. Co. v. East St. Louis Union R. Co.*, 17 Am. & Eng. R. Cas. 163, 108 Ill. 265.

A clause in a charter rendering the consent of the company necessary to legalize the construction of a competing road cannot affect the validity of the law as an act

of legislation. Its assent is no part of legislation. It does not create the law, but merely avoids the constitutional objection to its validity. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 321.

Even if the exclusive privilege also extend to way business, still a competing route for local business is not a nuisance unless so near the route of complainant's road as materially to affect or take away its custom. *Delaware & R. Canal Co. v. Camden & A. R. Co.*, 16 N. J. Eq. 321.

A state has the exclusive control over the construction and maintenance of railroads and other internal improvements within her own domain. The right to build and use a railroad for the public use is a franchise, the right to which can be derived from the sovereign only. Such franchise, in its nature and in the absence of express provision, is exclusive except against the government, so that a competing road established without legislative authority will be enjoined. *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546; *modifying* 16 N. J. Eq. 356.—FOLLOWED IN *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441; *Citizens Coach Co. v. Camden Horse R. Co.*, 1 Am. & Eng. R. Cas. 190, 33 N. J. Eq. 267, 36 Am. Rep. 542. QUOTED IN *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130; *McGregor v. Erie R. Co.*, 35 N. J. L. 89.—*Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.

Any railroad over the state, wherever built, if built for and adapted to be part of a through competing line between the cities of New York and Philadelphia is unlawful and liable to be enjoined unless authorized by legislative enactment. *Pennsylvania R. Co. v. National R. Co.*, 23 N. J. Eq. 441.—FOLLOWING *Raritan & D. B. R. Co. v. Delaware & R. Canal Co.*, 18 N. J. Eq. 546. QUOTING *Erie R. Co. v. Delaware, L. & W. R. Co.*, 21 N. J. Eq. 286. REVIEWING *Newburgh & C. Turnpike Co. v. Miller*, 5 Johns. Ch. (N. Y.) 112; *Auburn & C. Plank-Road Co. v. Douglass*, 9 N. Y. 454.

No authority is conferred by any or all of the charters together of the several New Jersey corporations, co-defendants with the National railway company, to build a road across the state, to be used for part of a competing line between the above cities, and the attempt by defendants to build such road is in fraud of the rights of complainants, and will be enjoined. *Pennsylvania*

R. Co. v. National R. Co., 23 N. J. Eq. 441.

Where a railroad in process of construction crosses or parallels an existing railway, it must accommodate itself to the established way of the latter, and cannot be so constructed as to overlap the existing track or right of way longitudinally, so that either track cannot be operated when the other is in use. *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. Rep. 551.

5. Validity of contracts between parallel roads.—A contract between parallel roads for a division of territory within which each shall prosecute the work of extending branch lines without interference from the other is not void as against public policy. *Ives v. Smith*, 8 N. Y. Supp. 46, 55 Hun 606, 28 N. Y. S. R. 917; affirming 3 N. Y. Supp. 645.

Provided the rates charged are not above a reasonable standard. *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. Rep. 383.—FOLLOWING *Hare v. London & N. W. R. Co.*, 2 Johns. & H. 80.

All contracts for leasing or controlling competing lines are void under N. H. Act of July 5, 1867. *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. Rep. 383.

The illegality of a contract of consolidation between two competing lines is of no avail as a defense to a bill for an accounting and a return of property, etc., passed under the contract. *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. Rep. 383.

Where, under contract, one railway company uses the track, equipments, etc., of another road for thirty years, *ultra vires* cannot be set up as a defense to a bill for an accounting and a return of the property. *Manchester & L. R. Co. v. Concord R. Co.*, 66 N. H. 100, 20 Atl. Rep. 383.

The act of congress (16 U. S. St. 578) granting land to the Texas Pacific R. Co. and forbidding discrimination by it against any connecting or intersecting road, and the Texas Act of May 2, 1873, forbidding the company to enter into any combination with any other road parallel with it so as to give the latter control of its rates, are both violated by a pooling and traffic arrangement with another road which has two hundred miles of track paralleling it within said state. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 28 Am. & Eng. R. Cas. 1, 30 Fed. Rep. 2.—FOLLOWED IN *Cutting*

v. Florida R. & N. Co., 43 Fed. Rep. 747.

6. Parallel street railways.—Mo. Act of Jan. 16, 1860, § 3, providing that "no street railroad shall hereafter be constructed in the city of St. Louis nearer to a parallel road than the third parallel street from any road now constructed, or which may hereafter be constructed, except the roads hereinbefore mentioned," prevents the construction of any parallel lines in the city within three blocks of each other except as to the three companies named. They may construct their roads within that distance of each other, but not of the roads of any other companies. *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; reversing 2 Mo. App. 69.—QUOTING *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 160.

In determining what are parallel roads within the meaning of the above statute, neither the relative location of the termini nor the general direction of the entire line of the roads can be regarded as controlling circumstances; nor is it necessary that every part, or even the greater part, of the roads shall be parallel. Two roads the general direction of which are substantially the same for two and a half miles will be deemed parallel, though their termini are wide apart, and the general direction of the two is not the same. *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; reversing 2 Mo. App. 69.

Where one company is proceeding to build in violation of the above statute, another company may enjoin it without proof of damage. *St. Louis R. Co. v. Northwestern St. L. R. Co.*, 69 Mo. 65; reversing 2 Mo. App. 69.

The above statute has never been repealed, and the municipal assembly of the city of St. Louis has not the power to repeal it. *St. Louis R. Co. v. South St. Louis R. Co.*, 72 Mo. 67.—REVIEWED IN *St. Louis v. St. Louis R. Co.*, 26 Am. & Eng. R. Cas. 534, 89 Mo. 44.

Pa. Const. art. 17, § 4, providing that "no railroad, canal, or other corporation * * * shall consolidate * * * with, or lease or purchase the works or franchises of, or in any way control, any other railroad or canal corporation owning * * * a parallel or competing line," is not applicable to street-railway companies. *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. St. 96, 20 Atl. Rep. 399.

The passenger travel over parallel streets of cities is not necessarily a competing travel, and it is quite clear, therefore, that the sense of "competing," which is the essential sense of the prohibition of the above section, is not applicable to the travel upon the streets of cities and towns over street passenger-railways. *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. St. 96, 20 Atl. Rep. 399.

N. Y. Act of 1884, ch. 252, § 14, prohibiting a horse-railroad company from laying its tracks on "that portion of any street" occupied by another company is not restricted to that part of the street actually occupied by the track, but extends to the space on each side of the track to the whole width of the street. *Forty-second St. & G. S. F. R. Co. v. Thirty-fourth St. R. Co.*, 20 J. & S. (N. Y.) 252; *appeal dismissed in 102 N. Y. 691, mem.*

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— show real contract, notwithstanding existence of passenger-ticket, see TICKETS AND FARES, 2.

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I. AT LAW.

1. Who may sue, generally.—If a duty exists from defendant to plaintiff and is neglected, to the injury of plaintiff, he has a right to sue for damages, and it is not necessary that such duty should have arisen

out of a contract between the parties. *Collett v. London & N. W. R. Co.*, 16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411.

Where one company leases its road to another in consideration that the lessee covenants to pay certain mortgage bonds issued by the lessor, parties holding such bonds have a right to use the name of the lessor in suing on the bonds. *Mississippi C. R. Co. v. Southern R. Assoc.*, 8 Phila. (Pa.) 107.

Where an erection in a watercourse is the immediate cause of injury to the possession, and, without further interference by the act of man, would, in the ordinary course of things, continue to be so on the determination of the tenancy, the reversioner has a right of action on the ground that the encroachment on the inheritance may, by lapse of time, ripen into a right, where he has notice or knowledge of it. *Tinsman v. Belvidere Del. R. Co.*, 25 N. J. L. 255.

The trustee under a trust deed which gave to one C. for life the possession and use of a tract of land cannot, during C.'s lifetime, recover from a railroad company a strip of land granted to it by C. for a road-bed until C.'s right of possession has been adjudged forfeited, which can only be done in a case to which he is a party. *Tutt v. Port Royal & A. R. Co.*, 20 Am. & Eng. R. Cas. 367, 20 So. Car. 110.

A contract between a city and certain of its citizens with a railway company whereby the latter agreed for a designated consideration to locate and permanently keep in operation its main machine shops, if sought to be enforced against the company, should be brought by the municipality or by such of its citizens as participated in furnishing the consideration, and who thus have a pecuniary interest in the enforcement of the contract. *St. Louis, A. & T. R. Co. v. Harris*, 73 Tex. 375, 11 S. W. Rep. 405.

In the absence of proof that a suit brought in the name of a corporation is not authorized by it, its assent will be presumed, although the corporation is but a nominal party. *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34.

A civil action cannot be maintained in the name of the people for the redress of private wrongs; these are remediable only at the suit of the parties injured. The people cannot intervene except upon the assertion of a distinct right on the part of the public in respect to the subject-matter litigated.

People v. Albany & S. R. Co., 57 N. Y. 161, 6 Am. Ry. Rep. 73; reversing 55 Barb. 344, 2 Lans. 459, 7 Abb. Pr. N. S. 265, 5 Lans. 25, 1 Lans. 308, 38 How. Pr. 228, 57 Barb. 204, 8 Abb. Pr. N. S. 122, 39 How. Pr. 49.-- QUOTED IN *People v. New York, L. E. & W. R. Co.*, 63 How. Pr. 291.

A transfer was made by a partnership to defendants of their road, franchises, horses, harness, etc., "subject to the payment of all the money which the partnership was bound to pay on account of sewers," etc., which transfer was accepted by defendants in writing. *Held*, that a party having a claim on account of sewers, as specified, could maintain an action against defendants, and was entitled to recover from them the amount due to him from the partnership. *Dingeldein v. Third Ave. R. Co.*, 37 N. Y. 575; reversing 9 Bosw. 79.—DINGINGUISHING *Belmont v. Coman*, 22 N. Y. 438.

An officer of the post-office department whom a railway company is bound by statute to carry, and who is injured owing to its negligence, may maintain an action for damages, although he sustains no contract relation towards the company. *Collett v. London & N. W. R. Co.*, 16 Q. B. 984, 15 Jur. 1053, 20 L. J. Q. B. 411.

Parties having the control of whale oil taken from vessels at Panama delivered it to the Panama R. Co. for transportation by that company and the Pacific Mail Steamship Co. to New York. The parties delivering the oil for transportation were also the consignees, but there was evidence that certain seamen had an interest in the oil. *Held*, in an action against the carriers to recover damages for negligence in the transportation of the oil, that the contracting parties must be assumed to have sufficient title and right to maintain the action; there being no evidence that the seamen were either partners or joint owners with the plaintiff, they were not necessary parties to the action. *Swift v. Pacific Mail Steamship Co.*, 30 Am. & Eng. R. Cas. 105, 106 N. Y. 206, 12 N. E. Rep. 583, 8 N. Y. S. R. 602; affirming 36 Hun 643, mem.

The owner of a ship sued a connecting railway carrier for the detention of his vessel at the railway's terminal wharf in consequence of the latter's alleged suspension in the receipt of such ship's cargo, and disclosed by his declaration that such ship was under charter with a third person, not a party to the suit, to deliver her cargo to de-

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fendant railway company, and that the railway company was under contract with such third person there to receive such cargo and to carry the same further. *Held*, that defendant railway company's duty to receive and carry the cargo was due directly and primarily to such third person, the charterer of the ship, and that he alone could properly sue for the breach of such duty. *Freeman v. Louisville & N. R. Co.*, 32 Fla. 420, 13 So. Rep. 892.

2. Rule requiring real party in interest to sue.—A reversioner is not entitled to maintain an action for a nuisance unless his reversionary interest is affected. *Mumford v. Oxford, W. & W. R. Co.*, 1 H. & N. 34, 25 L. J. Ex. 265.

A master cannot sue for an injury to his servant while a passenger unless he was a party to the contract under which the servant was carried. *Alton v. Midland R. Co.*, 19 C. B. N. S. 213, 11 Jur. N. S. 672, 34 L. J. C. P. 292, 13 W. R. 918, 12 L. T. 703.

A servant may sue for the loss of his luggage, although his master paid his fare and took the ticket, the action being founded on a breach of duty and not on a contract. *Marshall v. York, N. & B. R. Co.*, 11 C. B. 655, 16 Jur. 124, 21 L. J. C. P. 34.

A certificate, issued and signed by the chief engineer of a railroad company, "that the sum of \$1000 is due to A. B. from the Ala. & Miss. Rivers R. Co." is a contract for the payment of money within the meaning of Ala. Code, § 2129, requiring an action to be brought in the name of the party really interested. *Alabama & M. R. R. Co. v. Sandford*, 36 Ala. 703.

Defendant was indebted to a railroad company and gave his note therefor to the treasurer of the company, designated by name and as treasurer. It was the usage of the company to make such obligations payable to its treasurer, and this note was sent to him as treasurer to hold for payment. *Held*, that suit thereon was properly brought in his name. *Hymer v. Ijams*, 56 Md. 470.

On a written order, made for a consideration moving from a railroad company, to deliver property to "J. S.," president of the company, the company may sue in its own name. *Eastern R. Co. v. Benedict*, 5 Gray (Mass.) 561. — **DISTINGUISHING** *Stackpole v. Arnold*, 11 Mass. 27.

Plaintiff, who carried on business in her own name, having possession of certain

goods, claiming to own them, delivered them to defendant's agent to be transported. *Held*, in an action for the loss of the goods, that plaintiff was entitled to recover, although some third person might have an interest in her business, as the legal interest in the contract resided in her. *Mayall v. Boston & M. R. Co.*, 19 N. H. 122.

Where the cause of action relates to property and property rights belonging to a corporation as the absolute owner, vested with the legal title, such corporation is the real party in interest to prosecute the action. It is no defense to such action that another party has become the owner "of the sole beneficial interest in the rights, property, and immunities" of the corporation, and an averment of that character in the answer may be stricken out as immaterial and irrelevant. *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 23 Minn. 359.

3. Trustee of an express trust. — A. executed a duly recorded trust deed on his mule, which remained in his possession even after maturity and non-payment of the debt, and while so in his possession was killed by the negligence of a railroad company. *Held*, that a settlement by A. with the company, which was ignorant of the trust deed, and was not in collusion with A., was a bar to a suit by the trustee. *Loeb v. Chicago, St. L. & N. O. R. Co.*, 60 Miss. 933.

Plaintiff, having sold land as agent and received the purchase money delivered the latter to an express company for transportation to the owner. It was lost in transit. *Held*, that plaintiff could maintain an action for its recovery. He was the "trustee of an express trust," within the meaning of Mo. Rev. St. 1879, § 3463. *Snider v. Adams Exp. Co.*, 16 Am. & Eng. R. Cas. 261, 77 Mo. 523.

One with whom a contract for the carriage of goods is made, and who is described therein as the consignor, consignee, and sole owner, may maintain an action to recover an overcharge exacted by the carrier, although he was not, in fact, the owner, and did not personally furnish and pay the overcharge. Plaintiff in such case is "a trustee of an express trust," within the meaning of Wis. Rev. St. § 2607. *Waterman v. Chicago, A. & St. P. R. Co.*, 18 Am. & Eng. R. Cas. 486, 61 Wis. 464, 21 N. W. Rep. 611. — **QUOTING** *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 91.

4. Heirs or personal representatives.—Heirs and devisees who have taken possession of the deceased's lands, and not the executor, are entitled to maintain an action to recover compensation for land taken after the ancestor's death, and damages arising therefrom, although the executor has not been discharged at the time the action is brought. *Organ v. Memphis & L. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 75, 51 *Ark.* 235, 11 *S. W. Rep.* 96.

Where a lot is injured or damaged by the construction or operation of a railroad in the street in front thereof, a right of action will accrue to the owner of the lot as soon as the railroad is put into operation, and on the death of such owner the right of action will pass to his personal representative, and not to his heir or devisee, such right not being assignable. *Penn Mut. L. Ins. Co. v. Heiss*, 141 *Ill.* 35, 31 *N. E. Rep.* 138.

After a railway company had entered upon land without acquiring title or without having damages assessed the owner thereof died. Nothing was done in his lifetime to work a conversion of the realty into money. *Held*, that the heirs, and not the administrator, were the proper parties to maintain an action of ejectment. *Oliver v. Pittsburgh, V. & C. R. Co.*, 44 *Am. & Eng. R. Cas.* 175, 131 *Pa. St.* 408, 19 *Atl. Rep.* 47.

A cause of action to an abutting owner for permanent obstructions to a highway by a legally authorized railway arises on the creation of the obstructions, and passes, not, with the fee of the land, to successive owners, but to the personal representatives of the one first suffering damage. *Greene v. New York C. & H. R. R. Co.*, 65 *How. Pr. (N. Y.)* 154, 12 *Abb. N. Cas.* 124.—APPLIED IN *Uline v. New York C. & H. R. R. Co.*, 23 *Am. & Eng. R. Cas.* 3, 101 *N. Y.* 98, 4 *N. E. Rep.* 536.

5. Consignor or consignee.*—(1) *When the consignor should sue.*—The consignors and owners of goods sent by common carriers are the proper parties to sue for negligence in the transportation. *Sanford v. Housatonic R. Co.*, 11 *Cush. (Mass.)* 155. *Price v. Powell*, 3 *N. Y.* 322. *Coombs v. Bristol & E. R. Co.*, 3 *H. & N.* 510, 27 *L. J. Ex.* 401.

The consignor is the proper party to sue a carrier for negligently injuring live stock shipped, whether he be the owner of the stock or not. *Atchison v. Chicago, R. I. & P. R. Co.*, 80 *Mo.* 213.

Plaintiff contracted a debt and remitted the money to pay the same by express, but the company never delivered it, and plaintiff paid the debt with other money. *Held*, that he was the proper party to sue the company for the loss. *Southern Exp. Co. v. Craft*, 49 *Miss.* 480.

A consignor of goods may sue the carrier in his own name for failing safely to carry them. If it appears that he is not personally interested, he may recover for the benefit of the consignee or actual owner. *Illinois C. R. Co. v. Schwartz*, 13 *Ill. App.* 490.—QUOTING *Dunlop v. Lambert*, 6 *C. & F.* 610.—QUOTED IN *Illinois C. R. Co. v. Miller*, 32 *Ill. App.* 259.

Where the contract for the sale of goods is executory, and the consignee is only to pay for them after delivery, the consignor is the owner until the goods are delivered, and is the proper person to sue the carrier for failing to deliver the same; and he is the proper party to sue the carrier for unusual delay, or neglect to take proper care of the goods while in store before shipment. *East Tenn. & G. R. Co. v. Nelson*, 1 *Caldw. (Tenn.)* 272.

(2) *When the consignee should sue.*—A consignee to whom goods are shipped who is to pay the freight and sell the same on commission has such a special property therein as to enable him to maintain an action against the carrier for the detention of the same, and he may recover, not only his own damages, but such as have accrued to the general owners. *Boston & M. R. Co. v. Warrior Mower Co.*, 76 *Me.* 251.

Where goods are shipped under an agreement by which the consignee is to pay the freight, and apply the proceeds of the sale of the goods in payment of advances already made, he is the proper party to sue third parties for wrongfully attaching the goods in the hands of the carrier. *Wetzel v. Power*, 5 *Mont.* 214, 2 *Pac. Rep.* 338.

A factor who has accepted a draft for goods consigned to him may maintain an action against a carrier for a delay in carrying the same, though the delay is directed by the consignor after shipment. *Ober v. Indianapolis & St. L. R. Co.*, 13 *Mo. App.* 81.

* See also CARRIAGE OF MERCHANDISE, 705-722.

Where the consignor of goods sold to the consignee pays for their carriage to an intermediate station, where a second line takes them and delivers them to the consignee, who pays the charges on that line, the consignee may sue for damage done in transit over such line. *Mead v. South-Eastern R. Co.*, 18 W. R. 735.

6. Joinder of plaintiffs.—(1) *When joinder is proper.*—Persons who have a joint interest in the damages recoverable for destroying property may join in an action, though they are not joint owners of the whole of the property. So two persons in possession of a building used as a mill which belongs to one of them may unite in an action against the company for negligently destroying the building and its contents. *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.—REVIEWED IN *Laird v. Connecticut & P. R. R. Co.*, 43 Am. & Eng. R. Cas. 63, 62 N. H. 254.

And the same rule applies where suit is brought against a railroad company by several plaintiffs jointly to recover damages for the destruction of grass, turf, rails, pasture, hay, and cotton. *Missouri Pac. R. Co. v. Wise*, 3 Tex. App. (Civ. Cas.) 461.

And where one owns a wharf, and two others furnish money to improve it for the benefit of all, all may join in an action for an injury thereto. *Ashby v. Eastern R. Co.*, 5 Metc. (Mass.) 368.

Damage sustained alike by all the individuals of a large class furnishes no foundation for an action on the part of a single individual of the class. *Currier v. West Side El. Patent R. Co.*, 6 Blatchf. (U. S.) 487.

The fact that the owners of riparian lands have agreed to divide them, but to hold the riparian rights in common, does not prevent them from maintaining a joint action against a railroad company for interference with the riparian rights. *Organ v. Memphis & L. R. R. Co.*, 39 Am. & Eng. R. Cas. 75, 51 Ark. 235, 11 S. W. Rep. 96.

Separate owners of articles contained in a box delivered for carriage for them jointly may jointly sue for the loss of the goods, although the box is directed to one of them who pays the freight. *Metcalfe v. London, B. & S. C. R. Co.*, 4 C. B. N. S. 318, 4 Jur. N. S. 487, 27 L. J. C. P. 333.

Where the owner of the property destroyed and several insurers have rights of action for different portions of the value,

all arising out of the same wrongful act, they may join in a single action against the wrong-doer. *Swarthout v. Chicago & N. W. R. Co.*, 49 Wis. 625, 6 N. W. Rep. 314, 21 Am. Ry. Rep. 153.

The presumption will be indulged that a wife and children are properly made plaintiffs to a suit instituted during the life of a deceased husband and father to recover damages for an injury inflicted on the wife, when the cause of action survives. *Fordyce v. Dixon*, 70 Tex. 694, 8 S. W. Rep. 504.

(2) *When not.*—Where several parties expend money in organizing a railroad under an agreement that the company shall bear the expense thereof, each party so expending money may bring an action against the company without joining the others. *Catawissa R. Co. v. Titus*, 49 Pa. St. 277.

Two or more parties owning separate tracts of land cannot unite in the same action to recover damages against a company for injuring the same. To enable plaintiffs to join in one suit they must have a community of interest. *Norfolk & W. R. Co. v. Smoot*, 81 Va. 495.

A person who has contracted with a railroad company for the issue of a large number of excursion tickets, and who has resold a large number of the tickets at an advance, can maintain an action and recover the full amount of damages caused by the company's breach of its contract without joining his sub-purchaser as a party plaintiff. *Houston & T. C. R. Co. v. Hill*, 34 Am. & Eng. R. Cas. 363, 70 Tex. 51, 7 S. W. Rep. 659.

Where land is in possession of a life tenant, the reversioners are not entitled to damages for a breach of a covenant on the part of a railroad company to construct a certain passage under its track during the existence of the life tenancy, and therefore the life tenant and such reversioners are not jointly interested in the damages. *Murfeldt v. New York, W. S. & B. R. Co.*, 1 Silv. App. 93, 102 N. Y. 703, mem., 7 N. E. Rep. 404, 2 N. Y. S. R. 444; affirming 34 Hun 632, mem.

In a suit against a railway company by a tenant for damage to growing crops, it is not necessary for the landlord to be joined in the suit. *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570.

Plaintiffs were the surviving obligees of a bond executed to them by a railway company to secure to those who had contrib-

uted money to the road return of it in the event the road was not completed to a certain place in a certain time. *Held*, that the obligees, acting as trustees for all the subscribers, could sue without making the representatives of one of their number, who had died, parties. *Red River, S. & W. R. Co. v. Blount*, 3 *Tex. Civ. App.* 282, 22 *S. W. Rep.* 930.

In such suit plaintiffs are entitled to recover the entire amount subscribed and paid by the citizens to the company, including that subscribed and paid by the deceased trustee. *Red River, S. & W. R. Co. v. Blount*, 3 *Tex. Civ. App.* 282, 22 *S. W. Rep.* 930.

Hill's *Oreg. Code*, § 381, providing that "if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint," does not apply to actions at law. *State Ins. Co. v. Oregon R. & N. Co.*, 20 *Oreg.* 563, 26 *Pac. Rep.* 838.

Suit was brought against a line of steamers, a copartnership composed of an individual and a railroad company, which, under its charter, had no power to form such a partnership. *Held*, that the action was demurrable. There was nothing in it to amend by, and it was proper to refuse an amendment by which it was sought to sue the natural person and the company as individual tortfeasors united in a common venture as carriers. *Ledsinger v. Central Line Steamers*, 75 *Ga.* 567.—FOLLOWING *Gunn v. Central R. & B. Co.*, 74 *Ga.* 509.

7. Who may be sued, generally.—An action of contract for the use of a railroad cannot be maintained by the owner against persons who do not recognize his title, but use the railroad adversely to him, under a *bona fide* claim of right, by virtue of a lease from another person. *Kittredge v. Peaslee*, 3 *Allen (Mass.)* 235.

The Western railroad being the successor both of the rights and liabilities of the Montgomery & West Point R. Co., suit is properly brought against it for a personal injury. *Montgomery & W. P. R. Co. v. Boring*, 51 *Ga.* 582.

Where a person owning a bridge franchise made a contract with a railroad for the building of a bridge by which the company passed its freights and passengers over free and he collected toll from all other persons using such bridge, an action for an injury

to a person using the bridge and paying toll is properly brought against such owner. *Tift v. Towns*, 53 *Ga.* 47.

Plaintiff sued for erecting an embankment in the highway in front of his property. The evidence showed that the embankment was erected in the construction of a road in the name of a company not sued, but that defendant company had the use of such road, and that its officers owned the greater part of the stock therein, and that the embankment was authorized by defendant's directors, and paid for by defendant, and that the engineer in charge received his instructions from defendant or its officers, and was in its employ. *Held*, that defendant was the proper party to be sued. *Grand Trunk R. Co. v. Fitzgerald*, 19 *Can. Sup. Ct.* 359.

8. — or joined as defendants.*—Both a railroad company and its servant may be sued in a joint action for the tort of the servant while acting in the discharge of his duty; and this is so though the duty might have been performed without committing the wrong. *Hewett v. Swift*, 3 *Allen (Mass.)* 420.—FOLLOWING *Moore v. Fitchburg R. Corp.*, 4 *Gray (Mass.)* 465.—*Hussey v. Norfolk Southern R. Co.*, 98 *N. Car.* 34, 2 *Am. St. Rep.* 312, 3 *S. E. Rep.* 923.

If a passenger is injured by the concurrent negligence of two parties, one of whom at the time is the common carrier, both tortfeasors are liable jointly and severally. *Bunting v. Hogsett*, 48 *Am. & Eng. R. Cas.* 87, 139 *Pa. St.* 363, 21 *Atl. Rep.* 31.—DISTINGUISHING *Lockhart v. Lichtenthaler*, 46 *Pa. St.* 151; *Philadelphia & R. R. Co. v. Boyer*, 97 *Pa. St.* 91. FOLLOWING *Dean v. Pennsylvania R. Co.*, 129 *Pa. St.* 520.—*Patterson v. Wabash, St. L. & P. R. Co.*, 18 *Am. & Eng. R. Cas.* 130, 54 *Mich.* 91, 19 *N. W. Rep.* 761.

Plaintiff sued a railway company for personal injuries resulting from its erecting an "engineer-stake" in a street, over which plaintiff fell. *Held*, that the wrong complained of was the personal act of those engaged in running the line for the proposed road, and in law the act of those by whose authority the work was done, and that plaintiff had the right to sue one or more of them alone. *Gudger v. Western N. C. R.*

* As to maintaining joint or several actions against two or more persons negligently causing injury, see note, 16 *Am. St. Rep.* 250.

Co., 19 *Am. & Eng. R. Cas.* 144, 87 *N. Car.* 325.

Plaintiff shipped goods by the Grand Trunk R. Co., which delivered them to the Great W. R. Co., which carried them to the consignee, but they arrived in a damaged state. Plaintiff, being in doubt as to which company was liable, there having been a separate contract with each, joined both as defendants. *Held*, that the case came within rule 94, and that plaintiff had a right to make both companies parties. *Harvey v. Grand Trunk R. Co.*, 7 *Ont. App.* 715; *affirming* 9 *Ont. Pr.* 80.—REVIEWING *Honduras R. Co. v. Lefevre*, 2 *Ex. D.* 306.

9. Who are necessary parties defendant.*—Where the action is by a stockholder for an alleged conversion or misappropriation of corporate property, the corporation itself is a necessary party. *Greaves v. Gouge*, 52 *How. Pr. (N. Y.)* 58; *affirming* 49 *How. Pr.* 79; *affirmed in* 69 *N. Y.* 154, 54 *How. Pr.* 272.—FOLLOWING *Gardner v. Pollard*, 10 *Bosw. (N. Y.)* 675. QUESTIONING *Crook v. Jewett*, 12 *How. Pr.* 19.

A complaint alleged the depositing of certain bonds with defendant for the purpose of forming a new company, and the giving him a certificate which would entitle him to stock therein; that the new company was never formed, and in certain litigation which followed defendant was directed to sell the bonds "to create a fund for the costs and expenses of the action, and the surplus after paying such costs was thereby directed to be distributed among the actual owners of the trust certificates"; that other funds were used to pay costs and expenses, and plaintiff demanded the proceeds arising from the sale of the bonds. *Held*, that the complaint was demurrable, as it failed to state the amount of costs and expenses, or what share should be paid out of the proceeds of the bonds. *Carman v. Farmers' L. & T. Co.*, 70 *Hun* 283, 53 *N. Y. S. R.* 824, 24 *N. Y. Supp.* 39.

10. Proper, if not necessary, parties.—Where preferred stockholders sue to compel the payment of dividends, and charge that funds which were applicable to the payment of such dividends have been diverted to improvements of the road, the common stockholders are not necessary but may be

proper parties defendants. *Thompson v. Erie R. Co.*, 45 *N. Y.* 468.—EXPLAINED IN *Chase v. Vanderbilt*, 62 *N. Y.* 307.

Where time-checks are issued by subcontractors to laborers, an assignee suing on the same need not make the subcontractors defendants, where the company and the contractors are joined, and the facts show that the debt is primarily that of the contractors. *San Antonio & A. P. R. Co. v. Cockrill*, 72 *Tex.* 613, 10 *S. W. Rep.* 702.

In a proceeding on the part of the state to forfeit the charter of a railroad company on account of a sale of its corporate franchises, rights, and privileges to a railway company chartered by another state, the purchasing company is not a necessary party. *East Line & R. R. Co. v. State*, 40 *Am. & Eng. R. Cas.* 574, 75 *Tex.* 434, 12 *S. W. Rep.* 090.

Suit for land over which a railroad was constructed was brought by the owner. Pending the suit the road was placed in the hands of receivers, who were made parties. *Held*, that they are proper if not necessary parties. *San Antonio & A. P. R. Co. v. Ruby*, 80 *Tex.* 172, 15 *S. W. Rep.* 1040.

11. Improper parties defendant.—It is well settled that a receiver is not personally liable for a contract made while in office; so he is not a necessary party after his discharge to an action based upon a contract made by him while receiver agreeing to give a rebate. *Bayles v. Kansas Pac. R. Co.*, 40 *Am. & Eng. R. Cas.* 42, 13 *Colo.* 181, 5 *L. R. A.* 480, 2 *Int. Com. Rep.* 643, 22 *Pac. Rep.* 341.

When the corporation itself is made a defendant, it is improper to add the trustees or directors as parties when no personal claim or judgment is asked against them. *Allen v. New Jersey Southern R. Co.*, 49 *How. Pr. (N. Y.)* 14.

Where the superintendent of a road is merely holding possession under mortgage trustees for the benefit of creditors, and does not claim any possession or control in his own right, and does not claim to have anything to do with the agreement under which possession was obtained, he is not a proper party to a proceeding to recover possession of the road. *Ogdensburg & C. R. Co. v. Vermont & C. R. Co.*, 16 *Abb. Pr. N. S. (N. Y.)* 249; *affirmed in* 4 *Hun* 712.

12. Misjoinder of defendants.—Where an action is brought against a railroad corporation and its conductor jointly for an

* Necessary parties to actions to enforce statutory liability of stockholders for corporate debts, see note, 1 *AM. ST. REP.* 857.

assault committed by the latter on a passenger, and a verdict is returned against the corporation, and in favor of the conductor, the joinder of defendants is no ground of exceptions by the corporation. *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465.—FOLLOWED in *Hewett v. Swift*, 3 Allen (Mass.) 420; *Brokaw v. New Jersey R. & T. Co.*, 32 N. J. L. 328.

The complaint was against five defendants as common carriers, and the proof tended to establish a cause of action against two of them, and there was no proof whatever that the other three were liable jointly or otherwise. *Held*, that although plaintiff had joined with the two who were liable, others against whom no liability was shown, it was not error in the judge, upon the request of the two, to refuse to direct a verdict, or order judgment in their favor. *McIntosh v. Ensign*, 28 N. Y. 169.

Plaintiff sued a construction company for excavating on land near his, whereby the tides were allowed to come in and injure plaintiff's land. Afterwards he filed a supplemental petition alleging that a railroad company had succeeded to the property of the construction company and that both together were continuing the excavations, and asked that the railroad company be made a defendant. *Held*, that the railroad company would not be liable for the past acts of the construction company simply because it acquired its property. The acquisition of such property would not be a ratification by the railroad company of the previous wrongs of the construction company so as to make the former liable, and the supplemental petition was demurrable for a misjoinder of parties. *Mexican Nat. Constr. Co. v. Meddlege*, 75 Tex. 634, 13 S. W. Rep. 257.

13. Non-joinder of defendants.—Under the Missouri statute requiring railroad companies to erect waiting rooms where their roads cross each other, and fixing a penalty for a violation of the statute, each company failing is separately liable for the penalty, and when one is sued it cannot set up a defect of parties in that the other company was not joined. *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep. 722.

14. Bringing in new parties.—Where suit is brought for injuries by reason of a negligent act of defendant, defendant cannot, by setting up in his answer that

there are, in relation to such alleged wrongful act, other joint tortfeasors, compel plaintiff to make them parties. *Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. Rep. 956.

In a suit by heirs to recover damages for injury to land the defendant may, by proper plea, have the father, in whom is vested a life estate to one third of the property, made a party. Failing in this, he may by instruction limit the recovery to the interest of the minors. If the plaintiff be the father of the minors, and he alleges ownership in them, he is estopped from afterwards recovering damages to his life estate, and a judgment for damages to the entire estate will not be disturbed. *Ft. Worth & N. O. R. Co. v. Pearce*, 75 Tex. 281, 12 S. W. Rep. 864.

15. Substitution.—In an action for personal injuries it was shown by verified petition that after the commencement of the suit the then defendant corporation, with certain other railroad corporations, had consolidated their respective rights and franchises, and had formed a new corporation, which had succeeded to all the rights and assumed all of the liabilities of all the original corporations, including the liabilities for the appellee's cause of action. *Held*, that it was proper to substitute the consolidated corporation in place of the original defendant. *Louisville, E. & St. L. Con. R. Co. v. Summers*, 131 Ind. 241, 30 N. E. Rep. 873.

The discharge of a receiver, and the restoration of the property to the control of its owner, do not abate an action against the receiver. The owner may be substituted as a party, and the action prosecuted against him. *Brown v. Gay*, 42 Am. & Eng. R. Cas. 23, 76 Tex. 444, 13 S. W. Rep. 472.

A suit for damages caused by negligence brought against a receiver, within twelve months after the injury, may be prosecuted against the company by making it a party to the suit after the discharge of the receiver. Such proceedings constitute but one suit. No new cause of action is alleged in making the company a party. *Texas & P. R. Co. v. Comstock*, 83 Tex. 537, 18 S. W. Rep. 946.

16. Objections for defect of parties.—In an action *ex delicto* the non-joinder of a party who ought to have been made plaintiff can be taken advantage of only by plea in abatement, or by way of apportionment of

damages. *Cooper v. Grand Trunk R. Co.*, 49 N. H. 209.

An objection to the non-joinder of a husband as a plaintiff in an action by a wife to recover for injuries to her person is waived unless raised by demurrer or answer. It cannot be taken advantage of on motion for nonsuit. *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390, 19 Pac. Rep. 644.

In such action the wife is a necessary party plaintiff, and no recovery can be had unless she is joined. *Baldwin v. Second St. Cable R. Co.*, 77 Cal. 390, 19 Pac. Rep. 644.

II. IN EQUITY.

17. Who may sue, generally.—The holder of a portion of the bonds secured by deed of trust given by a railway company in order to protect the mortgaged property or fund securing his and others' bonds may file a bill in his own behalf and in behalf of all other holders of such bonds, his interest and that of the others being identical and inseparable. *Carter v. Rodevald*, 108 Ill. 351.

A township cannot maintain an action to enjoin the collection of an illegal tax levied on taxable property belonging to private individuals of such township. Such an action can be maintained only by the individuals themselves. *Center Tp. v. Hunt*, 16 Kan. 430.

Where a suit is necessary to obtain from the directors or officers of an incorporated company an account of their dealings with the company, or to recover from them or any other person property or money of the corporation, the only proper plaintiff is the company itself. *McMurray v. Northern R. Co.*, 22 Grant's Ch. (U. C.) 476.

18. All parties in interest to be joined either as plaintiffs or defendants.—Under N. Y. Code Civ. Pro. §§ 446, 447, and 452, all persons interested in the subject-matter of a suit in equity must be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and to secure a final determination of their rights. *Turner v. Midland R. Co.*, 1 N. Y. S. R. 219.

In the foreclosure of a deed of trust the *cestui que trustent* as well as the trustee should be made parties. But where the beneficiaries are very numerous, and they are represented by their trustee, they need not all be made parties; the impracticability of making all the persons interested parties

is a sufficient ground for dispensing with them. *Chicago & G. W. R. Land Co. v. Peck*, 112 Ill. 408.

A lease in which several railroads are interested will not be declared altogether void as against roads not made parties to the suit. *Dinsmore v. Atlantic & P. R. Co.*, 46 How. Pr. (N. Y.) 193.

A committee was appointed to reorganize a railroad and to issue new bonds instead of old ones. Plaintiff held certain bonds, and by direction of the committee he deposited them with a trust company, but later, when he applied for new bonds, he was refused on the ground that a third person claimed the bonds. Held, that the reorganized company, the trust company, and such third person were all necessary parties to an action to enforce the trust in order to save a multiplicity of suits. *Turner v. Midland R. Co.*, 1 N. Y. S. R. 219.

Such third person was a proper party both because he claimed an interest in the bonds and because the company was entitled to protection as against the two claimants. *Turner v. Midland R. Co.*, 1 N. Y. S. R. 219.

19. Joinder of parties complainant.—The owners of separate lots abutting on a street may join in a bill to restrain the construction of a street railway therein without payment of the damages thereby sustained, which damages are not recoverable in such suit, but in condemnation proceedings. *Taylor v. Bay City St. R. Co.*, 43 Am. & Eng. R. Cas. 335, 80 Mich. 77, 45 N. W. Rep. 335.

One of several joint contractors having died during the progress of work, a bill was filed by the survivors to enforce a claim under the contract. Held, that the personal representatives of the deceased partner should have been made parties, the rule respecting the rights of surviving partners to sue alone not applying to suits in equity. *Sykes v. Brockville & O. R. Co.*, 9 Grant's Ch. (U. C.) 9.

20. Misjoinder of complainants.—Where a receiver brings suit to compel the payment of one half of one per cent. on bonds issued by a company, as provided by the Florida Improvement Act of Jan. 6, 1855, bondholders should not be joined as plaintiffs. *Doggett v. Florida Land Co.*, 99 U. S. 72.

A portion of the stockholders cannot join with their company in a bill to redeem the

road from a mortgage where there is no allegation that the company has been guilty of any violation of its trust. *Kennebec & P. R. Co. v. Portland & K. R. Co.*, 54 Me. 173.

Where the fee of a street to the centre thereof is vested in the abutting proprietors, the interest of each proprietor in the same is separate and individual, and a complaint in which several proprietors are joined as plaintiffs, and which seeks to enjoin the construction of a railroad upon such street on the ground that it has not legally acquired the right to do so, nor made compensation therefor, is open to demurrer for misjoinder of parties. *Fogg v. Nevada C. O. R. Co.*, 43 Am. & Eng. R. Cas. 105, 20 Nev. 429, 23 Pac. Rep. 840.—FOLLOWING *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 82.

21. Necessary parties defendant.—

Where mortgage trustees file a bill against a corporation mortgagor to foreclose, none of the bondholders secured by the mortgage need be made parties. *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162.—APPROVED IN *Hall v. Sullivan R. Co.*, Brun. Col. Cas. (U. S.) 613. QUOTED IN *Sacramento & P. R. Co. v. San Francisco Superior Court*, 55 Cal. 453.

Where stockholders sue to have a foreclosure sale of the corporate property set aside, and the mortgage declared null and void, and the property restored to the company, the company is a necessary party. *Samuel v. Holladay, Wooler*, (U. S.) 400.

Where a company executes a mortgage to a trust company to secure its bonds, and places the bonds in the hands of the trust company to be used in the construction of the road, and certain stockholders file a bill to prevent the trust company from delivering the bonds, and asking that they be canceled, the trust company is a necessary party. *Mayer v. Denver, T. & Ft. W. R. Co.*, 41 Fed. Rep. 723.

Where a railroad company claims, under a grant, land which certain individuals are seeking to pre-empt, and the company files a bill to enjoin the United States land commissioner from proceeding to take proofs or to complete the entry, the individuals seeking to pre-empt are necessary parties. *Siox City & St. P. R. Co. v. United States*, 34 Fed. Rep. 835.

Where bondholders sue for an accounting of the earnings of a road, and it appears

that the road is leased, but is controlled by a third company, and the relief sought includes an injunction and a rescission of the lease, all three of the companies must be made defendants. *Port Royal & A. R. Co. v. Branch*, 78 Ga. 113.

Where property owners seek to restrain the building of a street railroad on the ground that the franchise is valuable, and has been granted by the city without sufficient consideration, in violation of its charter, the city in its corporate capacity is a necessary party; and the officers who, it is charged, have abused their power in granting the franchise, should be made parties also. *People v. Law*, 34 Barb. (N. Y.) 494, 22 How. Pr. 109.

A bill to enforce the lease of a railroad showed that the lease was made for forty years, but that the lessee in turn leased its road to a third company for twenty years, the lessee agreeing to assume the first lease. It is charged that the second lease had expired, and that the second lessee refused to pay the rent. Held, that the first lessee should be made a party, and the fact that it is no longer exercising its rights and franchises is no excuse. *Jessup v. Illinois C. R. Co.*, 36 Fed. Rep. 735.

The bondholders are necessary parties to a suit to adjudge void a mortgage, and the bonds secured thereby, given by a corporation. Service of process on trustees is not sufficient to bind them. *Appeal of Harrisburg & E. R. Co.*, (Pa.) 36 Am. & Eng. R. Cas. 249, 15 Atl. Rep. 459.

A corporation is a necessary defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders. If the stockholders are likewise proper parties, if they apply to be heard, to the end that each may be assessed his equitable share only. *Walsh v. Memphis, C. & N. W. R. Co.*, 2 McCrary (U. S.) 156, 6 Fed. Rep. 797.

Where a non-consenting stockholder files a bill to have a consolidation of his corporation with others declared void, and further proceedings under the consolidation enjoined, the president and directors of the consolidated company are necessary defendants. *Tyson v. Virginia & T. R. Co.*, 1 Hughes (U. S.) 80.

Where a bill seeks to recover property of a railroad company from the hands of parties who are accountable therefor to the company, and seeks to have the property

applied to the satisfaction of a judgment against the company, the company is a necessary party. *Brigham v. Luddington*, 12 *Blatchf.* (U. S.) 237.

22. Proper though not necessary defendants.—(1) *Federal decisions.*—A mortgage trustee is not a necessary party to a suit in equity by a holder of the income bonds of a railroad corporation, against it, to have the amount justly due for interest on the bonds ascertained and paid. *Spies v. Chicago & E. I. R. Co.*, 24 *Blatchf.* (U. S.) 280, 32 *Fed. Rep.* 713.—**DISTINGUISHING** *Morgan v. Kansas Pac. R. Co.*, 21 *Blatchf.* 134; *Barry v. Missouri, K. & T. R. Co.*, 22 *Fed. Rep.* 631.

Persons or corporations interested may be made parties, especially where the object of the bill cannot be attained without seriously affecting the interests of such persons or corporations. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 5 *McLean* (U. S.) 444.

A state is not a necessary party to a proceeding to foreclose a railroad mortgage because it has indorsed the bonds secured by the mortgage. *Young v. Montgomery & E. R. Co.*, 2 *Woods* (U. S.) 606.

Persons belonging to a class represented in the suit, such as mortgage creditors of a railroad, represented by the trustees of the mortgage, are regarded as *quasi* parties, and may be heard on petition. *Anderson v. Jacksonville, P. & M. R. Co.*, 2 *Woods* (U. S.) 628.—**FOLLOWED IN** *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 *Fed. Rep.* 850.

In a bill in equity, plaintiffs alleged that they were promoters of a railroad company; that they entered into a contract with McC. & Co. for the construction of the road, under which contract they conveyed to McC. & Co. the company's franchises, right of way, etc., in consideration of which McC. & Co. were to pay plaintiffs a cash consideration and certain stock and first mortgage bonds of the road; that McC. & Co., upon obtaining control of all the capital stock and property of the company, proceeded to elect a board of directors composed of themselves and others, and, without attempting to construct the road, sold out the whole property to defendant, a competing company. They alleged further that the competing railroad took the property with full knowledge and notice of plaintiffs' rights. The bill prayed that the transaction between McC. & Co. and defendant might be held void, and defendant declared trustee for plaintiffs, etc., but

sought no affirmative relief against McC. & Co. *Held*, that McC. & Co. were not indispensable parties. *Hamilton v. Savannah, F. & W. R. Co.*, 52 *Am. & Eng. R. Cas.* 130, 49 *Fed. Rep.* 412.—**DISTINGUISHING** *Central R. Co. v. Mills*, 113 U. S. 256, 5 *Sup. Ct. Rep.* 456.

(2) *State decisions.*—In a bill to enjoin a telegraph company from erecting its line along the right of way of a railroad, another telegraph company having a contract with the road for the exclusive use of such right of way to maintain and operate its own line of telegraph is a proper party to the extent of its interest. *Southwestern R. Co. v. Southern & A. Tel. Co.*, 46 *Ga.* 43.

In an action against a trustee to set aside a trust deed made by a company, the *cestuis que trustent* are not necessary parties, but if facts exist to justify it, they may, in the discretion of the court, be admitted to defend. *Winslow v. Minnesota & P. R. Co.*, 4 *Minn.* 313 (*Gil.* 230).

When the title to bonds, claimed by both parties to the bill by different assignments from the same person making no claim to the bonds, is in dispute, it is not necessary to join the assignor as a party. *Hale v. Nashua & L. R. Co.*, 60 *N. H.* 333.

Where a turnout has been constructed at the request of the owners of a warehouse to connect a railroad therewith, the owners are necessary parties to a suit to compel the removal of the turnout. *Philadelphia v. River Front R. Co.*, 43 *Am. & Eng. R. Cas.* 167, 133 *Pa. St.* 134, 19 *Atl. Rep.* 356.

Under N. Y. Code of Civ. Pro. §§ 446, 447, and 452, requiring all persons interested in the subject-matter of suits to be made parties, where a party sues to compel a railroad company to deliver him certain bonds of which he claims to be the owner, it is proper to make a third party who holds a certificate and claims to be entitled to the bonds a defendant. *Turner v. Conant*, 18 *Abb. N. Cas.* (N. Y.) 160.

A railroad company assigned its property to a trustee as preliminary steps to a complete sale and transfer to a new company, the consideration being, *inter alia*, the payment of the debts of the old company. A few days after the assignment plaintiff obtained a judgment against the company. Sometime afterwards suit was brought against the trustees and the new company to enforce the judgment. The trustees made no answer, but the company filed an

answer charging, in general terms, that the debts of the old company of the same class of plaintiff's exceeded its assets, and that plaintiff could not be entitled to more than a *pro rata* distribution. *Held*, that from the lapse of time a presumption arose that all the other debts had been satisfied, and therefore the single debt of plaintiff might be enforced without attempting to make other possible creditors parties. *Galveston, H. & S. A. R. Co. v. Butler*, 9 *Am. & Eng. R. Cas.* 552, 56 *Tex.* 506. — REVIEWING *Galveston, H. & S. A. R. Co. v. McDonald*, 53 *Tex.* 510. — FOLLOWED IN *Galveston, H. & S. A. R. Co. v. Hume*, 59 *Tex.* 47.

In an action by a preference shareholder to restrain a railway company from paying a dividend on the common stock before paying an arrear of dividend on the preference shares, it is sufficient as a matter of pleading to name one of the holders of the common stock to represent the common interest of his associates. *Smith v. Cork & B. R. Co.*, 5 *Ir. Eq.* 65.

A railway company paid to the executors of a tenant for life the sum payable for the fee simple of lands taken by the company for the purposes of their road, and subsequently the remainderman filed a bill against the company and the representatives of the tenant for life seeking to obtain payment from the company of the proportion of purchase money payable to the remainderman. *Held*, that the executors were properly made parties with a view to the company obtaining relief over against them in the event of the company being compelled to make good the money in the first instance. *Owston v. Grand Trunk R. Co.*, 28 *Grant's Ch. (U. C.)* 431.

23. Improper parties defendant. — When a bill is filed by a creditor against a corporation, its directors and officers, against whom no relief is prayed, and against whom no fraud, conspiracy, or breach of trust is charged, cannot be joined as defendants for the sole purpose of discovery. *Norwood v. Memphis & C. R. Co.*, 72 *Ala.* 563.

In a contest as to the right and authority of one company to lease the road of another, the state, not being a stockholder in either company, is not a proper party to a bill to enjoin the execution of the lease; nor is a city which only sues on behalf of its citizens a proper party to the bill. *Central R. & B. Co. v. Mayor, etc., of Macon*, 43 *Ga.* 605.

Where a corporation issues a certificate of shares in its capital stock upon the surrender of a former certificate for the same, accompanied by a transfer under a forged power of attorney, neither the person acting under such power, nor the person to whom the certificate is issued, is a necessary party to a bill by the true owner against the corporation to compel it to procure a like number of shares of its capital stock, to record and issue to him a certificate thereof, and to pay him the dividends thereon. *Pratt v. Boston & A. R. Co.*, 126 *Mass.* 443.

A corporation deposited certain securities with agents for the purpose of sale or as the basis of a loan. The agents disposed of the securities to a number of different persons, in violation of their trust, the transfers being by different transactions and the holders in no way connected. *Held*, that it was error to unite all of the transferees as defendants in an action by the company seeking to have the transfers set aside. The proper proceeding was a suit against each transferee, making the agents defendants in all. *Lexington & B. S. R. Co. v. Goodman*, 5 *Abb. Pr. (N. Y.)* 493, 25 *Barb.* 469, 15 *How. Pr.* 85.

Where a corporation sues to have certain shares of spurious stock which its officers had issued declared void, the holders of genuine stock are not proper parties. *New York & N. H. R. Co. v. Schuyler*, 8 *Abb. Pr. (N. Y.)* 239.

24. Bringing in new parties. — After final decree in a foreclosure suit by a mortgagee against the corporation, the court will not give a stockholder leave to become a defendant, and allow him to make answer and defense, but he might be allowed to be made a party for the purpose of allowing him to prosecute an appeal. *Ex parte Brown*, 58 *Ala.* 536, 21 *Am. Ry. Rep.* 101.

A complainant cannot be compelled to add new parties to his bill if he chooses to take the responsibility of their not being made parties. *Searles v. Jacksonville, P. & M. R. Co.*, 2 *Woods (U. S.)* 621.

Where the holder of one or more of a series of railroad mortgage bonds institutes foreclosure proceedings, he is bound to act for all standing in a similar position, and not only to permit other bondholders to intervene, but to see that their rights are protected in the final decree. *New Orleans Pac. R. Co. v. Parker*, 143 *U. S.* 42, 12 *Sup.*

Ct. Rep. 364.—QUOTING *Nashville & D. R. Co. v. Orr*, 18 Wall. (U. S.) 471.

25. Rule as to parties beyond the jurisdiction.—Plaintiff company sued in a federal court in Michigan to restrain defendant company, a Michigan corporation, from building and operating a road in Indiana, under a charter granted to a company in that state, on the ground that it would interfere with plaintiff's road. *Held*, that the Indiana company owning the charter was a necessary party. In such case the Act of Congress of 1839, providing for the non-joinder of parties who are not inhabitants of the district, does not apply. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 15 How. (U. S.) 233.

Act of Congress 1889 (5 St. at L. p. 34, § 1) and rule 47 for the equity practice for the circuit court, passed in pursuance thereof, relieve the plaintiff in equity from making persons in interest parties when the effect of their joinder would oust the court of jurisdiction. But notwithstanding the above act the court can make no decree between the parties before the court which involves the right of such omitted party. *Hamilton v. Savannah, F. & W. R. Co.*, 52 Am. & Eng. R. Cas. 130, 49 Fed. Rep. 412. See also *Brigham v. Luddington*, 12 Blatchf. (U. S.) 237.

PARTITION.

1. Who may sue.—A railroad company owned an undivided half interest in a lot in fee, and appropriated a life estate in the other half, and held it during the life estate. *Held*, that the owners of the remainder, who were heirs of the life tenant, might maintain a bill in equity for partition, and they were not restricted to the special remedy at law provided by Vt. Gen. St. 447. *Austin v. Rutland R. Co.*, 17 Fed. Rep. 466, 21 Blatchf. (U. S.) 358.—DISTINGUISHING *Austin v. Rutland R. Co.*, 45 Vt. 215; *McAuley v. Western Vt. R. Co.*, 33 Vt. 311; *Knapp v. McAuley*, 39 Vt. 275; *Troy & B. R. Co. v. Potter*, 42 Vt. 265.

A railroad corporation having purchased from another company an undivided interest in the latter's railroad, under Ohio Act of April 7, 1863, in relation to insolvent railroad companies, which authorizes such sale under certain conditions, if the same can be made without impairing the usefulness of the road to the vendor company,

whereby a tenancy in common is created between the parties, cannot compel partition of the common property either under the statute in relation to partition or in equity. *Pittsburg, C. & St. L. R. Co. v. Central Ohio R. Co.*, 9 Am. & Eng. R. Cas. 535, 38 Ohio St. 614.

2. Staying other proceedings.—Proceedings under a petition by some of the co-tenants for compensation for a right of way over the common property will be suspended until partition can be had under an action instituted for that purpose. *Charleston, C. & C. R. Co. v. Leech*, 43 Am. & Eng. R. Cas. 588, 33 So. Car. 175, 11 S. E. Rep. 631.

3. Parties defendant.—A railroad corporation is not a necessary or proper party to a process for partition in consequence merely of having laid out and constructed its road over lands owned by tenants in common. *Weston v. Foster*, 7 Metc. (Mass.) 297.

4. Commissioners.—A company holding a grant of a right of way from one tenant in common, the other tenants in common filed a petition for compensation. Thereupon the company instituted action to require its grantor and the other tenants to make partition, and it was so decreed. *Held*, that the partition so ordered was properly committed to five commissioners under the practice prescribed by statute. *Charleston, C. & C. R. Co. v. Leech*, 35 So. Car. 146, 14 S. E. Rep. 730.

The partition was ordered between defendants at the instance of the company, but it was really not a party, and therefore the judge properly treated the grantor of the right of way as plaintiff in the sense of the statute, and gave to her, and not to the company, the right to name the commissioners on the part of the "plaintiff," guarding in his order, in every way practicable, the rights of the company against its grantor and her co-tenants. *Charleston, C. & C. R. Co. v. Leech*, 35 So. Car. 146, 14 S. E. Rep. 730.

5. Owelty of partition.—Commissioners who are appointed to partition land are not authorized to set off to one owner, against his will, more than his proportionate share, and require him to pay the difference in money. Me. Rev. St. ch. 88, § 17, only provides that when land cannot be divided without great inconvenience "it may be assigned to one party," but it can-

not be done against his will. *Wilson v. European & N. A. R. Co.*, 62 Me. 112.

6. Voluntary partition.—A voluntary partition of land between the owners thereof is not binding upon the holders of existing liens upon the property unless they consent thereto. *United N. J. R. & C. Co. v. Long Dock Co.*, 42 N. J. Eq. 547, 7 Cent. Rep. 920, 9 Atl. Rep. 586.

Two out of five tenants in common conveyed a right of way. The interest of the other tenants in common in the right of way is now sued for. By partition between them, made after the sale of the right of way, the tenants in common equally divided between them the remainder of the tract out of which the right of way had been sold. *Held*, that, having by their subsequent partition put it out of their power to have any other partition with the railway company, they could not recover. *Cook v. International & G. N. R. Co.*, 3 Tex. Civ. App. 125, 22 S. W. Rep. 1012.

Plaintiffs having put it out of their power to have such partition with defendant as would recognize its right to have the land in controversy set apart to it, such proceedings must be deemed equivalent to a recognition of the right of defendant to have the land set apart to it, because all the rest of the land has been appropriated. *Cook v. International & G. N. R. Co.*, 3 Tex. Civ. App. 125, 22 S. W. Rep. 1012.

PARTNERS.

As parties to condemnation proceedings, see EMINENT DOMAIN, 271.

In goods shipped, when may sue carrier, see CARRIAGE OF MERCHANDISE, 717.

Liability of connecting carriers as, see CARRIAGE OF MERCHANDISE, 546, 547.

When entitled to land damages, see EMINENT DOMAIN, 430.

PARTNERSHIP.

Between connecting carriers, see CARRIAGE OF PASSENGERS, 518.

— lines, see CONNECTING LINES, 4.

When stockholder is liable to creditor as partner, see STOCKHOLDERS, 49.

1. What constitutes.*—An association among railroad companies for the

* Railway partnerships and fast freight lines, see note, 21 AM. & ENG. R. CAS. 3.

Connecting lines. Liability as partners, see note, 55 AM. & ENG. R. CAS. 434.

transportation of through freights, and a division of the receipts in prescribed proportion, does not constitute a partnership, nor render the carriers jointly liable for loss or injury occurring to goods transported. *Hot Springs R. Co. v. Trippe*, 18 Am. & Eng. R. Cas. 562, 42 Ark. 465, 48 Am. Rep. 65.—APPLYING *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166. QUOTING AND APPLYING *Darling v. Boston & W. R. Co.*, 11 Allen (Mass.) 295.

An express company organized as a joint stock company under the laws of New York as enacted in 1849, ch. 258, and amended in 1851 and 1853, is but a copartnership, and not a corporation, and the members may be sued as partners. *Boston & A. R. Co. v. Pearson*, 128 Mass. 445.

Certain persons resolved to organize themselves and such others as might unite with them into a joint stock association, and to do business as an express company, under the above statutes. They signed the articles of association and adopted a form of subscription, which, among other things, authorized the secretary to sign the names of other subscribers to the articles of association. *Held*, that one subscribing to the stock and paying in a percentage thereby became a member, and liable as a partner. *Boston & A. R. Co. v. Pearson*, 128 Mass. 445.

A railroad corporation leased a house owned by it to an individual, who paid a certain sum annually and "half the net proceeds arising from keeping said house as a hotel," and kept an account open to its inspection, and gave his own time and attention, and had free passes over the railroad for himself and all persons employed and all articles used by him in carrying on the house. *Held*, that the corporation and such individual did not thereby become partners, even as to third persons, in the business of keeping the house. *Holmes v. Old Colony R. Co.*, 5 Gray (Mass.) 58.

Plaintiffs were contractors to build a railroad, and shared the profit and loss of the contract. *Held*, that they were partners, and that an affidavit made by one of them on a mortgage of personal property was sufficient. *Belknap v. Wendell*, 21 N. H. 175.

If A. and B., who have a contract for building a railroad, agree to pay to C. one third of the profits of the contract in consideration of his services in procuring the

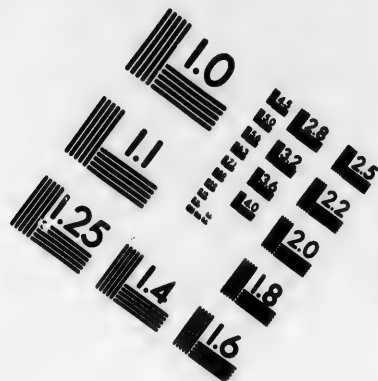
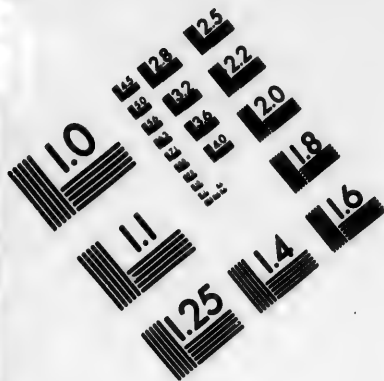
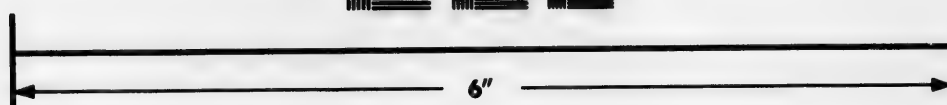
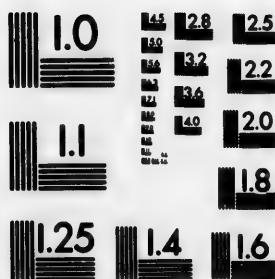


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contract and the benefit of his skill and experience in constructing a railroad, it does not constitute C. a partner, and make him liable for labor and materials used in building the road. *Voorhees v. Jones*, 29 N. J. L. 270.

If A. and B. contract with a railroad company to build its road, and afterwards sell and assign to C. and D. a part of the contract, so that C. and D. shall be equally interested with A. and B. in the profits of the contract, C. and D. become partners and jointly liable with A. and B. for work done on the road; and where a note is given for labor or materials signed "A. and B.," C. and D. will be liable on such note as partners. *Voorhees v. Jones*, 29 N. J. L. 270.

2. Validity of the partnership contract.—The power to form a partnership is not one of the powers common to all corporations; and where the charter of a railroad corporation confers no such power upon it, it has no authority to enter into a partnership with a natural person to run a line of boats and carry passengers, and its contracts pertaining to such business are invalid as against the corporation, and it is not liable for a tort committed while carrying on such business. *Gunn v. Central R. Co.*, 74 Ga. 509.—FOLLOWED IN *Ledsinger v. Central Line Steamers*, 75 Ga. 567; *Central R. & B. Co. v. Smith*, 76 Ala. 572.

Contract for partnership to engage in the business of buying up soldiers' claims for land warrants, under act of February 11, 1847—Illegality of.—When managing partner compelled to account, see *Brooks v. Martin*, 2 Wall. (U. S.) 70.—EXPLAINED IN *Texas & P. R. Co. v. Southern Pac. R. Co.*, 40 Am. & Eng. R. Cas. 475, 41 La. Ann. 970, 6 So. Rep. 888.

3. Rights and liabilities of partners.*—Corporators or partners associated for a special purpose specified in their articles of partnership cannot change that purpose without the consent of all the corporators or partners. *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. 178.—APPROVING *Stevens v. Rutland & B. R. Co.*, 29 Vt. 548, 1 Am. Law Reg. 154.—APPROVED IN *Snook v. Georgia Imp. Co.*, 38 Am. & Eng. R. Cas. 492, 83 Ga. 61, 9 S. E. Rep. 1104; *Black v. Delaware & R. Canal Co.*, 24 N. J.

Eq. 455. LIMITED IN *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130. REVIEWED IN *New Jersey Midland R. Co. v. Strait*, 35 N. J. L. 322.

4. Power of one partner to bind the firm—Ratification.—One of two partners entered into a contract in his own name with a railroad for the transportation of property belonging to the firm. The parties had no particular way of signing the firm name, signing sometimes in the name of both partners, and sometimes in the name of one or the other of them individually. Held, that a suit could be maintained in the names of both partners for a breach of the contract. *Illinois C. R. Co. v. Owens*, 53 Ill. 391.

The main business of a general partnership was the catching, packing, transportation, and selling of oysters, but it was proved that the partners formerly owned a line of wagons, that they purchased, held, and sold real estate in their joint names, owned vessels which they employed in the coasting trade, and subscribed for and purchased and sold stock in railroads and other companies. Held, that from this evidence it was competent for the jury to find that a particular subscription for stock in a railroad company made by one partner in the name of the firm was within the scope of the partnership and in the course of its business. *Maltby v. Northwestern Va. R. Co.*, 16 Md. 422.

Under Mo. Rev. St. 1889, § 2207, providing that a judgment may be given for or against one or more of several co-plaintiffs, it is proper to permit one partner to prosecute to final judgment for an injury to firm property while being shipped, after the other partner has signed a release and asked that the cause be dismissed. *Hoover v. Missouri Pac. R. Co.*, (Mo.) 16 S. W. Rep. 480.—FOLLOWING *Asher v. St. Louis, I. M. & S. R. Co.*, 89 Mo. 116, 1 S. W. Rep. 123; *State v. Philips*, 97 Mo. 340, 10 S. W. Rep. 855; *Spurlock v. Sproule*, 72 Mo. 503.

Where one of a firm subscribes for stock in a corporation by consent, the subscription may be transferred to the firm, making it liable for the subscription. *Weinman v. Wilkinsburg & E. L. Pass. R. Co.*, 118 Pa. St. 192, 11 Cent. Rep. 54, 12 Atl. Rep. 288, 20 W. N. C. 455.

One partner cannot make himself the agent of his firm to subscribe stock to a railroad company, the building of railroads

* When persons acting as a *de facto* corporation will be liable as partners, see note, 29 AM. ST. REP. 602.

not being within the scope of the partnership. *Livingston v. Pittsburgh & S. R. Co.*, 2 *Grant's Cas. (Pa.)* 219.

To enable a railroad company to recover against a firm for stock subscribed by one of its partners, plaintiff must prove the assent of all the partners. *Livingston v. Pittsburgh & S. R. Co.*, 2 *Grant's Cas. (Pa.)* 219.

Where one partner subscribes in the name of a firm to the stock of a railroad company, if the other partner has knowledge of the subscription and the payments thereon by the firm and does not dissent, it is strong evidence of assent, which, if given either before or after the subscription, ratifies it forever. *Livingston v. Pittsburgh & S. R. Co.*, 2 *Grant's Cas. (Pa.)* 219.—FOLLOWED IN *Pittsburgh & S. R. Co. v. Proudfit*, 2 *Pittsb. (Pa.)* 85.

5. Notice to one partner, when binds firm.—A member of a partnership who was also a director in a railroad company purchased certain bonds in behalf of his firm at less than their par value, and in violation of the statute of the state prohibiting a director from purchasing such bonds. *Held*, that the knowledge of the member as to the invalidity of the purchase bound all of the members, though the bonds were transferred after a dissolution of the firm, but in winding up its business. *Marietta & C. R. Co. v. Mowry*, 28 *Hun (N. Y.)* 79.—QUOTING *Duncomb v. New York, H. & N. R. Co.*, 84 *N. Y.* 190.

6. Dissolution by death of partner.—A contract made by a partnership for the construction of a railroad will be canceled by the death of any of the parties unless the other parties consent that the work shall be continued by the heirs of the deceased, or by others employed by them for that purpose. A refusal to give such consent will not subject the party refusing to damages. He is only bound to pay to the heirs the value of the work already done, and of the materials already prepared, proportionably to the price agreed on, in case such work and materials may be useful to him. *McCord v. West Feliciana R. Co.*, 3 *La. Ann.* 285.

7. Powers of surviving partner.—Where a sale of railway stock and bonds is effected by a partnership, a mortgage being taken back to secure part of the purchase money, and one of the partners subsequently dies, the right to enforce payment of the un-

paid purchase money remains in the surviving partner, whether the subject of sale be treated as realty or goods and chattels. *Bolckow v. Foster*, 24 *Grant's Ch. (U. C.)* 333.

It was held on rehearing that the right to enforce payment of the unpaid purchase money remained in the surviving partner, and that the representative of the deceased partner was an unnecessary party to the bill. *Bolckow v. Foster*, 25 *Grant's Ch. (U. C.)* 476.—APPROVING *Sykes v. Brockville & O. R. Co.*, 9 *Grant's Ch.* 9.

8. Rights of retiring partner.—A railroad was built over a leased colliery, held by two partners. One partner bought the interest of the other in the colliery, "and all property real and personal therewith connected." Afterwards the railroad paid \$10,000 damages for the location of the road. *Held*, that the retiring partner was entitled to his share thereof. *Blackiston's Appeal*, 81* *Pa. St.* 339.

9. Individual liability.—Where a partnership owns stock in an insolvent corporation, a member of the firm will be liable to an execution against himself individually as a stockholder, upon the motion of a creditor of the corporation, in all cases where the firm would be subject to such liability. *Bray v. Seligman*, 9 *Am. & Eng. R. Cas.* 653, 75 *Mo.* 31.

PARTNERSHIP LIABILITY.

Of stockholders to creditors, see STOCKHOLDERS, 48-50.

PART PERFORMANCE.

By parties to lease, estoppel by, see LEASES, ETC., 80, 81.

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I. CONTRACTS TO ISSUE

1. Interpretation. — Where a deed provides that "the said grantor and his family shall have and enjoy the right of free passage" in the company's cars over a railroad "so long as the land and appurtenances hereinbefore described shall continue to be used" for railroad purposes under its charter, grandchildren after ceasing to be members of such grantor's household are not entitled to a free pass over the railroad as one of his family. *Dodge v. Boston & P. R. Corp.*, 51 Am. & Eng. R. Cas. 388, 154 Mass. 299, 28 N. E. Rep. 243.

In consideration of the conveyance of a right of way defendant agreed to "carry" G. and wife and any of their children "free of charge" in its passenger-cars. Plaintiff is one of the children mentioned. Held, that plaintiff was entitled to be carried free. The fact that his father purchased and paid for this right of free carriage is not important. Plaintiff's right is as complete as if he had purchased and paid for it himself, and its infringement, whether tortious or otherwise, is a wrong to him for which he has his action. As a reasonable regulation defendant might have provided plaintiff with a pass, and required him to exhibit it to conductors; but plaintiff was, under no obligation to apply for one, and if none was furnished him he had the right to be carried without one. If defendant made it a rule to issue no passes, then it was its duty to inform the conductors of plaintiff's rights, and instruct them to allow them. *Grimes v. Minneapolis, L. & M. R. Co.*, 31 Am. & Eng. R. Cas. 123, 37 Minn. 66, 33 N. W. Rep. 33.

Where a company contracts with a firm "in consideration of a ticket entitling either member of the firm, but only one on any train, to a seat on its passenger trains," the firm is entitled to only one ticket, to be presented when any one member takes passage. *Knopf v. Richmond, F. & P. R. Co.*, 37 Am. & Eng. R. Cas. 140, 85 Va. 769, 8 S. E. Rep. 787.

2. Parol evidence to vary.—Plaintiff

accepted, in part settlement of a suit, free passes for ten years over defendant's line for himself and wife with the express written stipulation that each should be used by the person to whom it was issued and no other. The pass issued to plaintiff's wife was on one occasion loaned to her daughter. The company refused to issue passes for the ensuing year unless plaintiff made restitution for the wrong done the company the previous year. This he refused to do, and brought an action against the company for breach of contract, claiming that there was a distinct parol agreement that any member of his family should be allowed to use the pass. *Held*, that parol evidence of antecedent or contemporaneous verbal agreements was inadmissible to contradict, vary, or add to the terms of the written contract. *Baltimore & O. R. Co. v. Brant*, 17 Ill. App. 151.

3. Validity and enforcement.—A contract based upon a good consideration to grant a life pass is valid and binding upon the company, and for its refusal to perform the same it may be held liable in damages. *Erie & P. R. Co. v. Douthet*, 88 Pa. St. 243, 32 Am. Rep. 451.

An agreement between a railway company and a shipper whereby the shipper is to have a free pass on the payment of a nominal sum in consideration of shipping all his goods by the railway cannot be specifically enforced in equity against the company. *Sturge v. Midland R. Co.*, 4 Jur. N. S. 273.

A covenant in a lease of bridge privileges providing for the issuing of passes to the lessor's officers and directors is valid and will be enforced. *Niagara Falls Int. Bridge Co. v. Great Western R. Co.*, 25 U. C. Q. B. 313.

4. — damages.—In an action against a railroad for refusing to furnish plaintiff and his family a pass for life, as contracted, in estimating the damages it is proper for the jury to consider plaintiff's age and circumstances, and the number and station of his family. *Erie & P. R. Co. v. Douthet*, 88 Pa. St. 243.

II. ISSUANCE, EXPIRATION, AND RENEWAL.

5. Issuance of passes as affected by the Interstate Commerce Act.*—For

* See also INTERSTATE COMMERCE, 90.

provisions against issuing free passes under the Interstate Commerce Act, see *Ex parte Koehler*, 29 Am. & Eng. R. Cas. 44, 1 Int. Com. Rep. 317. *Slater v. Northern Pac. R. Co.*, 2 Int. Com. Com. 359. *Griffie v. Burlington & M. R. R. Co.*, 2 Int. Com. Com. 301. *Harvey v. Louisville & N. R. Co.*, 3 Int. Com. Rep. 793.

6. Revocation.—A pass for life, given without valid consideration, may be revoked, notwithstanding it was issued in pursuance of a vote of the stockholders of the company. *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170.

Receivers of a railroad cannot make an agreement for a free life pass which will bind subsequent owners of the road. *Martin v. New York, S. & W. R. Co.*, 12 Am. & Eng. R. Cas. 448, 36 N. J. Eq. 109.

7. — affected by lease of the road.*—A free pass is revoked by the leasing of the railroad to another company. *Turner v. Richmond & D. R. Co.*, 70 N. Car. 1.

8. Renewal after expiration.—A railway company by contract issued to plaintiff an annual pass. On its expiration plaintiff applied for and secured a renewal. On its expiration he did not apply for another. *Held*, that it is a question for the jury whether it was the duty of the company to issue a renewal without application. *Knopf v. Richmond, F. & P. R. Co.*, 37 Am. & Eng. R. Cas. 140, 85 Va. 769, 8 S. E. Rep. 787.

III. COMPANY'S DUTY AND LIABILITY TO ONE RIDING ON A PASS.

9. Generally.†—A passenger on a pass given for a valuable consideration has the same rights as a passenger for hire. *Griswold v. New York & N. E. R. Co.*, 26 Am. & Eng. R. Cas. 280, 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. Rep. 261.

A passenger on a vessel carried free because he is a "steamboat man" is entitled to the same protection as other passengers. *Steamboat New World v. King*, 16 How. (U. S.) 469.—APPROVED IN *Lemon v. Chanslor*, 68 Mo. 340. QUOTED IN *Jacobus v. St.*

* Agreements for pass over road in consideration of grant of right of way. Road changing hands, see 51 AM. & ENG. R. CAS. 391, *absr.*

† Traveler with pass as gratuity passenger, see note, 13 AM. & ENG. R. CAS. 27.

Rights of passengers traveling on passes, see note, 5 L. R. A. 820.

Paul & C. R. Co., 20 Minn. 125 (Gil. 110); Michigan S. & N. I. R. Co. v. Heaton, 37 Ind. 448; Union Pac. R. Co. v. Rollins, 5 Kan. 167; State v. Western Md. R. Co., 21 Am. & Eng. R. Cas. 503, 63 Md. 433.

Where a passenger who is riding free sues for a personal injury, the action cannot be maintained upon the basis of a contract, either expressed or implied. It must rest exclusively upon that obligation which the law always imposes upon every one who attempts to do anything, even gratuitously, for another to exercise some degree of care and skill in the performance of what he has undertaken. *Nolton v. Western R. Co.*, 15 N. Y. 444; *affirming* 10 How. Pr. 97.—DISTINGUISHING *Winterbottom v. Wright*, 10 M. & W. 109. FOLLOWING *Coggs v. Bernard*, 2 Ld. Raym. 909.—DISTINGUISHED IN *Higley v. Gilmer*, 3 Mont. 90.—*Prince v. International & G. N. R. Co.*, 21 Am. & Eng. R. Cas. 152, 64 Tex. 144.

10. Degree of care demanded.*—

The same degree of care on the part of the carrier is required in case of one carried gratuitously as in case of one carried for hire. *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).—QUOTING *McLean v. Burbank*, 11 Minn. 288.—APPROVED IN *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.—*State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433. *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671.—APPROVING *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18. QUOTING *Austin v. Great Western R. Co.*, L. R. 2 Q. B. 442.—QUOTED IN *State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433. REVIEWED IN *Atchison, T. & S. F. R. Co. v. Headland*, 18 Colo. 477.—*Gulf, C. & S. F. R. Co. v. McGown*, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640.—QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 486.—*Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177.

A railroad company is bound to exercise a high degree of care for the safety of such passenger. *Hospes v. Chicago, M. & St. P. R. Co.*, 29 Fed. Rep. 763.

Must exercise due and reasonable care. *Todd v. Old Colony & F. R. R. Co.*, 3 Allen (Mass.) 18.—APPROVED IN *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf.

* Person riding free by consent of company entitled to protection due passenger, see note, 2 L. R. A. 167.

(U. S.) 314, 17 Fed. Rep. 671. QUOTED IN *Swift v. Newbury*, 36 Vt. 355. REVIEWED IN *Greenleaf v. Illinois C. R. Co.*, 29 Iowa 14; *Worthington v. Central Vt. R. Co.*, 64 Vt. 107.—*Bryant v. Chicago, St. P., M. & O. R. Co.*, 58 Am. & Eng. R. Cas. 15, 53 Fed. Rep. 997.

The distinction between the different degrees of negligence is applicable to the case of a passenger injured while riding on a free pass. *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).—QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 486; *Steamboat New World v. King*, 16 How. 474.

11. Liability for personal injuries, generally.*—

Common carriers are subject to the same liability for injuries resulting from negligence to persons riding on a free pass as they are to those who pay full fare. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869. *Gillenwater v. Madison & I. R. Co.*, 5 Ind. 339. *Lemon v. Chanslor*, 68 Mo. 340.—APPROVING *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291; *Steamboat New World v. King*, 16 How. (U. S.) 469; *New York C. R. Co. v. Lockwood*, 17 Wall. (U. S.) 357. QUOTING *Philadelphia & R. R. Co. v. Derby*, 14 How. 468; *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo. 26.

12. — Illustrations.—Proof of the mere fact that plaintiff was injured on a train by the porter shutting the door against him, without more, does not amount to such negligence as to make the company liable where the carriage is gratuitous. *Hospes v. Chicago, M. & St. P. R. Co.*, 29 Fed. Rep. 763.

There is nothing in the fact that plaintiff was traveling upon a "shipper's pass," given in consideration of the freight paid on stock which he was shipping at the time of his injury, to prevent a recovery; and an answer which sets up that he was injured while riding on a free pass is bad on demurrer. *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.

If a railway company furnishes free trans-

* Free pass; liability of company to passenger traveling on, see notes, 18 AM. & ENG. R. CAS. 170; 13 ID. 57; 21 ID. 155; 48 ID. 97. See also CARRIAGE OF PASSENGERS, 18, 19.

Liability of company for injuries to persons riding on complimentary passes, to stock drivers, shippers, express agents, newsboys, and the like, see notes, 2 L. R. A. 166; 22 ID. 794; 18 AM. & ENG. R. CAS. 176; 37 ID. 53. See also CARRIAGE OF LIVE STOCK, 118-133.

portation to a civil officer, to a point which he may designate as necessary to the discharge of an official duty, the same liability which it assumes to transport him safely to the place he first designated, will attach to the company for his safe carriage to any point beyond, to which he deems it necessary to go for the proper performance of his duty, and to which its servants having charge of him as a passenger voluntarily transport him. *International & G. N. R. Co. v. Cock*, 68 Tex. 713, 5 S. W. Rep. 635.

13. — instructions.—Plaintiff, a citizen of Pennsylvania, while traveling in New Jersey was injured on the road of defendant. It was shown that plaintiff was riding on a pass, in which it was stipulated that the person accepting it assumed all risk of accident. Plaintiff offered evidence to prove that the pass was not a mere gratuity, but that it was issued to him as part consideration for the leasing to his employer of a pleasure resort owned by defendant. The negligence of the company in causing the injury was not denied. *Held*, that a charge to the jury instructing them that if the pass was accepted not as a mere gratuity but upon a good consideration, even by the law of New Jersey, he was entitled to recover, was not erroneous. *Camden & A. R. Co. v. Bausch*, (Pa.) 28 Am. & Eng. R. Cas. 142, 7 Atl. Rep. 731. —**DISTINGUISHING** *Kinney v. Central R. Co.*, 34 N. J. L. 513. **REVIEWING** *Railroad Co. v. O'Hara*, 12 W. N. C. (Pa.) 473.

14. — questions of fact.—It is a question for the jury whether a person riding on a free pass issued to another was, under circumstances tending to show acquiescence on the part of the company, lawfully on the train at the time he was injured. *Great Northern R. Co. v. Harrison*, 10 Ex. 376, 2 C. L. R. 1136, 23 L. J. Ex. 308.

15. Liability for causing death.—The payment of fare is not necessary to create the relation of common carrier and passenger. Upon this principle a railroad company was held liable for causing the death of a passenger by the negligence of its employés, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation signed by himself releasing the company from all liability for injury to his person or property while using the same. *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246, 9 Am. Ky. Rep. 7, 20 Am. Ky. Rep. 326. —**APPROVING** *Pennsylvania R. Co. v. Hen-*

derson, 51 Pa. St. 315. **DISAPPROVING** *Wells v. New York C. R. Co.*, 24 N. Y. 181; *Perkins v. New York C. R. Co.*, 24 N. Y. 196; *Bissell v. New York C. R. Co.*, 25 N. Y. 442. **REVIEWING** *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 483.

16. Liability to employe riding on pass.—A railroad company is bound to carry a passenger safely whether he has paid the fare or not, if he is lawfully on the train, as in this case, where one who had been in the employ of the company was permitted to ride free. *Ohio & M. R. Co. v. Muhling*, 30 Ill. 9.—**APPLIED IN** *Buck v. People's St. R.*, E. L. & P. Co., 46 Mo. App. 555. **DISTINGUISHED IN** *Higgins v. Hannibal & St. J. R. Co.*, 36 Mo. 418. **REVIEWED IN** *Waterbury v. New York C. & H. R. R. Co.*, 21 Blatchf. (U. S.) 314, 17 Fed. Rep. 671.

A railroad employe while riding to his home on a free pass, after the usual services of his employment were over for the day, was killed by the negligence of the company's servants. *Held*, that he was substantially a stranger and entitled to all the remedies he would have had if he had not been a servant. *State v. Western Md. R. Co.*, 21 Am. & Eng. R. Cas. 503, 63 Md. 433. —**DISTINGUISHING** *Tunney v. Midland R. Co.*, L. R. 1 C. P. 291; *Marshall v. Stewart*, 33 Eng. L. & Eq. 1; *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466; *Gillshannon v. Stony Brook R. Corp.*, 10 Cush. (Mass.) 228. **QUOTING** *Hutchinson v. York, N. & B. R. Co.*, 6 Railw. Cas. 580; *O'Donnell v. Allegheny Valley R. Co.*, 59 Pa. St. 239. **REVIEWING** *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Russell v. Hudson River R. Co.*, 5 Duer (N. Y.) 39.

Plaintiff was an employe and the company had given him a pass over its road bridge. *Held*, that in such case it was as much bound in its duty towards the passenger as if it had received him for pay. *Pembroke v. Hannibal & St. J. R. Co.*, 32 Mo. App. 61.

17. — expulsion from train.—Plaintiff was ejected from a passenger train while attempting to travel on a pass to a point at which he was to engage in work for the company. The conductor refused the pass on the ground that an order had been issued a short time before not to recognize such passes, but it did not appear that plaintiff had any knowledge of such order, but, on the contrary, believed his pass to be valid; that such passes had been recognized up to that time. *Held*, that the com-

pany was bound to recognize the pass and carry him, and it was estopped from denying the validity of the pass after the holder had accepted it from one of the company's agents in good faith. *St. Louis, A. & T. R. Co. v. Tucker*, 3 *Tex. App. (Civ. Cas.)* 390.

18. Liability to one fraudulently riding on another's pass.—One who fraudulently attempts to ride on a non-transferable pass issued to another person is not a passenger to whom the carrier owes a duty to carry safely. *Louisville, N. A. & C. R. Co. v. Thompson*, 27 *Am. & Eng. R. Cas.* 88, 107 *Ind.* 442, 8 *N. E. Rep.* 18, 9 *N. E. Rep.* 357, 57 *Am. Rep.* 120.

The fact that plaintiff was traveling on a pass at the time of her injury will not relieve the company from liability; and a slight error in inserting the name "Mrs. E. Price" instead of "Mrs. E. Rice," her true name, is not conclusive proof that she was riding on a ticket issued to another, and therefore practising a fraud on the company, so as to release it from liability. *Rice v. Illinois C. R. Co.*, 22 *Ill. App.* 643.

19. Liability to one riding on pass illegally issued.—One who accepts and uses a free pass issued by a railroad company in violation of the Pa. Constitution of 1873 and the act of June 15, 1874 (P. L. 289), does not thereby become a trespasser. *Buffalo, P. & W. R. Co. v. O'Hara*, 9 *Am. & Eng. R. Cas.* 317, 3 *Pennyp. (Pa.)* 190.

And he may recover for personal injuries notwithstanding a condition in the pass that the person accepting it "assumes all risk of accident to his person or property without claims for damages on this corporation." *Buffalo, P. & W. R. Co. v. O'Hara*, 9 *Am. & Eng. R. Cas.* 317, 3 *Pennyp. (Pa.)* 190.

IV. CONDITIONS EXEMPTING CARRIER FROM LIABILITY.

20. Necessity of signature of passenger.*—Although a free pass containing a condition exempting the railroad from liability for accidents requires that the pass should be signed, a person who has accepted such pass and used it is estopped to deny that he made the agreement releasing the company from liability because he did not and was not required to sign it. *Quimby v.*

Boston & M. R. Co., 40 *Am. & Eng. R. Cas.* 693, 150 *Mass.* 365, 5 *L. R. A.* 846, 23 *N. E. Rep.* 205.—REVIEWING *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357; *Griswold v. New York & N. E. R. Co.*, 53 *Conn.* 371; *Gulf, C. & S. F. R. Co. v. McGown*, 65 *Tex.* 640.

One who received and used a pass to procure free passage is held to have consented to the conditions indorsed on such pass to the effect that he assumed all risk of accident, etc., as fully as though he signed the same. *Gulf, C. & S. F. R. Co. v. McGown*, 26 *Am. & Eng. R. Cas.* 274, 65 *Tex.* 640.—REVIEWING *Perkins v. New York C. R. Co.*, 24 *N. Y.* 196.—REVIEWED IN *Quimby v. Boston & M. R. Co.*, 40 *Am. & Eng. R. Cas.* 693, 150 *Mass.* 365, 5 *L. R. A.* 846, 23 *N. E. Rep.* 205. Compare also *Camden & A. R. Co. v. Bausch*, (Pa.) 28 *Am. & Eng. R. Cas.* 142, 7 *Atl. Rep.* 731; affirming 18 *Phila. (Pa.)* 392.

21. Valid in England.—In England a carrier has full power by stipulation to provide against liability, and a condition in a pass that the passenger travels "at his own risk" will exclude everything for which the company would otherwise have been responsible. *McCawley v. Furness R. Co.*, *L. R.* 8 *Q. B.* 57. *Gallin v. London & N. W. R. Co.*, *L. R.* 10 *Q. B.* 212. *Hall v. North Eastern R. Co.*, *L. R.* 10 *Q. B.* 437.

22. — in Canada.—Defendant gave a free ticket over its railway in these words: "Pass Captain James Sutherland free * * * from the 1st of January, 1857, to 31st of December, 1857. This ticket is not transferable, and the person accepting it assumes the risk of accidents and damage." The holder was killed while passing over the railway. *Held*, that defendant was authorized to enter into a special contract, and was not liable. *Sutherland v. Great Western R. Co.*, 7 *U. C. C. P.* 409.

23. — in Connecticut.—Where a passenger accepts a free pass on a railroad upon the express condition that he will make no claims for damages for or on account of any personal injury received while using it, in consequence of the negligence of defendant's servants, and by such negligence he is killed in a collision, his personal representative is bound by the condition and cannot maintain suit for damages. *Griswold v. New York & N. E. R. Co.*, 26 *Am. & Eng. R. Cas.* 280, 53 *Conn.* 371, 55 *Am. Rep.* 115, 4 *Atl. Rep.* 261.

* Validity of clause in pass exempting carrier from liability, see notes, 21 *AM. & ENG. R. CAS.* 156; 57 *AM. REP.* 388; 1 *L. R. A.* 501.

A company gave to a boy a free pass to travel and to sell sandwiches and fruit on the trains for a restaurant keeper, the pass stipulating that the company should not be liable for the negligence of its servants. The company derived no direct benefit from his acts. When traveling on his pass to visit his mother, he was killed through the negligence of the company's servants. *Held*, that no liability was incurred. *Griswold v. New York & N. E. R. Co.*, 26 *Am. & Eng. R. Cas.* 280, 53 *Conn.* 371, 55 *Am. Rep.* 115, 4 *Atl. Rep.* 261.—NOT FOLLOWING *Cleveland, P. & A. R. Co. v. Curran*, 19 *Ohio St.* 1; *Mobile & O. R. Co. v. Hopkins*, 41 *Ala.* 486; *Pennsylvania R. Co. v. Henderson*, 51 *Pa. St.* 315; *Flinn v. Philadelphia, W. & B. R. Co.*, 1 *Houst. (Del.)* 469. QUOTING *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357.—APPROVED IN *Bryan v. Missouri Pac. R. Co.*, 32 *Mo. App.* 228. REVIEWED IN *Quimby v. Boston & M. R. Co.*, 40 *Am. & Eng. R. Cas.* 693, 150 *Mass.* 365, 5 *L. R. A.* 846, 23 *N. E. Rep.* 205.

24. — In Massachusetts.—A railroad company which gives gratuitously a pass upon a train may stipulate that the person accepting it shall assume all risk of accident which may happen while traveling upon the train. *Quimby v. Boston & M. R. Co.*, 40 *Am. & Eng. R. Cas.* 693, 150 *Mass.* 365, 5 *L. R. A.* 846, 23 *N. E. Rep.* 205.

25. — In New Jersey.—A contract that in consideration of free passage a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company is valid in law; and a passenger who knowingly receives a free ticket with an indorsement of such contract upon it is bound by its terms and cannot recover for injuries from such negligence. *Kinney v. Central R. Co.*, 34 *N. J. L.* 513; *affirming* 32 *N. J. L.* 407.—DISTINGUISHING *Pennsylvania R. Co. v. Henderson*, 51 *Pa. St.* 315.—DISTINGUISHED IN *Camden & A. R. Co. v. Bausch*, (Pa.) 28 *Am. & Eng. R. Cas.* 142, 7 *Atl. Rep.* 731. NOT FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 *Minn.* 125 (Gil. 110).

26. — In New York.—A contract between a carrier and a passenger who is riding free releasing the company from liability under any circumstances for injury that may result through the negligence of its employes is not void as against the law or public policy. *Wells v. New York C. R. Co.*, 24 *N. Y.* 181; *affirming* 26 *Barb.* 641.—

FOLLOWING *Wells v. Steam Nav. Co.*, 8 *N. Y.* 375.—CRITICISED IN *Mobile & O. R. Co. v. Hopkins*, 41 *Ala.* 486. DISAPPROVED IN *Rose v. Des Moines Valley R. Co.*, 39 *Iowa* 246; *Pennsylvania R. Co. v. Henderson*, 51 *Pa. St.* 315. DISTINGUISHED IN *Illinois C. R. Co. v. Read*, 37 *Ill.* 484. FOLLOWED IN *Bissell v. New York C. R. Co.*, 25 *N. Y.* 442. NOT FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 *Minn.* 125 (Gil. 110).

27. — in Washington.—A person riding on a free pass upon a street-car cannot recover for personal injuries caused by the negligence of the company's servants when the pass contains conditions exempting the company from all injuries resulting from its negligence. *Muldoon v. Seattle City R. Co.*, 58 *Am. & Eng. R. Cas.* 546, 7 *Wash.* 528, 35 *Pac. Rep.* 422.

28. Void as against public policy in Indiana.—Where a person traveling on a railroad receives from the company a free pass upon which is indorsed a statement that "it is agreed that the person accepting this ticket assumes all risk of personal injury and loss or damage to property whilst using the same on the trains of the company," such indorsement or agreement does not cast upon such person any risks arising from the gross negligence of the servants of the company in running the train; and it would seem that such agreement does not cast upon such person any risks arising from any negligence of the servants of the company in running the train. *Indiana C. R. Co. v. Mundy*, 21 *Ind.* 48.—QUOTING *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How. (U. S.)* 344; *Wells v. Steam Nav. Co.*, 8 *N. Y.* 375.—CRITICISED IN *Mobile & O. R. Co. v. Hopkins*, 41 *Ala.* 486. FOLLOWED IN *Jacobus v. St. Paul & C. R. Co.*, 20 *Minn.* 125 (Gil. 110). See also *Ohio & M. R. Co. v. Selby*, 47 *Ind.* 471, 17 *Am. Rep.* 719. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 *Ind.* 126. *Knowlton v. Erie R. Co.*, 19 *Ohio St.* 260, 2 *Am. Rep.* 395. *New York C. R. Co. v. Lockwood*, 17 *Wall. (U. S.)* 357. But see *Griswold v. New York & N. E. R. Co.*, 26 *Am. & Eng. R. Cas.* 280, 53 *Conn.* 371, 55 *Am. Rep.* 115, 4 *Atl. Rep.* 261.

29. — in Iowa.—A carrier is liable for causing the death of a passenger by the negligence of its employes, notwithstanding he was at the time riding upon a free pass upon which was a stipulation, signed by himself, releasing the company from all

liability for injury to his person or property while using the same. *Rose v. Des Moines Valley R. Co.*, 39 Iowa 246.

30. — in Mississippi.—The acceptance of a "free ticket" by a railroad mail agent conditioned that he shall take all risk of injury on such road is not a waiver of his right to damages for an injury occasioned by the negligence of the company's servants, for, as the company receives compensation from the government for transporting the mail agent, such waiver would be without consideration and against public policy. *Illinois C. R. Co. v. Crndup*, 63 Miss. 291.

31. — in Missouri.—Plaintiff was a passenger upon a free pass expressly conditioned that the person accepting it assumed all risks of accident and damages without claim upon the company. *Held*, that the conditions of the pass did not shield defendant from the consequences of its own negligence. *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.—**APPROVING** *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371; *Annas v. Milwaukee & N. R. Co.*, 67 Wis. 46.

32. — in Pennsylvania.—A free pass containing an express release of the liability of a railroad company for all damages on account of injury to the person of the holder, although accepted and used, does not relieve the company from liability as a common carrier for negligence. *Bufalo, P. & W. R. Co. v. O'Hara*, 9 Am. & Eng. R. Cas. 317, 3 Pennyp. (Pa.) 190.

33. — in Texas.—A public carrier of passengers cannot so contract as to relieve itself from liability for an injury to a passenger riding on a free pass from the negligence of the carrier or its servants in the course of their employment. *Gulf, C. & S. F. R. Co. v. McGown*, 26 Am. & Eng. R. Cas. 274, 65 Tex. 640.

34. Exemption from liability for gross negligence.—A provision in a free pass that a passenger will not hold the company liable for injuries received "under any circumstances," whether the result of the negligence of its agents or otherwise, does not exempt the company from liability for an injury which is the result of gross negligence, but exempts it from injuries resulting from any lower degree of negligence. *Illinois C. R. Co. v. Read*, 37 Ill. 484, 87 Am. Dec. 260.—**FOLLOWED IN** *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125 (Gil. 110).—

6 D. R. D.—60

Chicago, B. & N. R. Co. v. Hawk, 36 Ill. App. 327. *Annas v. Milwaukee & N. R. Co.*, 27 Am. & Eng. R. Cas. 102, 67 Wis. 46, 30 N. W. Rep. 282, 57 Am. Rep. 388, n.—**QUOTING** *Illinois C. R. Co. v. Morrison*, 19 Ill. 136. **REVIEWING** *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125; *Morrison v. Phillips & C. Constr. Co.*, 44 Wis. 405; *Western & A. R. Co. v. Bishop*, 50 Ga. 473.—**APPROVED IN** *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.

Some courts, conceding the right of the carrier to stipulate for exemption in cases of ordinary negligence, refuse to apply the principle in cases of gross negligence. *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613. *Jacobus v. St. Paul & C. R. Co.*, 20 Minn. 125, 18 Am. Rep. 360. *Pennsylvania R. Co. v. McCloskey*, 23 Pa. St. 526.

35. Exempting from liability for negligence of officers and directors.—Still others hold that such a stipulation will protect the carrier against the negligence of any of its servants and agents other than its managing officers or directors, the latter being regarded as identical with the corporation itself. *Welles v. New York C. R. Co.*, 26 Barb. (N. Y.) 641, 24 N. Y. 181. *Perkins v. New York C. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282. *Kinney v. Central R. Co.*, 32 N. J. L. 407, 34 N. J. L. 513.

36. Rule where pass was given for a consideration, not a gratuity.—Plaintiff was injured while riding on a train of defendant in the state of New Jersey. Under the law of New Jersey a passenger loses his right of recovery in case of injury resulting from the negligence of the carrier if he accepts and uses a pass containing a provision or notice that the person accepting and using it thereby assumes all risk of accident and damage to person and baggage. *Held*, that neither in New Jersey nor anywhere else will a railroad company be exempt from liability for negligence by reason of a mere notice or declaration upon a pass or ticket when it appears that it was not a gratuity, but was founded upon an actual consideration. *Baush v. Camden & A. R. Co.*, 18 Phila. (Pa.) 392.—**REVIEWING** *Railroad Co. v. O'Hara*, 12 W. N. C. 473.

37. Rule where person rides at request of or for the benefit of carrier.—It is correct to instruct a jury that if plaintiff was lawfully on the road at the time of the collision, and the collision and

consequent injury to him were caused by the gross negligence of the servants of the company, he is entitled to recover notwithstanding the facts that he was a stockholder in the company, and riding by invitation of the president, paying no fare, and not in the usual passenger-cars. *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468.

Plaintiff was the owner of a patented car coupling, and was negotiating with defendant company for its adoption by the latter, and was given a pass and requested to go over the road to see the different officers of the company. The pass contained a condition that the holder assumed all risk of accident, and expressly agreed that the company should not be liable under any circumstances for an injury to his person or property. *Held*, that there was a consideration for the issuing of the pass, which entitled plaintiff to the rights of a passenger for hire, and that he was not bound by the conditions printed on the ticket. *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655.—DISTINGUISHED IN *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553. FOLLOWED IN *Bells v. St. Louis, K. & N. W. R. Co.*, 52 Fed. Rep. 903.

38. Effect of purchase of ticket for drawing-room car.—A stipulation in a free pass exempting the company issuing it from all liability for personal injuries to the person using it is not abrogated by the purchase of a ticket entitling the holder of the pass to occupy a drawing-room car during the journey. *Ulrich v. New York C. & H. R. R. Co.*, 34 Am. & Eng. R. Cas. 350, 108 N. Y. 80, 15 N. E. Rep. 60, 13 N. Y. S. R. 120; *reversing* 13 *Daly* 129.—DISTINGUISHING *Thorpe v. New York C. & H. R. R. Co.*, 76 N. Y. 402.

39. Validity of such condition in pass of mail agent.—A railroad company owes the same degree of care to mail agents riding in postal cars in charge of the United States mails as it does to passengers. *Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; *affirming* 31 Hun 100.

A mail agent was killed while riding on a pass issued for his use by the company, which contained a stipulation exempting the company from liability for any injury that resulted from its negligence. *Held*, that the United States statutes which authorize the government to contract for the

transportation of mail agents do not authorize a contract exempting the company from liability for injuries to the agent; and, such condition being unauthorized and void, the company was liable for an accident resulting from its negligence. *Seybolt v. New York, L. E. & W. R. Co.*, 18 Am. & Eng. R. Cas. 162, 95 N. Y. 562, 47 Am. Rep. 75; *affirming* 31 Hun 100.

PASSWAY.

Over track, reservation of, in deed, see DEEDS, 43.

PAST DAMAGES.

Trial of, by jury, issues as to, see ELEVATED RAILWAYS, 171.

PASTURAGE.

Amount recoverable for injury to, by fire, see FIRES, 345.

Injuries to, from failure to build and maintain fences, see FENCES, 104.

Measure of damages for injuries to, see FENCES, 110.

PASTURE.

Damages for injuries to, by failure to build or repair cattle-guards, see CATTLE-GUARDS, 33.

PATENT DEFECTS.

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For land granted, withholding, until payment of cost of survey, see LAND GRANTS, 61.

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PATENTS FOR INVENTIONS.

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I. WHAT IS PATENTABLE.

1. In general — Utility. — Plaintiff sued for an infringement of a patent on a machine for reforming the ends of worn rails, and defendant claimed, among other things, that there was no evidence of utility, but the evidence showed that defendant had been manufacturing and using the machines for a considerable time. *Held*, that this was evidence in itself of utility. *Tur-rill v. Illinois C. R. Co.*, 3 Biss. (U. S.) 66.

Though rails, chairs, fish plates, and screw bolts had long been used separately on railroads, still the combination used in the improved chair for preventing bolts or nuts used in bracing and joining together iron rails from becoming loose or insecure, patented to Thomas Fogg, May 2, 1864, effected a new purpose, and was patentable. *Yates v. Great Western R. Co.*, 24 Grant's Ch. (U. C.) 495.

2. Lack of invention. — A device which displays only the expected skill of the maker's calling, and involves only the exercise of the ordinary faculties of reasoning upon materials supplied by special knowledge, and facility of manipulation resulting from habitual intelligent practice, is in no sense a creative work of inventive faculty, and is therefore not patentable. *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. Rep. 717.

The following inventions held not patentable for want of invention: The invention patented Sept. 16, 1873, to John A. O'Haire, consisting of a combination of devices by which the rear door of a street-car could be opened and closed by the driver from the front platform in order to let passengers in or out of the car. *Stephenson v. Brooklyn Cross-Town R. Co.*, 114 U. S. 149, 5 Sup. Ct. Rep. 777.

And the patent granted to said O'Haire, March 30, 1875, for "an improvement in signaling devices for street-cars" whereby passengers, by means of cords or straps attached to bells or gongs, might signal the driver without rising from their seats. *Stephenson v. Brooklyn Cross-Town R. Co.*, 114 U. S. 149, 5 Sup. Ct. Rep. 777.

The patent granted to John Stephenson, Sept. 7, 1875, which consists of a mirror so arranged that the driver of a street-car may see what goes on in the car behind him is but a combination of well-known elements. *Stephenson v. Brooklyn Cross-Town R. Co.*, 114 U. S. 149, 5 Sup. Ct. Rep. 777.

The patent granted to Augustus Day, Aug. 27, 1878, for a horse-railway track cleaner or snow plow. *Day v. Fair Haven & W. R. Co.*, 23 Fed. Rep. 189; *affirmed in* 132 U. S. 98, 10 Sup. Ct. Rep. 11.

The patent granted Nov. 18, 1884, to Edward S. Richards for "a grain-transferring apparatus" is but a combination of old parts, with nothing new in the combination. *Richards v. Michigan C. R. Co.*, 40 Fed. Rep. 165.

Patents Nos. 339,913 and 314,459, granted for an improvement in car trucks, but in fact only an attempted improvement in car-truck bolsters. *McCarthy v. Lehigh Valley R. Co.*, 43 Fed. Rep. 384.

3. Patentable novelty. — In trucks already in use on railroad cars the king bolt which held the car to each truck passed through a bolster supporting the weight of the car, and through an elongated opening in the plate below, so as to allow the swiveling of the truck upon the bolt, and lateral motion in the truck; and the bolster was suspended by divergent pendent links from brackets on the frame, whereby the weight of the car tended to counteract any tendency to depart from the line of the track. *Held*, that a patent for employing such a truck as the forward truck of a locomotive engine with fixed driving wheels was void for want of novelty. *Pennsylvania R. Co. v. Locomotive E. S. Truck Co.*, 110 U. S. 490, 4 Sup. Ct. Rep. 220; *reversing* 2 Fed. Rep. 677, 10 Phila. (Pa.) 252.

The patent issued to William W. Rosenfield, Nov. 13, 1883, for a device for closing the gates of street-cars as passengers get on or off, especially designed for elevated railways, is void as not possessing any patentable novelty. *Aron v. Manhattan R. Co.*, 26 Fed. Rep. 314; *affirmed in* 132 U. S. 84, 10 Sup. Ct. Rep. 24.

The patent issued to Facer & Shaub, Feb. 6, 1883, for "a device for manufacturing car tires" is invalid as possessing nothing that is novel or new. *Facer v. Midvale Steel-Work Co.*, 38 Fed. Rep. 231.

The patent issued to Asa E. Hovey, Sept. 18, 1877, for "an improvement in endless-rope traction or cable railways" is void as not possessing any patentable novelty. *National Cable R. Co. v. Mt. Adams & E. P. I. R. Co.*, 38 Fed. Rep. 840.

4. Anticipation. — The patent issued to Kearney & Tronson, April 11, 1871, for improvements in spark arresters on loco-

tives, the spark arrester being placed in the smokestack, was not anticipated by the patent issued to J. Smith, on March 7, 1871, as plaintiff's patent was applied for before the other. The date of the application, if it describes the invention sufficiently, is conclusive evidence of the date of the invention. *Kearney v. Lehigh Valley R. Co.*, 32 *Fed. Rep.* 320.

The patent issued to William Eppelsheimer, March 16, 1875, for an improvement in an apparatus for connecting street-cars "with endless traveling devices," consisting of a combination for connecting a street-car or other vehicle with an endless moving rope or cable for moving the same, and composed of a movable jaw and a transverse bar carrying pulleys, was not anticipated by the patent to Andrew S. Hallidie, granted July 16, 1872, which answers the same practical purpose, but is so different in arrangement and operation as not to be substantially the same. *Root v. Third Ave. R. Co.*, 39 *Fed. Rep.* 281; *affirmed in* 146 *U. S.* 210, 13 *Sup. Ct. Rep.* 100.—REFERRED TO IN *Root v. Sioux City Cable R. Co.*, 42 *Fed. Rep.* 500.

A spark arrester and consumer for locomotives which consists in the combination of a blast pipe with a return flue so arranged that the sparks are driven by the blast in a continuous current through the flue from the smokepipe back into the fire chamber without resting is not anticipated by prior spark arresters which, though in some respects of construction the same, were not practically effectual to produce a continuous current carrying the sparks into the fire chamber without resting. *Pike v. Providence & W. R. Co.*, 1 *Holmes (U. S.)* 445.

5. Mechanical equivalents.—The doctrine of equivalents should be critically scanned where there may be a difference in relation to two car brakes, which, in some respects, operate by equivalent devices, and in other respects do not, to ascertain whether one has become a practical machine, while the other is not. *Sayles v. Chicago & N. W. R. Co.*, 1 *Biss. (U. S.)* 468.

A different arrangement of parts which possesses no special advantage over a well-known and existing device is not patentable. Thus the lower bar of a car bolster which merely has its ends turned up and back so as to support the upper bar is equivalent to a flange attached to the lower bar which effects the same purpose, and where the latter

is already known the former is not patentable. *McCarty v. Lehigh Valley R. Co.*, 43 *Fed. Rep.* 384.

6. Prior public use.—Plaintiff sued for an infringement of a patent for "an improvement in the construction of cable railways." The defense was that the patent was in public use more than two years before the application, and therefore invalid. Plaintiff claimed that the use was experimental. The proofs showed that the invention was put in operation some two years after its discovery, and regularly used on a road of which plaintiff was superintendent for some three years before the application, and no changes were ever made. *Held*, that such use was not experimental, but was such a public use as to defeat the patent. *Root v. Third Ave. R. Co.*, 146 *U. S.* 210, 13 *Sup. Ct. Rep.* 100; *affirming* 39 *Fed. Rep.* 281.

When an improvement or a machine has been once made and used, it is not necessary that it should be used up to the time that another person may make a similar improvement. If it has been once used and is a practical improvement or machine, no one else can claim to be the inventor. *Sayles v. Chicago & N. W. R. Co.*, 1 *Biss. (U. S.)* 468.

The law allows an inventor a reasonable time to perfect his invention by experiment and ascertain its utility before it obliges him to take out his patent; and in the case of plaintiff's invention experiments could be made only by putting the car into the service of those controlling lines of railroads. In applying the rule a jury must take into consideration the nature of the invention and all the circumstances of the case. But an inventor is bound to act in good faith, and must not suffer his invention to be used except for the purposes of experiment. *Winans v. Schenectady & T. R. Co.*, 2 *Blatchf. (U. S.)* 279.

Plaintiff sued for an infringement of a patent for "a fare register" for street-cars, and the defendant set up as a defense a public use for more than two years prior to the application. The evidence showed that the public use was upon street-cars, in the only manner which it could conveniently be used for the purpose of actual experiment to ascertain the best mode of construction. *Held*, that this was allowable and did not consist of a public use. *Railway Register Mfg. Co. v. Broadway & S. A. R. Co.*, 22 *Fed. Rep.* 655.

Plaintiff in the specification of his patent claimed as his invention "an improvement in the construction of the axles or bearings of railway or other wheeled carriages," and it appeared that the improvement, though it had never before been applied to railway carriages, was well known as applied to other carriages. *Held*, that the patent was not good. *Winans v. Boston & P. R. Co.*, 2 Story (U. S.) 412.

II. ISSUING AND OBTAINING PATENTS.

7. Specifications—Delay in patent office.—Patentees cannot be held accountable for the delays in the patent office, the law, by its terms, providing for the perfection of imperfect and insufficient specifications even after the patent issues. *Sayles v. Chicago & N. W. R. Co.*, 1 Biss. (U. S.) 468.

8. Drawings.—A patent issued in 1834 had no drawings annexed to it, and the specification contained no reference to any drawings. It was recorded anew in June, 1837, under the act of March 3, 1837 (5 U. S. St. at L. 191), and a drawing, verified by the oath of the patentee under section 1 of the act, was filed in November, 1838. *Held*, that a certified copy of such drawing was admissible in evidence under section 2 of said act, in connection with certified copies of the patent and specification, and that the whole together were *prima facie* evidence of the particulars of the invention and of the patent granted therefor. *Winans v. Schenectady & T. R. Co.*, 2 Blatchf. (U. S.) 279.

As a general rule, such a drawing cannot be used to correct any material defect in the specification unless it corresponds with a drawing filed with the original specification for the patent; otherwise, in case of discrepancy, the specification must prevail; nor can such a drawing have the same force and effect as if it had been referred to in the specification, nor is it to be deemed and taken as part of the specification. *Winans v. Schenectady & T. R. Co.*, 2 Blatchf. (U. S.) 279.

9. The claim.—The scope of a patent should be limited to the invention covered by the claim, and though the claim may be illustrated, it cannot be enlarged, by language used in other parts of the specification. *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112.

Where it becomes important for the court to determine what is covered by letters patent, the court may look to the claim made by the patentee. *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112.

The claim of the patent granted Oct. 1, 1834, to Ross Winans for an improvement in the construction of cars is "the before-described manner of arranging and connecting the eight wheels which constitute the two-bearing carriages with a railroad car so as to accomplish the end proposed by the means set forth, or by any others which are analogous and depend upon the same principles." *Held*, that the claim is for a car which is constructed after the manner of the patent, and evidence that certain parts of it were known before does not affect the novelty of the invention. *Winans v. Schenectady & T. R. Co.*, 2 Blatchf. (U. S.) 279.

10. Disclaimer.—The specifications accompanying the English patent issued to William Maylor, July 21, 1863, for an improvement in steam safety valves contains the statement: "By this means I am enabled to avail myself of the recoil action of the steam against the valve, for the purpose of facilitating the further lifting of such valve when once opened; but I wish it to be understood that I lay no claim to such recoil action, nor to the extension of the valve latterly beyond its seat." Subsequently a patent was issued in the United States to plaintiff Ashcroft, assignee of said Maylor, without any disclaimer. *Held*, that the disclaimer in the English patent showed that the patentee was not the first person to discover the means of using the recoil action of the steam, and that the American patent must be limited to the other elements of the device. *Ashcroft v. Boston & L. R. Co.*, 97 U. S. 189.

III. VARIOUS CONTRACTS INVOLVING PATENT RIGHTS.

11. In general.—A person who approves of a patented right, but refuses to pay the price charged for it, is inexcusable for using it. *Simpson v. Mad River R. Co.*, 6 McLean (U. S.) 603.

The fact of use is evidence of its utility, and should subject the defendant to damages. *Simpson v. Mad River R. Co.*, 6 McLean (U. S.) 603.

When a ship carpenter for his own private yard invents an improvement in marine

railways, but before applying for a patent he goes into the government service, and the invention is adopted by the government with the inventor's consent, and with knowledge that he intends to take out a patent, and with the understanding that if it succeeds he shall be paid a royalty, a contract may be implied. *Talbert v. United States*, 25 Ct. of Cl. 141.—DISTINGUISHING *Solomon v. United States*, 22 Ct. of Cl. 342.

12. Assignments.—Plaintiff had granted a railroad company the right to use a patent brake on its "own cars" only. Afterwards the road became indebted to defendant, and it granted to him the right to operate the road and to receive the revenues, and to apply the net income of the road to the payment of his debt. *Held*, that defendant was not liable to plaintiff for an infringement of the patent, as he only operated the road as the agent of the company. *Emigh v. Chamberlain*, 1 Biss. (U. S.) 367.

The owner of a patented improvement on brakes assigned it to a railroad company "for and during the term for which said letters patent are or may be granted," with the right to make, construct, and use the same. The patent was extended for a second term. *Held*, that the company might continue to use the same for its own use, but for no other purpose. *Wood v. Michigan S. & N. I. R. Co.*, 2 Biss. (U. S.) 62.

W. B. Mann became the patentee of a certain style of sleeping cars, and afterwards assigned to plaintiff company the right to manufacture such cars, having an interest therein himself, and being its president. He believed that his assignment only extended to the right to manufacture and sell in the United States, and, acting under this belief, he wrote to defendant company, which was engaged in building cars, asking for terms upon which it would construct him certain cars to be used in another country; and, among the terms agreed upon, defendant agreed to pay him a certain royalty and five per cent. commission additional. *Held*, that plaintiff's assignment included the right to manufacture and sell everywhere, and therefore it was entitled to the royalty and commission agreed to be paid to its president. *Mann's Boudoir Car Co. v. Gilbert Car Mfg. Co.*, 23 N. Y. Supp. 607, 69 Hun 245; affirmed in 141 N. Y. 571, 36 N. E. Rep. 345, 57 N. Y. S. R. 867.

13. Licenses.—A license to a railroad

company to use a patent brake extends no further than the road then used, or which the company is then authorized to construct. It does not extend to any and all lines which the company, under a new name and organization, may thereafter be authorized to build, lease, or use. *Emigh v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 400.

A license by one of three patentees to use a patented improvement in car-brake shoes clothes the licensee with the right to use it, and he becomes liable for the contract price. *Dunham v. Indianapolis & St. L. R. Co.*, 7 Biss. (U. S.) 223.

A license to a railroad company to construct and use a patented car brake "on any and all cars belonging to said company, and to use the same improvement upon the entire length of its road, and upon all parts thereof, * * * for and during the term for which said letters patent are or may be granted," covers the use of brakes belonging to the company attached to trucks and running gear belonging to it, even though the superstructures which are borne upon the trucks do not belong to the company. Such license does not convey the right to use the brake during an extended term of the patent, granted after the making of the license. *Hodge v. Hudson River R. Co.*, 6 Blatchf. (U. S.) 85.—QUOTING *Phelps v. Comstock*, 4 McLean (U. S.) 353; *Case v. Redfield*, 4 McLean 526; *Clum v. Brewer*, 2 Curtis (U. S.) 506; *Pitts v. Hall*, 3 Blatchf. 201.

The only right which the company has under such extended term is the right given by the act of July 4, 1836, § 18 (5 U. S. St. at L. 125), to continue to use until they are worn out, or as long as they can be repaired, such brakes as they had lawfully in use under the license when the first term of the patent expired. *Hodge v. Hudson River R. Co.*, 6 Blatchf. (U. S.) 85.

A company in running its cars on the railroad of another company by permission cannot be considered as operating the railroad, within the meaning of a license granting to the latter company, "and any and all other parties that may hereafter own or operate" such railroad, the right to construct and use a patented invention "on any and all cars now or hereafter owned by said company, or by parties that may hereafter own or operate" said railroad. *Hodge v. Hudson River R. Co.*, 6 Blatchf. (U. S.) 85.

Where an inventor consents to the use of

his device before a patent has been applied for, but coupled with a condition that he shall be paid for it when patented, a defendant does not acquire an implied license nor a right to gratuitous use under U. S. Rev. St. § 4899. *Talbert v. United States*, 25 Ct. of Cl. 141.

A railroad 58 miles long, having a license to use a patented improvement, subsequently acquired, by consolidation and change of name, 210 miles more. *Held*, that the license did not extend to the newly acquired portion. *Emigh v. Chicago, B. & Q. R. Co.*, 2 Fish. Pat. Cas. 387.

Where there is an established license fee of so much per car per month for the use of a patented car brake, a court in a cause in equity in a suit for profits from the use of the patent, where the proof of profits is otherwise difficult, will accept the license fee as a proper basis for estimating the amount of complainant's recovery. *Emigh v. Baltimore & O. R. Co.*, 4 Hughes (U. S.) 271, 6 Fed. Rep. 283.

The terms "upon and about the locomotive engines used by the said company on the Penn. R. or any road or roads now owned or that may hereafter be owned or operated by said company" embrace not only locomotive engines in use at the date of the license upon roads then owned or operated by the company, but also such other engines as it might thereafter use, and other roads which it might thereafter operate. *Matthew v. Pennsylvania R. Co.*, 8 Fed. Rep. 45, 14 Phila. (Pa.) 602.

IV. INFRINGEMENT, AND REMEDIES THEREFOR

14. Jurisdiction.—Although the term of a patent has expired before suit is brought, a bill may be maintained for an infringement, where it seeks a discovery and accounting of profits made by the defendant's use of the patent, where such profits are of such nature as to require an investigation, which a court of law is not as competent to make as a court of equity. *Sayles v. Dubuque & S. C. R. Co.*, 5 Dill. (U. S.) 561.

Under U. S. Rev. St. §§ 629, 711, 4821, a bill in equity will not lie solely to recover damages for the infringement of a patent, but it will where an injunction or a discovery and an account for profits are sought. *Vaughan v. East Tenn., V. & G. R. Co.*, 1 Flipp. (U. S.) 621.

15. What amounts to infringement.—The patent issued to Kearney & Tronson, April 11, 1871, for an improved locomotive spark arrester, consisting of a grating with vertical bars placed at the foot of the spark arrester, is infringed by the arrester used by defendants, which consists of upright cast-iron bars with connections between them, with spaces between the bars. *Kearney v. Lehigh Valley R. Co.*, 32 Fed. Rep. 320.

A cable-railway patent for a dummy engine to carry no passengers, and with the grip located under the forward axle, is infringed by a car similarly constructed intended to carry passengers, and in which the grip is situated between the axles. *Pacific Cable R. Co. v. Butte City St. R. Co.*, 55 Fed. Rep. 760.

A patent for a spark arrester and consumer which consists in the combination of a blast pipe with a return flue so arranged that the sparks are driven in a continuous current through the flue from the smokepipe back into the fire chamber is infringed by a spark arrester and consumer consisting of a blast pipe and two return flues so arranged that the sparks are carried into the fire chamber in a continuous current through the flues without resting, although the current is accelerated, and the combustion of the returned sparks is aided by a current of air brought into the return flues by an additional device. *Pike v. Providence & W. R. Co.*, 1 Holmes (U. S.) 445.

16. What does not.—Plaintiff sued for an infringement of a patent in the manner of placing the tire or bands upon the body of car wheels. The evidence showed that one used the rounded flange on the tire, while the other used an angular one. *Held*, that there was no infringement. *Lehigh Valley R. Co. v. Mellon*, 104 U. S. 112.

Plaintiff sued for an infringement of a patent for an improvement in electric signaling apparatus for railroads, the essential feature of which consisted of an insulated section of the track. The signaling apparatus used by defendants dispensed with this insulated section and used the earth for the return current to complete the circuit. *Held*, that there was no infringement. *Electric R. Signal Co. v. Hall R. Signal Co.*, 114 U. S. 87, 5 Sup. Ct. Rep. 1069.

Plaintiff sued for an infringement of a patented steam bell ringer, the essential fea-

ture of which is a piston and piston rod which are detached from each other. *Held*, that there was no infringement in the apparatus used by defendants, which dispensed with the piston and piston rod. *Snow v. Lake Shore & M. S. R. Co.*, 121 U. S. 617, 7 Sup. Ct. Rep. 1343; affirming 18 Fed. Rep. 602.

Plaintiff sued for an infringement of a patent on the mode of constructing elevated street railways, which was described as "composed of a series of arches, supported on each side of the street upon iron shoes imbedded in masonry. These arches are connected by braces of an ordinary and suitable construction which will impart sufficient strength and rigidity to the whole superstructure to prevent any vertical or lateral displacement of the railway." *Held*, that a railway constructed without such arches, which were the essential features of plaintiff's patent, was not an infringement. *Morgan El. R. Co. v. Pullman*, 14 Fed. Rep. 648.

Plaintiff patented a continuous mileage railroad ticket, consisting of leaves or sheets bound together in book form, each having a number of mileage coupons, the leaves being connected at alternate ends for tearing off in a single piece the required number of single coupons for mileage traveled. Defendant used a ticket, printed with mileage coupons connected, with one end fastened to a cover and folded up like a pocket map, the coupons to be torn off over the edge of the lid. The essential feature of plaintiff's patent was a ticket bound in book form. *Held*, that it was not infringed by defendant's ticket. *Eastman v. Chicago & N. W. R. Co.*, 39 Fed. Rep. 552.

17. Who liable for infringement.—A Pennsylvania railroad company is responsible for an infringement of a patent in building cars, though it maintains but a nominal organization, its stock being held by a Maryland company with whose road the defendant road connects, and which furnishes the entire rolling stock of the defendant company. *York & M. L. R. Co. v. Winans*, 17 How. (U. S.) 31.—DISTINGUISHED IN *Arrowsmith v. Nashville & D. R. Co.*, 57 Fed. Rep. 165. QUOTED IN *Naglee v. Alexandria & F. R. Co.*, 32 Am. & Eng. R. Cas. 401, 83 Va. 707; *Ricketts v. Chesapeake & O. R. Co.*, 41 Am. & Eng. R. Cas. 42, 33 W. Va. 433, 7 L. R. A. 354, 10 S. E. Rep. 801.

A transportation company was organized to provide a through freight line between certain cities in the eastern and others in the western states, and contracted with companies owning railroads between those cities to furnish cars for use throughout the line. Defendant was the general agent of the transportation company, with power to contract for the carriage of goods, but without power to say in what cars they should be carried, or what axle boxes should be used on the cars. Axle boxes which infringed plaintiff's patent were used on the cars used by the transportation company. *Held*, that defendant was not liable as an infringer of plaintiff's patent. *Lightner v. Kimball*, 1 Low. (U. S.) 211.

18. Application to enjoin.—A bill praying an injunction to restrain the infringement of a patent which only describes it as "an improvement in cable railways," and that letters patent have been issued for the same, and neither the patent nor the specifications are made an exhibit therewith, is open to demurrer as not showing in what the patent consists. *Wise v. Grand Ave. R. Co.*, 33 Fed. Rep. 277.

An injunction *pendente lite* to restrain the infringement of a patent should not be granted where the evidence is *ex parte*, and leaves the validity of the patent in doubt, and where the interests involved are large, and the granting of the injunction might produce as great injury as refusing it, and where the defendant is able to respond in damages, and the damages are readily ascertained. *Pullman v. Baltimore & O. R. Co.*, 4 Hughes (U. S.) 236, 5 Fed. Rep. 72.

A railroad company used an appliance patented by plaintiffs for about four years before complaint was made of the infringement, and for about two years longer before suit was brought. *Held*, that the delay formed no objection to a recovery. *Yates v. Great Western R. Co.*, 24 Grant's Ch. (U. C.) 495.

19. Matters of defense.—Where a company is sued for infringement of a patent on valves, and it admits the validity of the patent and an infringement, it cannot avoid an injunction by showing that the patent is of very small value, and offering that plaintiff may take a decree for nominal damages, and an injunction against the use of any more of the valves, if plaintiff will grant it the right to use those already on its trains. In such case plaintiff is entitled to

an accounting before a master to ascertain the damages. *Campbell P. P. & M. Co. v. Manhattan R. Co.*, 49 *Fed. Rep.* 930.

Where the application is for an injunction to restrain the use of a patented article, it is no defense that plaintiff has never manufactured or sold any of the articles, or sold the privilege to others to do so; and especially is this true where defendant and other roads refused to pay the price demanded, and adopted the same without permission, expecting to pay less by way of damages than the amount asked by plaintiff. *Campbell P. P. & M. Co. v. Manhattan R. Co.*, 49 *Fed. Rep.* 930.

Where a company has infringed a patent by adopting the patented article without permission and placing it upon its trains, it is no excuse against granting an injunction that it would work a great hardship to the company and seriously inconvenience it in carrying passengers, as in such case the court can provide by decree for a gradual removal of the patented article from the cars. *Campbell P. P. & M. Co. v. Manhattan R. Co.*, 49 *Fed. Rep.* 930.

20. Evidence.—Plaintiff sued for the infringement of a car-brake patent, and defendant insisted that the same brake had been used some years prior to the patent on a single car on a certain occasion, but on this point there was some conflict of evidence. It was admitted that the brake was of great utility. *Held*, that the fact that it was only used on a single car, unexplained, is conclusive evidence that it did not exist. *Sayles v. Chicago & N. W. R. Co.*, 3 *Biss. (U. S.)* 52; *reversed in* 97 *U. S.* 554.

In deciding the question of the infringement of a patent the conduct of defendants in relation to their machines, in constantly approaching as near as possible to plaintiff's machine, yet not close enough to infringe it, may be considered. *Turrill v. Illinois C. R. Co.*, 5 *Biss. (U. S.)* 344.

Where plaintiff sues for the infringement of a patent upon steel rails, and one of the defenses set up is that the same kind of rail was in public use before the patent was applied for, and there is evidence that rails of the same general character were manufactured before the application, the exact shape of the rail becomes material, and a *subpoena duces tecum* may issue to compel the production of drawings descriptive of the shape of the rail. *Johnson S. S. R. Co. v. North Branch Steel Co.*, 48 *Fed. Rep.* 191.

21. When an injunction will be refused.—Where plaintiff owns a patent on car couplings, and does not manufacture or use the patent, but merely sells the right or license to others to use it, a preliminary injunction against such infringing couplings as are already in use should be refused where there is a wide difference of views as to the amount of royalty to be paid; but plaintiff is entitled to an injunction against the use of any other couplings, and he may require security if he can show that defendant is unable to pay the damages. *Campbell P. P. & M. Co. v. Manhattan R. Co.*, 47 *Fed. Rep.* 663.

The infringement of a patent will not be enjoined after the expiration of the term for which the patent issued. *Vaughan v. Central Pac. R. Co.*, 4 *Sawyer. (U. S.)* 280.

Where the owner of a patent brake only sells the right to use it, his damages for an infringement is the value of the license to use the brake, which may be readily ascertained in an action at law, and equity relief may be refused. *Vaughan v. Central Pac. R. Co.*, 4 *Sawyer. (U. S.)* 280.

22. Reference to ascertain damages.—Where the court has already passed upon the merits of an infringement suit, and has sustained the validity of the patent, and the case is referred to a master to ascertain and report the damages, he should confine his examination to the simple question of the amount of damages incurred, and should not consider the general question of infringement. *Turrill v. Illinois C. R. Co.*, 5 *Biss. (U. S.)* 344.

23. Measure of damages.—Plaintiff had a patent for "an improvement in locomotive lamps," containing eleven claims, each of which was a claim to a combination of certain members, no member being original with plaintiff. Defendant had used three forms of lamps, two of which infringed only some of the claims, and one all the claims, and had burned only kerosene oil in them. Plaintiff's lamp was the first one which successfully burned kerosene oil in a locomotive lamp. In suit in equity for infringement there was a decree for plaintiff and a reference to a master. Plaintiff exercised his monopoly by making and selling the lamps. *Held*: (1) that plaintiff was entitled to recover, as profits, the saving made by defendant in burning kerosene oil in the infringing lamps, and not merely a proper license fee for each

lamp; (2) that part of such saving was the value of the additional lard oil defendant would have burned in the eleven lamps used by it if it had not used kerosene oil in them, they being capable of burning lard oil; (3) that it also saved the difference between the value of the kerosene oil it used and the value of the higher priced lard oil it would otherwise have been obliged to use; (4) that plaintiff was entitled to the same rate of profit for the lamps which contained less than all the claims as for those which contained all, because it infringed in each lamp enough of the claims to burn kerosene oil successfully. *Williams v. Rome, W. & O. R. Co.*, 18 *Blatchf. (U. S.)* 181, 2 *Fed. Rep.* 702.

Where the suit is for infringement of a patent on dumping cars, in ascertaining the damages the jury should ascertain what would be a reasonable royalty for defendant to have paid for the use of the cars at so much per car; and in determining this point the utility and cheapness of operation for the use of the cars in question as compared with others known or used at the time of the infringement, and the saving, if any, to defendant by the use of such cars, should be considered. *Ross v. Montana Union R. Co.*, 45 *Fed. Rep.* 424.

The rule is that the measure of profits as distinguished from damages for which an infringer is responsible is the aggregate of gains or savings which he has made from the use of the patented invention above what he could have made in doing the same work from the use of any other device or process existing at the time capable of accomplishing the same purpose or attaining the same result, and free and open to the public use. *Locomotive Safety Truck Co. v. Pennsylvania R. Co.*, 14 *Phila. (Pa.)* 432.

V. DECISIONS RELATIVE TO PARTICULAR PATENTS.

24. Apparatus for supplying fuel and water to tenders. — Patent No. 99,723, granted to A. H. Spencer, Feb. 8, 1870, having for its object the utilization of the traction of a moving locomotive to raise suitable coal- or water-delivery apparatus so that their contents may be discharged into the tender of a locomotive, is valid when construed as a claim for the particular means shown to perform the work described. *Spencer v. Pennsylvania R. Co.*, 34 *Fed. Rep.* 899.

25. Bridge-building apparatus.

Under the Dubois patent for building bridge piers the first claim is for an instrument or device called a floating coffer-dam; and the second claim is for the use of the tube, without reference to its shape or material, or of how many parts composed, and whether long or short. *Philadelphia, W. & B. R. Co. v. Dubois*, 12 *Wall. (U. S.)* 47.

26. Cable-railway construction.

The Root patent, No. 262,162, granted Aug. 1, 1882, for an improvement in the construction of cable railroads is invalid because the invention had been in use for more than two years prior to patentee's application for a patent. *Root v. Third Ave. R. Co.*, 37 *Fed. Rep.* 673.

The first claim of patent No. 95,372, granted to Asa E. Hovey, Sept. 18, 1877, for "an improvement in endless-rope traction railways," is void because it had been anticipated and in actual use as early as 1873. *National Cable R. Co. v. Mt. Adams & E. P. I. R. Co.*, 38 *Fed. Rep.* 840.

Patent No. 241,044, granted to S. R. Matthewson, May 3, 1881, for "a cable tramway for carrying cars around curves," which consists of certain vertical rollers with intervening vertical plates, is void for want of novelty, having been anticipated by an English patent in 1872 which combined substantially the same mechanism. *Root v. Third Ave. R. Co.*, 43 *Fed. Rep.* 73.

27. Cables and grips. — Patent No. 160,757, issued to William Eppe'sheimer, March 16, 1875, for "an improvement in a clamp apparatus for connecting street cars with endless traveling devices," the novelty of which is claimed to consist in attaching the ends of the gripping device two vertical pulleys, by which the cable is supported when the car is stopped, and thus the wearing of the lower jaw by friction is avoided, as well as avoiding the effect of friction on the cable itself, is not infringed by the device used by defendants, in which the cables constantly rest upon the pulleys, and the lower jaw is fixed and is not touched by the cable when the car is at rest. *Root v. Sioux City Cable R. Co.*, 42 *Fed. Rep.* 500. — REFERRING TO *Root v. Third Ave. R. Co.*, 39 *Fed. Rep.* 281.

Patent No. 195,505, issued to A. S. Hallidie, Sept. 26, 1877, for an improvement in the mechanism used in connection with cable railways, and which is described in the first claim as a combination of pulleys

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and a single tube so arranged that an endless cable can run through it, thereby forming two cables running in different directions, is void for want of patentable novelty, as the same result had formerly been reached by the use of separate tubes. *National Cable R. Co. v. Sioux City Cable R. Co.*, 42 Fed. Rep. 679.

There was nothing novel or patentable about the claim of the above patent in so far as it covered the combination of a diagonal tube between the main cable tubes, with a slot therein, so as to allow a car to pass from one track to another. *National Cable R. Co. v. Sioux City Cable R. Co.*, 42 Fed. Rep. 679.

But the third claim in the above patent, for a pivoted switch rail and spring so arranged as to obviate the objection of the opening made at the meeting of the slot in the branch tube with that in the main tube, was novel and patentable, though there had been previously used devices of somewhat the same nature. *National Cable R. Co. v. Sioux City Cable R. Co.*, 42 Fed. Rep. 679.

Patent No. 244,147, issued to Henry Root, for a track brake for railway cars, achieves a new and useful result sufficient to sustain the patent, and is not void as a mere aggregation of old elements. *Pacific Cable R. Co. v. Butte City St. R. Co.*, 52 Fed. Rep. 863.

Claims 2 and 3 of patent No. 203,249, issued to T. H. Day, May 7, 1878, for a rope tramway and apparatus, disclose no invention, and therefore are not patentable. *Pacific Cable R. Co. v. Butte City St. R. Co.*, 53 Fed. Rep. 545.

Patent No. 244,147, issued to Henry Root, July 12, 1881, for a tension apparatus designed for taking up the slack of the cable in cable railways, is so far different in kind and degree from the preceding patent issued to William Eppelsheimer, Aug. 7, 1877, as to constitute an invention. *Consolidated P. Cable Co. v. Pacific Cable R. Co.*, 53 Fed. Rep. 382, 7 U. S. App. 434, 3 C. C. A. 566.

In the above patent plaintiff claims the invention to be a cable-pulley having its axis journaled upon a car which moves on rails or timbers, which again travel on a second track, which is designated as a "secondary track." In defendant's device part of the rails and timbers which appear in plaintiff's device are cut off, and the movable car, which supports the cable pulley, and upon which it is journaled, as in plaintiff's, is let down so that the car which

carries the cable wheel and the one which carries the chain wheel move on the same track. *Held*, that the principle and operation of the machines are the same, and an infringement is not avoided by the few alterations made. *Consolidated P. Cable Co. v. Pacific Cable R. Co.*, 53 Fed. Rep. 382, 7 U. S. App. 434, 3 C. C. A. 566.

Plaintiff sued for an infringement of the third claim of the Eppelsheimer patent, No. 189,204, issued April 3, 1877, for "an improved clamp apparatus for tramways or street railways," which consists of five old elements, one being friction rollers, which secure the grip of the cable. *Held*, that the device used by defendants, which combines four of the same elements, and the fifth, a bell crank or toggle, in place of the friction rollers, is an infringement. *Consolidated P. Cable Co. v. Pacific Cable R. Co.*, 53 Fed. Rep. 385, 7 U. S. App. 444, 3 C. C. A. 570.

Patent No. 271,727, granted to D. J. Miller, Feb. 6, 1883, for improvements in the construction of cable railways, and consisting of a combined cable support and cable lifter so arranged that horizontal sections of the cable can be raised sufficiently to be received into the gripper at any desired point, is valid as combining old elements so as to produce a new and useful result. *American Cable R. Co. v. Mayor, etc., of N. Y.*, 56 Fed. Rep. 149.

There is nothing in the specification or claim of the above patent which confines it to use in tunnels; and an infringement by defendant's apparatus is not avoided by the fact that defendant instead of raising two pulleys, as in plaintiff's patent, also raised others, and thus elevated a longer section of the cable. *American Cable R. Co. v. Mayor, etc., of N. Y.*, 56 Fed. Rep. 149.

28. Car-axle boxes.—Reissued patent No. 3243, to T. P. Stewart of Dec. 22, 1868, for improvements in car-axle boxes, and having for its essential feature two tubes fitting one within the other without flanges, is void for want of patentable novelty. *Baltimore Car-Wheel Co. v. North Baltimore Pass. R. Co.*, 21 Fed. Rep. 47.

29. Car brakes.—Patent No. 9109, issued to Henry Tanner, July 6, 1852, for an improvement in car brakes, is void so far as it applies to double brakes operating on two trucks of a car at the same time by a single force through connecting rods, as it had been publicly used before the Tanner brake

was invented; and only the specific improvements made by the patent are valid. *Chicago & N. W. R. Co. v. Sayles*, 97 U. S. 554; reversing 3 Biss. 52.

Claim two of patent No. 40,156, granted to James Bing, Oct. 6, 1863, for an improved shoe for car brakes, does not embody any lateral rocking motion as an element of combination; but there is patentable novelty in the claim, and a shoe which substantially combines the same parts infringes it. *Lake Shore & M. S. R. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 229, 4 Sup. Ct. Rep. 33.

Stevens' patent of Nov. 25, 1851, for a car brake fairly interpreted means the particular combination and arrangement of levers, link rods, and rubbers in a car so as to produce the described result, viz., the retarding of each wheel of the car when the brake is applied with uniform force, and is new. *Emigh v. Chicago, B. & Q. R. Co.*, 1 Biss. (U. S.) 400.

Patent No. 304,863, issued to Henry Root for "a track brake for railway cars," was issued after a hearing on the question of interference with a previous patent issued to Patterson, Sept. 25, 1883, and was, therefore, not anticipated by the latter. In such case the fact that the second patent was issued is *prima facie* evidence that it was first invented. *Pacific Cable R. Co. v. Butte City St. R. Co.*, 52 Fed. Rep. 863.

The above Root patent is infringed by a car brake used by defendants which combines substantially the same construction, except that the toggle lever is connected with a shaft by a rod or link, while in the Root patent they are connected directly. *Pacific Cable R. Co. v. Butte City St. R. Co.*, 52 Fed. Rep. 863.

30. Car couplers.—Patent No. 337,780, issued to Charles Mueller, March 9, 1886, for an improvement in car couplings, the essential feature of which is a draw head on which the strain is received upon a plate held in place by a spring, is not infringed by the coupling used by defendants, in which the plates are bent in towards the center of the car and do not enter the draft bar. *Joslin v. Northern Pac. R. Co.*, 55 Fed. Rep. 66.

Claim 2 of patent No. 50,518, granted to H. H. Trenor, Oct. 17, 1865, upon a car coupler, and which is described as a method of coupling the cars or vehicles of a train of two or more cars or vehicles, cannot be

limited to the coupling of cars or vehicles having four-wheeled trucks, and is therefore void as having been anticipated by a previous English patent which combined the same method in coupling two-wheeled carriages. *Perrin v. Manhattan R. Co.*, 56 Fed. Rep. 503.

31. Car gates.—Letters patent No. 288,494, granted to Joseph Aron, assignee of W. W. Rosenfield, Nov. 13, 1883, for an improvement in railway car gates, are invalid, the invention containing no patentable novelty. *Aron v. Manhattan R. Co.*, 132 U. S. 84, 10 Sup. Ct. Rep. 24; affirming 26 Fed. Rep. 314.

32. Car trucks.—The specifications of the Winans patent, granted Oct. 1, 1834, for an improvement in cars said nothing about the mode of attaching the car to the motive power or to the next car in a train, nor anything about the use of side bearings to prevent the rocking of the car from side to side, but the drawing filed in November, 1838, showed that the car was to be attached to the motive power and to the next car in a train by its body, and not by a perch from the truck, and also showed a provision for side bearings. Held, that the specification afforded a sufficient description of the invention independently of the drawing, and that the mode of attaching the car and the use of side bearings did not enter into the essence of the invention or constitute any substantial part of the improvement. *Winans v. Schenectady & T. R. Co.*, 2 Blatchf. (U. S.) 279.

The location of the trucks relative to each other under the body of the car, as well as the near proximity of the two axles of each truck to each other, form an essential part of the arrangement of the patentee, who states in his specification that the closeness of the fore and hind wheels of each truck, taken in connection with the use of two trucks arranged as remotely from each other as can conveniently be done for the support of the car body, with a view to the objects and on the principles set forth by him, is considered by him as an important feature of his invention. But the improvement does not consist in placing the axles of the two trucks at any precise distance apart, or at any precise distance from each end of the body; and the specification is sufficient, although it does not state in feet or inches the exact distance from the ends of the car body at which it would be

best to arrange the trucks, or what should be the exact distance between the axes. *Winans v. Schenectady & T. R. Co.*, 2 *Blatchf.* (U. S.) 279.

The patent of September 21, 1837, issued to Richard Inlay for an "improvement in the mode of supporting the bodies of railroad cars and carriages" consisted of two cylinder plates, male and female, one within the other and acting in combination, one attached to the truck and the other to the car body, and is infringed by the use and application of two cylinder plates, one within the other, to give substantial support to the railroad carriage, even though other means are used in connection with them to give the required support, and such other means better accomplish the object. *Inlay v. Norwich & W. R. Co.*, 4 *Blatchf.* (U. S.) 227.

33. Chairs and rails for street railways.—The patent issued to James Stimpson, Aug. 23, 1831, and reissued Sept. 26, 1835, and Aug. 27, 1840, for an improvement in the method of carrying railroads "through the streets of towns, or in other situations where it may be desirable that the wheels of ordinary carriages should not be subject to injury or obstruction," is but a combination of means already known and in use, and is not original in its discovery or invention. *Stimpson v. Baltimore & S. R. Co.*, 10 *How.* (U. S.) 329.

The means used by defendant company in turning the corners of streets is so different from the means employed in the above patent that there is no infringement. *Stimpson v. Baltimore & S. R. Co.*, 10 *How.* (U. S.) 329.

Patent No. 272,554, issued to T. L. Johnson, Feb. 20, 1883, for street-railroad rails, is but an obvious application of what had preceded, and is void for want of patentable invention. *Johnson Co. v. Pacific Rolling Mills Co.*, 51 *Fed. Rep.* 762, 7 *U. S. App.* 214, 2 *C. C. A.* 506; affirming 47 *Fed. Rep.* 586.

Patent No. 312,259, granted to B. F. Curtis, Feb. 17, 1885, for "a street-railroad chair," the object of which is to lift the rail on which the car runs above the cross-ties so as to make the paving blocks come flush with the rail, to permit the lowering of the ties, and to do away with the old wooden stringer, is not infringed by patent No. 316,995, issued to A. J. Moxham, May 5, 1885, which consists of a chair made of

wrought iron in box form. *Curtis v. Atlanta St. R. Co.*, 56 *Fed. Rep.* 596.

34. Connection for vestibule cars.—Pullman's patent, No. 223,137, for connecting vestibule cars is not void for want of novelty, nor was it anticipated by the Session's patent, granted Nov. 15, 1887. *Pullman Palace Car Co. v. Boston & A. R. Co.*, 44 *Fed. Rep.* 195.

35. Construction of cars.—The claim of letters patent issued to Ross Winans, June 26, 1847, was for a patent for making the body of a railroad coal car of sheet iron, the upper part being cylindrical, and the lower part in the form of a frustum of a cone, the under edge of which has a flange secured upon it to which a movable bottom is attached. *Held*, that the patent was not merely for changing the form of a machine, but by means of such change to secure a new mode of operation, and thus attain a new and useful result. *Winans v. Denmead*, 15 *How.* (U. S.) 330.

So in a suit for infringement of such patent by constructing octagonal and pyramidal cars it was error to instruct the jury that the patent covered conical cars only, the same result being attained by each. The patent should have been explained to the jury, and left to them to decide whether there was an infringement. *Winans v. Denmead*, 15 *How.* (U. S.) 330.

The patent issued to Ross Winans, Oct. 1, 1834, for "an improvement in the construction of cars or carriages intended to run on railroads," and which consists in the manner of connecting and arranging the eight wheels so as to allow the cars to pass curves with greater facility and safety, is void, if the jury should find that the discovery was known and used before the date of the patent. *Winans v. New York & E. R. Co.*, 21 *How.* (U. S.) 88.

Letters patent No. 203,226, dated April 30, 1878, issued to C. R. Watson for an improvement in grain-car doors, embrace nothing that is patentable. *Watson v. Cincinnati, I., St. L. & C. R. Co.*, 132 *U. S.* 161, 10 *Sup. Ct. Rep.* 45.

Richard's patent, No. 147,863, granted Feb. 24, 1874, for an improvement in perches for dumping cars, is void for want of novelty. *Stitt v. Eastern R. Co.*, 22 *Fed. Rep.* 649.

Patent No. 203,226, granted to C. R. Watson, April 13, 1878, for an improvement in

grain-car doors, is not infringed by car doors manufactured and used similar to those described in patent No. 78,188, issued to M. M. Crooker, May 26, 1868. *Watson v. Cincinnati, I., St. L. & C. R. Co.*, 23 *Fed. Rep.* 443.

Session's patent, No. 373,098, granted Nov. 15, 1887, for a frame-shaped plate, of about the height of the car, applied vertically and transversely to the end of a railway car, and so fixed that it can have no lateral motion except with the lateral motion of the body of the car, and projecting a short distance beyond the end of the car by backing springs, possesses patentable novelty and utility. *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 38 *Fed. Rep.* 416.

36. Electric rail connectors.—Patent No. 434,087, issued to Charles Leib, Aug. 12, 1890, for an electric rail connector, is void for want of novelty, having been known and previously patented. *Leib v. Electric Merchandise Co.*, 48 *Fed. Rep.* 722; *affirmed in 54 Fed. Rep.* 385, 9 *U. S. App.* 509, 4 *C. C. A.* 381.

37. Fare registers.—The invention described in reissued letters patent No. 4240, granted to John B. Slawson, Jan. 24, 1871, is not patentable, as it is confined to putting in the ordinary fare box used on street-cars an additional pane of glass opposite to that next the driver, so that the passenger can see the interior of the box. The letters are therefore void. *Slawson v. Grand St. P. & F. R. Co.*, 13 *Am. & Eng. R. Cas.* 451, 107 *U. S.* 649, 2 *Sup. Ct. Rep.* 663.

Letters patent No. 121,920, granted to Elijah C. Middleton, Dec. 12, 1871, are void. The fare box, the headlight of the car, and the reflector are the elements of the contrivance described in the specification and claim for lighting the interior of the box at night, and they are old. What is covered by the letters is not patentable, as it is simply making in the top of the box an aperture through which the rays of the head-lamp are turned by means of a reflector. *Slawson v. Grand St., P. P. & F. R. Co.*, 13 *Am. & Eng. R. Cas.* 451, 107 *U. S.* 649, 2 *Sup. Ct. Rep.* 663.

Patent No. 265,145, issued to N. A. Ransom, Sept. 26, 1882, "for a fare register and recorder," amounts to a new arrangement for the working together of old devices into a patentable contrivance, and is therefore valid. *Railway Register Mfg. Co. v. Broadway & S. A. R. Co.*, 22 *Fed. Rep.* 655.

Patent No. 233,915, granted to J. B. Benton, Nov. 2, 1880, for a fare register, is not void for want of novelty. *Railway Register Mfg. Co. v. North Hudson County R. Co.*, 24 *Fed. Rep.* 793.—*QUOTING Stephenson v. Brooklyn Cross-Town R. Co.*, 114 *U. S.* 149, 5 *Sup. Ct. Rep.* 777.

Patent No. 260,526, granted to J. B. Benton, July 4, 1882, for an improvement in fare registers, which consists of a combination which includes a tell-tale hand to indicate any failure to reset the trip hand of the register at zero at the commencement of a trip, is not infringed by a device which is incapable of acting as a tell-tale. *Railway Register Mfg. Co. v. Broadway & S. A. R. Co.*, 30 *Fed. Rep.* 238.

Patent No. 206,565, issued to Charles B. Harris, July 30, 1878, for an improvement in fare registers, and which consists, as set forth in claims 1, 2, 4, and 5, of a device which is designed to guard against the fraudulent manipulation of fare registers used on street-cars, and to require the collector of fares to make a registry of each collection, which cannot be omitted without exposure to detection, and which when made cannot practically be obliterated, must be limited, in view of prior foreign patents, to the specific mechanical devices which constitute the novelty of the combination. *Railway Register Mfg. Co. v. Third Ave. R. Co.*, 33 *Fed. Rep.* 31.

38. Grain elevators—Horse-rail-road switch.—Where a suit for infringement of a patent for loading grain into elevators is defended on the ground that the invention shows no patentable combination, the court will assume from common knowledge that it was old at the date of the patent to construct buildings with railroad tracks running into or alongside of them, and with apparatus in such buildings for elevating into the upper part thereof grain brought in cars upon such tracks; and that it was old to elevate the grain into a hopper-scale, where it was weighed, and whence it was run into bins by a spout; or to load cars by running grain into them from a bin in an elevator building by means of the spout—such being the claims of the patent. *Richards v. Michigan C. R. Co.*, 40 *Fed. Rep.* 165.

Patent No. 117,198, issued to Thomas Newman, July 18, 1871, for an improvement in switches for horse railroads, which is described as consisting in the combination of

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an oscillating platform with a movable frog or switch, the platform being arranged within a railroad track so that it can be operated by the weight of the horses or other animals, thereby moving the switch from one track to another, is infringed by the switch used by defendants, which appropriates the essence of the invention, with but slight changes in its construction. *Johnson v. Forty-second St., M. & St. N. A. R. Co.*, 33 Fed. Rep. 499.

Thomas Newman was the pioneer inventor of a combination in patent 117,198 for a practical horse-railroad switch operated by the weight of draught animals oscillating a tiptable, the vertical movement of which is converted by connecting mechanism into horizontal movements of a switch tongue. *Johnson v. Brooklyn & C. R. Co.*, 40 Fed. Rep. 892.

30. Improvement in cattle cars.—Patent No. 161,807, issued to J. R. McPherson, April 6, 1875, for an improvement in stock cars, and reissued April 4, 1876, and relating to the means for feeding and watering live stock during a long journey without stopping or unloading the cars, by means of "capacious and strong water troughs," is void for want of novelty, except as to what is called the "water shed," and is not infringed by troughs used for the same purpose, but not located within the cattle spaces of the car, and which empty their contents clear of the floor without the aid of such water sheds. *American L. S. & M. Transp. Co. v. Street S. C. Line*, 46 Fed. Rep. 782.

Patent No. 168,061, issued to Stevenson & McGrath, Sept. 21, 1875, for a feed and water trough, is void for want of patentable novelty, except so far as it relates to a continuous shaft which supports the troughs, and by means of which all of the troughs are turned simultaneously. *American L. S. & M. Transp. Co. v. Street S. C. Line*, 46 Fed. Rep. 782.

40. Locomotive Headlights.—Patent No. 262,169, issued to Edward Wilhelm, Aug. 1, 1882, for an improved locomotive headlight, according to claim 1, covering "a reflector provided with an opening behind the burner whereby light is emitted backwardly into the headlight case for illuminating the signal plates or lenses applied to such case, substantially as described," must be limited to a reflector having an opening behind its apex separate from the

burner hole or chimney. *Steam Gauge & L. Co. v. Williams*, 50 Fed. Rep. 931, 1 U. S. App. 218, 2 C. C. A. 83; affirming 42 Fed. Rep. 843.

Claim 2 of the above patent is for "a reflector constructed with an opening behind the burner, and an auxiliary reflector, whereby the light emitted backwardly through such opening is directed towards the signal plates or lenses." Held, that this claim must be limited to a combination of the reflector as described in the first claim, and is not infringed by a reflector having an opening behind the burner in combination with the auxiliary reflector. *Steam Gauge & L. Co. v. Williams*, 50 Fed. Rep. 931, 1 U. S. App. 218, 2 C. C. A. 83; affirming 42 Fed. Rep. 843.

41. Locomotive trucks.—The claim of letters patent granted to Alba F. Smith, Feb. 11, 1862, for an "improvement in trucks for locomotives" by "the employment in a locomotive engine of a truck or pilot wheels, fitted with the pendent links *o, o*, to allow of lateral motion to the engine as specified, whereby the drivers of said engine are allowed to remain correctly on the track, in consequence of the lateral motion of the truck, allowed for by said pendent links, when running on a curve, as set forth," is not anticipated by the patent granted to Bridges & Davenport, May 4, 1841, for an "improvement in railway carriages." *Locomotive E. S. Truck Co. v. Erie R. Co.*, 10 Blatchf. (U. S.) 292.

Nor is such claim anticipated by the patent granted to Kipple & Bullock, December 20, 1859, for an "improvement in car trucks," although the mode of operation of the latter truck, *per se*, in a car having a like truck at the other end is the same for all the purposes of the truck itself, that it is in a structure which has driving wheels at the other end. Nor is it anticipated by the patent granted to Levi Bissell, Aug. 4, 1857, for an "improvement in trucks for locomotives." *Locomotive E. S. Truck Co. v. Erie R. Co.*, 10 Blatchf. (U. S.) 292.

The combination of Smith is patentable, because it produces a new mode of operation, and new results, in the structure as a whole, although the trucks used are old; and the fact that his patent is granted for an "improvement in trucks for locomotives," and that the truck he uses is old, and that his invention is really an improvement in locomotives, forms no objection to the va-

lidity of the patent. *Locomotive F. S. Truck Co. v. Erie R. Co.*, 10 Blatchf. (U. S.) 293.

42. Lubricating tubes.—The second branch of the sixth claim of patent No. 195,372, granted to Asa E. Hovey, Sept. 18, 1877, for an improvement in endless-rope traction railways, is described as "the means for lubricating the bearings of said pulleys from the outside of the tunnel." *Held*, that the use of tubes for carrying oil through inaccessible journals was well known before the application for the patent, and it therefore lacks invention and is not patentable. *National Cable R. Co. v. Mt. Adams & E. P. I. R. Co.*, 38 Fed. Rep. 840.

43. Machinery for making or mending rails—Damages.—The patent issued to J. D. Cawood, Sept. 9, 1856, for an "improvement in the common anvil and swedge block for the purpose of welding up and reforming the ends of railroad rails," construed, and held not void as a matter of law, as having been anticipated by prior inventions, as held by the court below. *Turrill v. Michigan S. & N. I. R. Co.*, 1 Wall. (U. S.) 491. —APPLIED IN *Turrill v. Illinois C. R. Co.*, 3 Biss. (U. S.) 66, 72.

The Cawood patent "for an alleged new and useful improvement in the common anvil or swedge block for the purpose of welding up and reforming the ends of railroad rails" is not infringed by what are known as the "Beebee & Smith," the "Bayonet Vice," and the "Michigan Southern" machines; but it is infringed by the "Whitcomb," the "Etheridge," and the "Illinois Central" machines. *Illinois C. R. Co. v. Turrill*, 94 U. S. 695, 15 Am. Ry. Rep. 387; reversing 3 Biss. 72, 5 Biss. 344.

The above patent is both new and useful, and therefore valid. *Turrill v. Illinois C. R. Co.*, 3 Biss. (U. S.) 66; see 94 U. S. 695, 15 Am. Ry. Rep. 387. —APPLYING *Turrill v. Michigan S. & N. I. R. Co.*, 1 Wall. 491. —FOLLOWED IN *Turrill v. Illinois C. R. Co.*, 3 Biss. (U. S.) 72.

The Cawood patent is not infringed by what is known as "Bain's Reversible Rolls," which has no jaws for holding the rail, as the Cawood patent has, and no hammer is used. *Turrill v. Illinois C. R. Co.*, 5 Biss. (U. S.) 344; reversed on other grounds in 94 U. S. 695, 15 Am. Ry. Rep. 387.

In an action for infringing the above patent, where the evidence shows that there was no other way of repairing rails except

by plaintiff's machine or the common anvil, it is proper to compare the cost of doing the work in the two methods, there being a saving by the use of plaintiff's machine, for the purpose of estimating the damages. *Turrill v. Illinois C. R. Co.*, 5 Biss. (U. S.) 344; reversed in part in 94 U. S. 695, 15 Am. Ry. Rep. 387.

Where the evidence shows that defendants have used plaintiff's patent for repairing rails, it is not competent for defendants to show that it was not profitable to repair rails with the machine, or that it would have been better to have disposed of the old rails or rerolled them. The very fact of using the machine is evidence that it was profitable. *Turrill v. Illinois C. R. Co.*, 5 Biss. (U. S.) 344; reversed in part in 94 U. S. 695, 15 Am. Ry. Rep. 387.

Where a company is charged with infringing plaintiff's patent for repairing rails, and the evidence shows that in the meantime there has been a consolidation, and a new company formed, the master, in ascertaining the damages, should show the extent of the infringement both by the old and new company, as it appears that the new company may not be liable for the debts of the old. *Turrill v. Illinois C. R. Co.*, 5 Biss. (U. S.) 344; reversed in part in 94 U. S. 695, 15 Am. Ry. Rep. 387.

44. Oil cars.—Patent No. 216,506, issued to M. C. Brown, June 17, 1879, which consists in dividing cars into two or more parts for the carriage of oil and other merchandise in the same car, and especially to avoid returning oil cars empty, is void for want of patentable novelty. *Standard Oil Co. v. Southern Pac. R. Co.*, 54 Fed. Rep. 521, 7 U. S. App. 636, 4 C. C. A. 491; affirming 48 Fed. Rep. 109, which reversed 42 Fed. Rep. 295, 14 Sawy. 430.

45. Railroad frogs.—Reissued patent No. 8914, issued to plaintiff Weir, Sept. 30, 1879, for "an improvement in railroad frogs," and which uses the U iron as a mode of connecting the point and wing rails, is not valid, on the ground that it was publicly used and well known before the time of plaintiff's claim as the inventor. *Weir v. Morden*, 21 Fed. Rep. 243.

46. Railway signals.—The privilege to manufacture and use the improved railroad signal secured by patent No. 284,716, issued to G. W. Blodgett and G. R. Hardy, Sept. 11, 1883, was granted to a railroad company. Defendant, a manufacturer, learn-

ing that the company intended to erect such signals, took a contract to manufacture and furnish them at a certain price. *Held*, that the transaction was for the sale of the signals to the railroad company, and therefore defendant infringed the patent, and could not claim to be a mere employé of the railroad. *Union S. & S. Co. v. Johnson R. Signal Co.*, 52 *Fed. Rep.* 867.

47. Spark arresters.—Plaintiff sued for an infringement of a reissue of the patent granted to Kearney & Tronson, April 11, 1871, for improvements in spark arresters on locomotives, which consisted of a spark arrester inside of the smokehead of the boiler, instead of the smokestack above, with a grate with perpendicular bars with fixed apertures sufficiently fine to arrest the sparks. *Held*, that this was not infringed by what is known as the Vanclain spark arrester, which consists of a perforated cylindrical box or screen, in which the perforations or apertures consist of horizontal slots cut out of sheet iron. *Kearney v. Lehigh Valley R. Co.*, 32 *Fed. Rep.* 320.

The above patent is not to be restricted to the use of what is known as a petticoat pipe. Under the claims of the patent the pipe may be of any form or dimension. *Kearney v. Lehigh Valley R. Co.*, 32 *Fed. Rep.* 320.

48. Signal bells in compartment cars.—Patent No. 122,622, issued to W. D. Mann, Jan. 9, 1872, for an improvement in compartment railway cars, claim 7, which is for signal bells extending from each compartment to the porter's room, is void for want of novelty as such bells had been in common use before the patent. *Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co.*, 34 *Fed. Rep.* 130.

49. Steam safety valves.—In view of the prior state of the art the reissue patent granted to E. H. Ashcroft, assignee of William Naylor, Nov. 9, 1869, for a steam safety valve having an overhanging, downward-curved lip surrounding an annular recess, into which the steam passes as it issues from under the valve, if valid, must be limited to the combination of the other elements of the device with an annular recess of the precise form described. So limited, the patent is not infringed by the use of a steam safety valve substantially the same as that described and shown in the patent granted to George W. Richardson, Sept. 25, 1866, although that valve has an

overhanging, downward-curved lip and an annular recess surrounding the valve seat, into which a portion of the issuing steam is deflected, the lip and recess being, in construction and mode of operation, substantially different from the lip and recess described in the Naylor patent. *Ashcroft v. Boston & L. R. Co.*, 1 *Holmes (U. S.)* 366.

50. Track cleaners.—Claim 4 of reissued letters patent No. 8388, granted to Augustus Day, Aug. 27, 1878, for an improvement in railroad track cleaners, is invalid, as possessing no patentable novelty. *Day v. Fair Haven & W. R. Co.*, 132 *U. S.* 98, 10 *Sup. Ct. Rep.* 11; *affirming* 23 *Fed. Rep.* 189.

51. Ventilating apparatus.—Patent No. 327,289, granted to W. D. Mann, Sept. 29, 1885, "for an improved system and apparatus for ventilating railway cars," having for its object the providing of the car with an even supply and exhaust of fresh warm air, from which all dust and impurities have been removed by passing it through a dust arrester consisting of a water tank lined with excelsior, is valid, and is infringed by a ventilating apparatus which only differs in using a box with wire nettings filled with wet sponges as a dust arrester. *Mann's Boudoir Car Co. v. Monarch Parlor Sleeping Car Co.*, 34 *Fed. Rep.* 130.

PAUPERS.

1. Liability for support of.—Massachusetts statutes making a person liable for the support of another person whom he may bring into the state do not apply to a common carrier of passengers which carries a person into the state as a passenger without any reason to believe that he is likely to become a pauper. *Fitchburg v. Cheshire R. Co.*, 110 *Mass.* 210.

Laborers who come to this country from European countries, without their families, and who are employed under railroad contractors, and who may quit work or be discharged at any time, and who live in temporary shanties, do not gain a residence in a town by working therein one year, under N. Y. Rev. St. 2111, § 29. *In re Hector*, 24 *N. Y. Supp.* 475.

2. Suits in forma pauperis.—N. Y. Code Civ. Pro. § 458, which allows poor persons to apply to the court for leave to prosecute a suit as a poor person, applies to

infant plaintiffs. *Tybias v. Broadway & S. A. R. Co.*, 39 N. Y. S. R. 183, 14 N. Y. Supp. 641.

Applications to sue *in forma pauperis* are not to be encouraged, and although an infant cannot apply for leave to sue in this way until after a guardian *ad litem* is appointed, yet where the suit is actually begun and the application to sue *in forma pauperis* is evidently an afterthought, the application should be denied. *Glasberg v. Dry Dock, E. B. & B. R. Co.*, 12 Civ. Pro. (N. Y.) 50.

An infant sued to recover damages for personal injuries, and an order was granted requiring the guardian *ad litem* to make a deposit or give security for costs. Two months afterwards the guardian applied on behalf of the infant for leave to sue *in forma pauperis*. Held, that while an infant cannot apply for leave to sue *in forma pauperis* until after a guardian *ad litem* is appointed, yet where the suit is begun and the application so to sue is an afterthought, as in this case, the application should be denied. *Glasberg v. Dry Dock, E. B. & B. R. Co.*, 12 Civ. Pro. (N. Y.) 50.

PAVING.

Duty of street-railway companies as to, see STREET RAILWAYS, 133-153.

Liability of steam railroads in cities respecting, see STREETS AND HIGHWAYS, 341-359.

PAY MASTERS.

Rights, powers, and duties of, see OFFICERS, 12.

PAYMENT.

By company of mortgages on land condemned, see EMINENT DOMAIN, 141.

For goods delivered C. O. D., see EXPRESS COMPANIES, 53.

— land granted, taking stock in, see EMINENT DOMAIN, 198.

— lands condemned, necessity of, to the passing of title, see EMINENT DOMAIN, 852.

— stock subscribed, see SUBSCRIPTIONS TO STOCK, 16-23.

— — as a defense to suit to enforce liability to creditors, see STOCKHOLDERS, 64.

— — taking note in, see STOCK, 18.

In Confederate money, see WAR, 3.

In lieu of taxation, construction of statute providing for, see TAXATION, 59.

Into court generally, see TENDER, 6, 7.

— — under Canadian expropriation acts, see EMINENT DOMAIN, 1225.

— — — English compulsory purchase laws, see EMINENT DOMAIN, 1153.

Of amount due before applying for injunction, see TAXATION, 344.

— change bills, enforcement of, see CHANGE BILLS, 2.

— charges, averment of, in actions against carriers of goods, see CARRIAGE OF MERCHANDISE, 727.

— claims by receivers, see RECEIVERS, 75-93.

— costs of former suit, see COSTS, 3.

— coupons, see COUPONS, 7-8.

— coupon, when compelled by mandamus, see COUPONS, 23.

— damages, stay in execution until, see EMINENT DOMAIN, 1031.

— debts, issuing bonds in, see BONDS, 6.

— dividends, guaranty of, see GUARANTY, 3.

— fare, see TICKETS AND FARES, 117-129.

— — necessity of, see CARRIAGE OF PASSENGERS, 13.

— fee to secretary of state on consolidation, see CONSOLIDATION, 19.

— given sum in lieu of taxes, provision for, see TAXATION, 149.

— judgment against corporation as a defense in creditor's suit, see STOCKHOLDERS, 65.

— land damages into court, see EMINENT DOMAIN, 397-403.

— — presumption of, from lapse of time, see EMINENT DOMAIN, 382.

— mortgage, provisions as to time of, see MORTGAGES, 80.

— mortgages, see MORTGAGES, 308.

— note, guaranty of, see GUARANTY, 4.

— overcharge under protest, see CHARGES, 40.

— premium on insurance policy, see ACCIDENT INSURANCE, 7.

— price for right of way, enforcement of, see EMINENT DOMAIN, 230.

— profits, guaranty of, see GUARANTY, 6.

— rent, enforcement of, see EQUITY, 18.

— taxes, see TAXATION, 290-305.

— — effect of, to create adverse possession, see ADVERSE POSSESSION, 11.

— wages, by garnishee to creditor, effect of, see ATTACHMENT, ETC., 38.

Receiving a check in, see CARRIAGE OF MERCHANDISE, 271.

Taking stock in, see CONSTRUCTION OF RAILWAYS, 25.

Tender and refusal, when equivalent to, see EMINENT DOMAIN, 385.

What may be taken in, at foreclosure sale, see MORTGAGES, 246.

— necessary to effect redemption of mortgaged property, see MORTGAGES, 317.

When deemed voluntary, see TAXATION, 338, 339.

See also ACCORD AND SATISFACTION.

1. Who may receive payment.—

Payment of a claim to a *de facto* administrator, though his appointment be erroneous and voidable, will bind the estate and discharge the debtor. *Chicago, B. & Q. R. Co. v. Gould*, 64 Iowa 343, 20 N. W. Rep. 464.

2. Payments other than in money, generally—Confederate currency.—

When a permission is in the alternative to pay in money or in some other medium of payment, the promisor has an election either to pay in money or in the equivalent, but after the day of payment has elapsed without payment the right of election on the part of the promisor is gone, and the promisee is entitled to payment in money. *So held*, where a railroad company issued its bonds, with interest payable semi-annually, payable either in money or in scrip. *Marlor v. Texas & P. R. Co.*, 21 Fed. Rep. 383.

A bond of a railroad company for the payment of money executed in 1862 comes within the provision of the ordinance of N. Car. convention of 1865, and is "presumed to be solvable in money of the value of Confederate currency, subject to evidence of a different intent by the parties." *Alexander v. At'antic, T. & O. R. Co.*, 67 N. Car. 198, 2 Am. Ry. Rep. 181.

In the absence of all evidence to show the consideration of such bond, or that the parties intended otherwise than is presumed by the ordinance, a different intent will not be implied from a provision in the charter that the company may make contracts for building the road, and may pay contractors in bonds at par value. *Alexander v. At'antic, T. & O. R. Co.*, 67 N. Car. 198, 2 Am. Ry. Rep. 181.

3. Taking a check, bill, or note in payment.—If it appears in an action against a railroad for arrears of pay for services that judgment was rendered against the company as garnishee of plaintiff in proceedings in attachment, that the company gave its check to the justice who entered the judgment, and that the check was indorsed and passed to the attaching

creditor, a presumption arises that the check was accepted as payment of the judgment, and was itself paid, and it is error to submit the question of payment of the judgment to the jury. *Beatty v. Lehigh Valley R. Co.*, 134 Pa. St. 294, 19 Atl. Rep. 745.

Plaintiff was a railroad contractor and settled with a firm who were the agents of the company, one of the firm being its president, and received a part in cash for the amount due for work, and the president's note for the remainder, being informed that there was not enough cash on hand to pay in full. *Held*, that the taking of the note and giving a receipt did not relieve the company from liability, in the absence of proof of an express agreement to take the note as actual payment; and it mattered not that the president was largely indebted to the company at the time and was credited with the amount of the note. *Higby v. New York & H. R. Co.*, 3 Bosw. (N. Y.) 497, 7 Abb. Pr. 259.

Whether a note was received as payment of an account is a question of fact depending upon intention, but such intention appears here from the manner of closing the account by note for balance, together with receipt for such note expressed to be in settlement, and a deposit of collaterals to secure the payment of the note. *Ex parte Williams*, 12 Am. & Eng. R. Cas. 425, 17 So. Car. 396. — QUOTING Townsends v. Stevenson, 4 Rich. (So. Car.) 62.

Besides, the payee of such note having transferred it with the collaterals for value, and the collaterals having been sold by the transferee, the original cause of action on the account, if still existing, was then destroyed. *Ex parte Williams*, 12 Am. & Eng. R. Cas. 425, 17 So. Car. 396.

Receiving "time checks" of a railroad in satisfaction of a note by a creditor of his debtor is a payment. *Swearingen v. Buckley*, 1 Tex. Unrep. Cas. 421.—QUOTING Robson v. Watts, 11 Tex. 768; Jennings v. Case, 17 Tex. 673. REVIEWING Boulware v. Robinson, 8 Tex. 330; McNeil v. McCamley, 6 Tex. 165; Cartwright v. Jones, 13 Tex. 1; Piedmont & A. Life Ins. Co. v. Ray, 50 Tex. 518.

A railroad company sold the right to cut lumber on its lands, the company reserving "full and complete ownership and control of all lumber which shall be cut from the * * * premises, wherever and however it may be situated, until all sums due or to

become due for stumpage * * * shall be fully paid." A draft on third parties, which was given for lumber cut, was accepted, and approved by the company. The lumber was then sold to the same company on whom the draft was drawn, who had notice of the terms on which the lumber was cut, but before the draft was paid it failed, and its assignee sold the lumber. *Held*, that the acceptance of the draft was not payment, and that the equitable interest of the company followed the lumber into the hands of the assignee, and that the company could recover from him. *New Brunswick R. Co. v. McLeod*, 17 *New Brun.* 257.

4. When payment must be made in coin.—In an action against the Baltimore & Ohio railroad company by the state to recover a certain amount claimed to be due in gold under a contract entered into under the Md. Act of 1835 known as "The Eight Million Loan Bill," and of the act of 1838—*held*, that as the law stood at the date of the contract the state could have required payment in gold, and that at the date of the institution of the action the company was bound to pay the dividend in gold, but by the operation of the legal-tender laws the company was exonerated from such obligation, it not appearing that it was the intention of the parties that the dividend should be paid in gold specifically. *Baltimore & O. R. Co. v. State*, 36 *Md.* 519.—DISTINGUISHING *Lane County v. Oregon*, 7 *Wall.* (U. S.) 71. REVIEWING *Hepburn v. Griswold*, 8 *Wall.* 603; *Knox v. Lee*, 12 *Wall.* 457.

The Pacific railroad state bonds issued under the act to expedite the construction of the Pacific railroad and Hannibal & St. Joseph railroad, approved February 22, 1851, being payable on their face in gold and silver, can be met only by payment of the sum called for in gold and silver, and not by payment of the amount in legal-tender currency. The legal-tender act cannot affect this obligation. But where the legislature has determined to pay the bonds in legal-tender currency, the supreme court has no power to interfere, and mandamus to compel the fund commissioners to pay said bonds in gold and silver coin will not lie. *State ex rel. v. Hays*, 50 *Mo.* 34.

5. Voluntary payments—Right to recover back payments.*—Where a

carrier makes an unlawful freight charge, the shipper may pay it rather than forego the shipment, and recover back the illegal charge. The payment under such circumstances cannot be said to be voluntary. *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559.—FOLLOWED IN *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 *Ind.* 517. QUOTED IN *Peters v. Marietta & C. R. Co.*, 42 *Ohio St.* 275. REVIEWED IN *West Va. Transp. Co. v. Sweetzer*, 22 *Am. & Eng. R. Cas.* 469, 25 *W. Va.* 434.

If payment beyond the rate specified in the charter be made voluntarily by the shipper through mere ignorance of the law, or paid "where the facts are well known, and there is no misplaced confidence, and no artifice, or deception, or fraudulent practice is used by the other party," an action will not lie to recover it back. *Arnold v. Georgia R. & B. Co.*, 50 *Ga.* 304.—NOT FOLLOWED IN *Louisville, E. & St. L. Con. R. Co. v. Wilson*, 132 *Ind.* 517.

And where the overcharge is voluntarily paid under no mistake of facts, and there is no duress, fraud, or extortion, plaintiff is not entitled to recover. *Potomac Coal Co. v. Cumberland & P. R. Co.*, 38 *Md.* 226.—REVIEWING AND APPROVING *Mayor, etc., of Baltimore v. Lefferman*, 4 *Gill* 431; *Morris v. Mayor, etc., of Baltimore*, 5 *Gill* 247; *Lester v. Mayor, etc., of Baltimore*, 29 *Md.* 418.—DISAPPROVED IN *Mobile & M. R. Co. v. Steiner*, 61 *Ala.* 559; *West Va. Transp. Co. v. Sweetzer*, 22 *Am. & Eng. R. Cas.* 469, 25 *W. Va.* 434.

And the fact that the party at the time of making the payment files a written protest does not make the payment involuntary. *Kansas Pac. R. Co. v. Wyandotte County Com'rs*, 16 *Kan.* 587.—FOLLOWED IN *Archison, T. & S. F. R. Co. v. Atchison County Com'rs*, 47 *Kan.* 722.

The rule that a payment voluntarily made under a mistake of law, but with a full knowledge of the facts, cannot be recovered back rests upon general principles of public convenience, and applies to a corporation as well as to natural persons, and a corporation cannot recover the price of goods delivered in payment of a subscription to the stock of a railroad made *ultra vires*. *Valley R. Co. v. Lake Erie Iron Co.*, 46 *Ohio St.* 44, 1 *L. R. A.* 412, 18 *N. E. Rep.* 486.

As between two innocent parties, that one who has been guilty of laches must suffer

* See also CHARGES, 39-58.

the wrong. Money paid by one party to another, without consideration and by mistake, becomes so much money received by him to the use of the party paying, for which he is accountable on demand. *Stebbins v. Union Pac. R. Co.*, 2 *Wyom.* 71.

Where the treasury gives to a collector of customs a peremptory admonition to deposit all moneys received by him in the treasury, a deposit of "receipts for storage" will not be deemed a voluntary payment, though the collector be entitled to them as a portion of his compensation. *Ellsworth v. United States*, 14 *Cl. of Cl.* 382.

6. Overpayment—Recovery of excess.*—Where the agent of a railroad company agrees to pay only what the engineer of the company certifies, and supposes he is paying no more, while in fact he pays more to a contractor, the company may recover the sum erroneously paid. *Baltimore & S. R. Co. v. Faunce*, 6 *Gill (Md.)* 68.

Defendant's claim was \$2436.10, and his agent, intending to pay that sum, erroneously and unconsciously paid \$3306.10, which was made up of \$1006 in small notes illegally issued by plaintiff and \$2300.10 in current money. Defendant received the whole as money, and upon immediate demand refused to return the small notes or the overpayment. *Held*, in an action for money had and received, that plaintiff might show the error, and defendant could not defend upon the ground that the small notes were illegally issued. *Baltimore & S. R. Co. v. Faunce*, 6 *Gill (Md.)* 68.

7. Application of payments.—Where money paid by a corporation on several contracts, some of which are *ultra vires*, is by the act of the corporation itself appropriated to particular contracts, such payment is valid, notwithstanding the existence of legal objections to the contracts to which the money was so applied. *Williamson v. New Jersey Southern R. Co.*, 78 *N. J. Eq.* 277, 14 *Am. Ry. Rep.* 34; *reversed in 29 N. J. Eq.* 311.

A debtor paying money to a creditor is entitled to have it placed to the credit of a particular claim, but if he makes no selection the creditor can apply it where he chooses. If neither debtor nor creditor has made an application, the court will apply it

to the claim for which the security is most precarious. *Hempfield R. Co. v. Thornburg*, 1 *W. Va.* 261.

Plaintiff sold a parcel of land to defendant company for \$300 and a right of way for \$1225, and agreed to remove certain buildings for \$2275. The company paid him \$2012, and after the completion of the road plaintiff brought suit to enforce his vendor's lien against the land. *Held*, that it was proper to apply the amount paid to the liquidation of the amount to be paid for the removal of the buildings, under the above rule for the application of payments, and to declare a lien on the land sold and on the right of way for the amount due thereon. *Hempfield R. Co. v. Thornburg*, 1 *W. Va.* 261.

8. Presumption of payment from lapse of time.—A debt due by a railway company to a contractor, and secured by an indefinite lien on the road, is presumed to have been paid after the lapse of twenty years. *Hayes v. Bald Eagle Valley R. Co.*, 6 *Atl. Rep.* 144.

PAY ROLL.

Admissibility and effect of, as evidence, see EVIDENCE, 235.

PECUNIARY CONDITION.

Of deceased, proof of, on question of damages, see DEATH BY WRONGFUL ACT, 282.

— parties, admissibility of evidence as to, see EVIDENCE, 68.

— plaintiff, proof of, in mitigation of damages, see DEATH BY WRONGFUL ACT, 286.

PECUNIARY LOSS.

Averment of, in complaint for causing death, see DEATH BY WRONGFUL ACT, 131-133.

To beneficiaries as a measure of damages for causing death, see DEATH BY WRONGFUL ACT, 380-387.

— proof of, see DEATH BY WRONGFUL ACT, 273-275.

PENAL LAWS.

Enforcement of, by attorney-general, see ATTORNEY-GENERAL, 4.

PENAL STATUTES.

Not enforceable in foreign state, see DISCRIMINATION, 76.

Strict construction of, see STATUTES, 46.

* Overcharges paid under protest may be recovered back, see note, 51 *AM. REP.* 820.

PENALTY.

Actions for, when barred by lapse of time, see LIMITATIONS OF ACTIONS, 633.

Against final carrier for failure to deliver, see CARRIAGE OF MERCHANDISE, 661.

In England for failure to pay fare or produce ticket, see TICKETS AND FARES, 145, 146.

For breach of construction contracts, see CONSTRUCTION OF RAILWAYS, 35.

— delay, fixing, in contract, see CARRIAGE OF MERCHANDISE, 787.

— discrimination, recovery of, see DISCRIMINATION, 77-80.

— disobedience of commissioners' orders, see RAILWAY COMMISSIONERS, 34.

— excessive speed in cities, see STREETS AND HIGHWAYS, 330, 331.

— failure to comply with order of commissioners regarding grade crossings, see CROSSING OF STREETS AND HIGHWAYS, 112.

— — deliver goods, under Texas statute, see CARRIAGE OF MERCHANDISE, 293.

— — establish station, see STATIONS AND DEPOTS, 31.

— — feed cattle during transit, see CARRIAGE OF LIVE STOCK, 35.

— — forward goods promptly, see CARRIAGE OF MERCHANDISE, 40.

— — keep crossing in repair, see CROSSING OF STREETS AND HIGHWAYS, 35.

— — obtain license, see STREET RAILWAYS, 203.

— — post time of arrival of trains, see TIME-TABLES, 5.

— — stop before crossing another railway, see CROSSING OF RAILROADS, 83.

— keeping cattle in cars more than twenty-eight hours, see CARRIAGE OF LIVE STOCK, 34.

— non-payment of taxes, see TAXATION, 302.

— obstruction of highway, see STREETS AND HIGHWAYS, 425.

— overcharge in passenger fare, see TICKETS AND FARES, 132.

— overcharges, see CHARGES, 11, 52-58.

— — on fares, see STREET RAILWAYS, 307.

— refusal to issue bill of lading, see BILLS OF LADING, 10.

— refusing to check baggage, see BAGGAGE, 59.

— violation of contract labor law, see CONTRACT LABOR LAW, 2.

— — internal revenue laws, see REVENUE, 9.

Recovery of, in action for taxes, see TAXATION, 322.

Staying proceedings to enforce, see INJUNCTION, 47.

When amount recoverable is considered a, see DAMAGES, 40.

I. FOR WHAT ACTS OR OMISSIONS IMPOSED.

II. ENFORCEMENT

I. FOR WHAT ACTS OR OMISSIONS IMPOSED.

1. In general.* — If the statute which provides a penalty for failure of a railroad company to signal at a highway crossing (Mansf. Ark. Dig. § 5478) contemplates a recovery by civil action only, a judgment for the recovery of such penalty, based upon a pleading which is in form an indictment indorsed by the foreman and returned by the grand jury, is not open to collateral attack, if such pleading is in substance a civil complaint prepared and signed by the prosecuting attorney, and is so treated by the trial court. *St. Louis, I. M. & S. R. Co. v. State*, 55 Ark. 200, 17 S. W. Rep. 806.

The provision of Ark. Const. of 1868, art. 1, § 4, that "no person shall be held to answer a criminal offense unless on the presentment or indictment of a grand jury" is inapplicable to an action to recover the penalty imposed on a railway company for failure to signal at a highway crossing. *St. Louis, A. & T. R. Co. v. State*, 56 Ark. 166, 19 S. W. Rep. 572.

If a statute in the nature of a police regulation gives a remedy for private injuries resulting from the violations thereof, and also imposes fines and penalties at the suit of the public for such violations, the former will not be regarded in the nature of a penalty unless so declared. *Pittsburgh, Ft. W. & C. R. Co. v. Methuen*, 21 Ohio St. 586.

2. Delay in transporting goods. — Corporations, like natural persons, are subject to the police power of a state; therefore N. Car. Act of 1874-75, ch. 24, § 2, which fixes a penalty of \$25 a day for delay of local shipments beyond five days after the receipt of the goods, is constitutional. *Branch v. Wilmington & W. R. Co.*, 77 N. Car. 347.

In computing the time under the above statute the term "five days" must be construed to mean consecutive days, and therefore will include a Sunday which may intervene: but the day on which the default

* Liability of railroad company to penalties as a common carrier. see note, 27 AM. & ENG. R. CAS 70.

occurs is not counted. *Branch v. Wilmington & W. R. Co.*, 77 N. Car. 347.—FOLLOWED IN *Keeter v. Wilmington & W. R. Co.*, 9 Am. & Eng. R. Cas. 165, 86 N. Car. 346.

The five days within which, under the North Carolina statute, a railroad company must forward freight or answer in damages are five full running days, exclusive of the day of delivery and the day of shipment. *Branch v. Wilmington & W. R. Co.*, 88 N. Car. 570.

3. Engine not consuming smoke.—A penalty is not incurred in the Railways Clauses Act 1845, § 114, for failing to construct engines so as to consume their own smoke unless the engine is so defectively constructed as to be incapable of consuming its own smoke, although used with proper care: if the emission of smoke is caused merely by careless handling, the penalty does not attach. *Manchester, S. & L. R. Co. v. Wood*, 2 El. & El. 344, 29 L. J. M. C. 29, 1 L. T. 31.

4. Failure to give notice of accident.—So. Car. Gen. St. § 1525, requires a railroad company to give immediate notice of an accident, attended with injuries to a person, to the railroad commissioners, and to the nearest physician, under a penalty. A brakeman was seen on a train after leaving a station, but was missed at the next station, but the other employés supposed he was on the engine. Some time afterwards it was learned that he was not on the train, when the conductor telegraphed inquiries to the station where he was last seen and to headquarters, and inquiries were made along the road on the return trip. Some days afterwards his body was found at the side of the road, and the circumstances tended to show that he had fallen off and received some injuries, but had frozen to death. *Held*, that even if the above statute would apply the company was not guilty of negligence, so as to make it liable, for failing to institute a search along the track. *Adkins v. Atlanta & C. A. L. R. Co.*, 31 Am. & Eng. R. Cas. 281, 27 So. Car. 71, 2 S. E. Rep. 849.

5. Failure to stop on signal.—A railway company sold a passenger a ticket from a regular station to a flag station and return, on which the passenger was carried to the flag station, and on the return of the train no stop was made at the flag station, where the passenger was waiting for the

return trip, and claimed to have given the customary signal. *Held*, that the company was liable to the penalty imposed by How. Mich. St. § 3324, if the trainmen saw the signal and wilfully ran by the station. *Freeman v. Detroit, M. & M. R. Co.*, 30 Am. & Eng. R. Cas. 623, 65 Mich. 577, 9 West. Rep. 117, 32 N. W. Rep. 833.

6. Overcharges in freights and fares.—The legislature has the right to fix a money penalty upon a railroad company for charging more than the fixed maximum rates of toll for carriage of freight and passengers. *State v. Winona & St. P. R. Co.*, 19 Minn. 434 (Gil. 377).

If a railroad charges and receives for transporting a car-load of merchandise to a station on its road where it delivers the goods, and they are accepted by the consignee, more than it charges for transporting the same a greater distance, it is liable to the penalty imposed by N. H. Laws of 1859, ch. 55, although by the original contract the merchandise was to be transported to a more distant station. *Osgood v. Concord R. Co.*, 21 Am. & Eng. R. Cas. 44, 63 N. H. 255. — REVIEWING COM. v. Worcester & N. R. Co., 124 Mass. 561.

By implication Tex. Rev. St. art. 4258, providing for a penalty of \$500 for an overcharge in a passenger fare, is repealed by the act of April 10, 1883. *Eller v. Missouri Pac. R. Co.*, 2 Tex. App. (Civ. Cas.) 48.

7. Refusal to receive goods for carriage.—Where a company refuses to receive freight tendered for transportation, an action for the penalty of fifty dollars, as provided by the act of 1879, ch. 182, may be brought. *Branch v. Wilmington & W. R. Co.*, 88 N. Car. 570.

8. Stacking hay or straw near right of way.—Mo. Rev. St. 1889, § 26:4, prescribes a penalty of not exceeding \$500 for stacking or ricking grain, hay, or straw within one hundred yards of the right of way of a railroad. *Reed v. Missouri Pac. R. Co.*, 50 Mo. App. 504.

II. ENFORCEMENT.

9. Jurisdiction—Nature of action.—An action for the enforcement of a penalty for overcharging upon fares can only be brought in the forum prescribed by statute. *Reed v. Omnibus R. Co.*, 33 Cal. 212.

Qui tam actions for a penalty may be prosecuted civilly or criminally by information,

under Mo. Rev. St. § 1674. *State ex rel. v. Hannibal & St. J. R. Co.*, 30 Mo. App. 494.

An action for a penalty, given by statute to any person injured, is an action on contract. *Doughty v. Atlantic & N. C. R. Co.*, 78 N. Car. 22.

10. Right of action.—The right of a passenger to enforce a penalty against a railroad for overcharge upon a fare being purely of statutory creation, no other process of procedure for its enforcement can be pursued than that prescribed by the statute. *Reed v. Omnibus R. Co.*, 33 Cal. 212.

Parties equally at fault can have no remedy against each other based upon a contract or transaction which is unlawful. So where a station agent makes an overcharge on freights and pays the same over to the company, he cannot maintain an action against the company to recover a penalty provided by statute for making such overcharge. *Steever v. Illinois C. R. Co.*, 16 Am. & Eng. R. Cas. 53, 62 Iowa 371, 17 N. W. Rep. 595.

The rule that a carrier who receives goods from another and pays the charges that have then accrued can only claim to be reimbursed for the just and reasonable charges which were due for the carriage applies only in an action for damages for detaining the goods or for recovery of an overcharge, and does not apply when a penalty is sought to be recovered. *Gulf, C. & S. F. R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. Rep. 470. — FOLLOWED IN *Schloss v. Atchison, T. & S. F. R. Co.*, 85 Tex. 601.

The rule which inhibits the legislature from interfering with vested rights means such rights as spring from contracts or from the principles of the common law, and does not embrace rights growing out of a tort or actions for a penalty in their nature *ex delicto*. So an action commenced under Tex. Rev. St. art. 4258 to recover a penalty for an overcharge in a passenger fare does not give the plaintiff a vested right so as to prevent the legislature from repealing the section and taking away the remedy, as was done by the act of April 10, 1883. *Etter v. Missouri Pac. R. Co.*, 2 Tex. App. (Civ. Cas.) 48. — FOLLOWED IN *Gulf, C. & S. F. R. Co. v. Lott*, 2 Tex. App. (Civ. Cas.) 51.

11. Proper party plaintiff.—Where an action to recover from a railroad company the penalty for failure to give a signal before

crossing a highway is prosecuted by the informer in his own name, the error in not bringing the suit in the name of the state cannot be cured by an amendment substituting the state as plaintiff. *St. Louis, A. & T. R. Co. v. State*, 56 Ark. 166, 19 S. W. Rep. 572.

An action to recover of a railroad company the penalty provided for by Mo. Rev. St. § 806, where a bell or whistle is not sounded at a street crossing, need not be brought in the name of the prosecuting attorney to the use of the county and the informer, but is properly brought in the name of the state to the use of the county. *State ex rel. v. Wabash, St. L. & P. R. Co.*, 89 Mo. 562, 1 S. W. Rep. 130. — FOLLOWED IN *State ex rel. v. Hannibal & St. J. R. Co.*, 89 Mo. 571.

The person claiming the penalty, and not the state, is the proper party plaintiff in an action for the penalty imposed on railroads by N. Car. Code, § 1967. *Middleton v. Wilmington & W. R. Co.*, 95 N. Car. 167. — FOLLOWING *Norman v. Dunbar*, 8 Jones 319. NOT FOLLOWING *Duncan v. Philpot*, 64 N. Car. 479.

So. Car. Gen. St. § 1457 empowers the railroad commissioners to make suggestions to any railroad company regarding repairs or improvements in the road or station houses, but prescribes no penalty, and no mode of enforcement, except through the attorney-general; therefore the commissioners themselves have no right of action to recover the penalty provided in § 1539. *Railroad Com'rs v. Columbia & G. R. Co.*, 30 Am. & Eng. R. Cas. 177, 26 So. Car. 353, 2 S. E. Rep. 127. — APPLIED IN *Ross v. Georgia, C. & N. R. Co.*, 46 Am. & Eng. R. Cas. 34, 33 So. Car. 477.

By Tex. Act of April 8, 1889, amending Rev. St. art. 4238, imposing certain forfeitures, it is provided that "it shall be the duty of the attorney-general, or the district or county attorney of the district or county in which said crossing or depot is situated, to sue, prosecute for, and recover the same." When a duty is thus imposed upon an officer, it cannot be said that it was not the intention of the legislature that he should have the power to perform it. *San Antonio & A. P. R. Co. v. State*, 45 Am. & Eng. R. Cas. 586, 79 Tex. 264, 14 S. W. Rep. 1063.

12. Pleading.—Penal statutes must be strictly construed, and to recover a penalty

a plaintiff must always make a plain case and bring his claim within the very letter of the statute. *Palm v. New York, N. H. & H. R. Co.*, 28 *J. & S.* 162, 42 *N. Y. S. R.* 219, 17 *N. Y. Supp.* 471. *Wray v. Pennsylvania R. Co.*, 19 *N. Y. S. R.* 53, 4 *N. Y. Supp.* 354. *State v. Androscoggin R. Co.*, 20 *Am. & Eng. R. Cas.* 624, 76 *Me.* 411.

In an action for failure to give the statutory signals, it is not necessary to set forth in the declaration the hour of the day or night in which the train passed the crossing, or to state the nature of the train and the direction in which it was running. *Ohio & M. R. Co. v. People*, 49 *Ill. App.* 225.

In an action under Mo. Rev. St. 1879, § 810, as amended, the petition is not demurrable because the plaintiff sues for the penalty therein provided for for himself, and not as a common informer, as it is the intention of the legislature to give the penalty to the person whose property has been injured. *Scott v. Missouri Pac. R. Co.*, 38 *Mo. App.* 523.

In a suit against a railroad company to recover several penalties for running locomotives in violation of the statute, the first count set forth the statutes under which the penalties were claimed, and in the other counts the statutes were only referred to in the introductory part of each count by averring that defendant, not regarding said statutes nor fearing the penalties therein contained, at a certain time did run its locomotive engines across certain highways without stopping, and without causing the bell on the engine to be rung or the whistle to be blown. *Held*, that all the counts except the first one were insufficient. *Crawford v. New Jersey R. & T. Co.*, 28 *N. J. L.* 479.

13. Defenses—Contributory negligence.—Where the action is against a company to recover a statutory penalty for failure to give signals at a highway crossing, it is immaterial whether the party injured, and for whose use the action is brought, was guilty of contributory negligence. *Mobile & O. R. Co. v. People ex rel.*, 24 *Ill. App.* 250; *reversed on other grounds* in 130 *Ill.* 146, 22 *N. E. Rep.* 850.

In an action by a private person to recover damages for the violation of a duty imposed upon defendant by statute, it is a competent and sufficient defense to show (unless precluded from so doing by the terms of the statute or by clear implication arising there-

from) that plaintiff by his own negligence contributed to the injuries complained of; and it matters not, as to such defense, whether the contributory negligence of plaintiff arose from the violation on his part of a duty imposed upon him by a statute or a common law duty. *Pittsburgh, Ft. W. & C. R. Co. v. Methven*, 21 *Ohio St.* 586.

Tennessee statute subjecting railroads to a penalty for failing to call out a station at which the train stops is for the benefit of passengers, and does not include those who travel solely for the purpose of speculation or profit to be derived from playing the part of spies, and a party suing for such penalty should show that he was or intended to be such passenger, and was not traveling for the disreputable purpose indicated. *Parks v. Nashville, C. & St. L. R. Co.*, 18 *Am. & Eng. R. Cas.* 404, 13 *Lea (Tenn.)* 1, 49 *Am. Rep.* 655.

In a suit by the state against a railway company to recover a penalty, under Tex. Rev. St. art. 4250, for failing to make an annual report to the comptroller of public accounts, as required by article 4249, the fact that the state has shown no special damage resulting from the failure of the company to make its report affords no defense to the action. *Houston & T. C. R. Co. v. State*, 61 *Tex.* 342.

14. Evidence.—Ark. Act of March 24, 1887, prescribes a penalty for violation of either of several of its provisions, and a right to recover the penalty is shown by proof that any one of such provisions has been violated, as by a failure to unload freight. *Little Rock & Ft. S. R. Co. v. Bruce*, 55 *Ark.* 65, 17 *S. W. Rep.* 363.

In an action against a carrier to recover a penalty for an unreasonable charge of eight cents per 100 pounds for carrying brick between certain points, the jury may consider the fact that the charge for carrying stone between the same points is four and one half cents per 100 pounds. *Little Rock & Ft. S. R. Co. v. Bruce*, 55 *Ark.* 65, 17 *S. W. Rep.* 363.

15. Amount recoverable, and who entitled thereto.—A judgment in favor of a county for the recovery of a statutory penalty is not void, although it should have been rendered in favor of the state or of an informer. *St. Louis, I. M. & S. R. Co. v. State*, 55 *Ark.* 200, 17 *S. W. Rep.* 806.

The penalty against a railroad company for failure to forward freight imposed by N.

Car. Laws 1874-75, ch. 240, is not given to the county school fund by N. Car. Const. art. 9, § 5. *Katzenstein v. Raleigh & G. R. Co.*, 6 Am. & Eng. R. Cas. 464, 84 N. Car. 688.—DOUBTED IN *State ex rel. v. Marietta & N. G. R. Co.*, 108 N. Car. 24.

Under Tenn. Act of 1865, ch. 15, which makes a railroad company liable to a penalty of \$100 upon a failure, during any one trip of passenger-cars, to announce the stopping place or station at which the train stops, only one penalty can be recovered up to the bringing of suit. *Parks v. Nashville, C. & St. L. R. Co.*, 18 Am. & Eng. R. Cas. 404, 13 Lea (Tenn.) 1, 49 Am. Rep. 655.—QUOTING *Fisher v. New York C. & H. R. R. Co.*, 46 N. Y. 644.—NOT FOLLOWED IN *State ex rel. v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. Rep. 722.

16. Rights of informer.—If the provision in the statute (Mansf. Ark. Dig. § 5478) that one half of the penalty for failure to signal should go to the informer and the other half to the county conflicts with the constitution in force at the date of its passage, that all penalties should go to the school fund, the remainder of the act is capable by its own terms of being carried into effect consistently with the intent of the legislature. *St. Louis, I. M. & S. R. Co. v. State*, 55 Ark. 200, 17 S. W. Rep. 806.—FOLLOWED IN *St. Louis, A. & T. R. Co. v. State*, 56 Ark. 166.

Mo. Rev. St. § 806, which gives one half of the penalty therein named to the informer, is not for that reason violative of the Const. art. 11, § 8, which provides that "the clear proceeds of all penalties and forfeitures, and of all fines collected in these several counties, * * * shall belong to and be securely invested, and sacredly preserved in the several counties, as a county public-school fund." *State ex rel. v. Wabash, St. L. & P. R. Co.*, 89 Mo. 562, 1 S. W. Rep. 130.

PENDENCY.

Of another action as ground of abatement, see ABATEMENT, 2.

- appeal in condemnation proceedings, effect of, see EMINENT DOMAIN, 954, 955.
- writ of error, effect of, see EMINENT DOMAIN, 966.
- — — from United States supreme court to state court, effect of, see FEDERAL COURTS, 27.

PENDING SUITS.

Effect of discharge of receiver upon, see RECEIVERS, 178.

— — dissolution upon, see DISSOLUTION, ETC., 29.

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— — — on application for receiver, see RECEIVERS, 20.

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Joint use of street-car tracks in, see STREET RAILWAYS, 240.

PHILADELPHIA, G. & N. R. CO.

1. **Right to condemn land.**—The company has, under its charter, and the various enabling supplements, the right to appropriate property for its use for sidings, switches, turnouts, and necessary branches, subject to the limitations imposed upon its exercise of eminent domain. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

The company can build on Washington street of the borough of Conshohocken, conceding it to be a public street, without and against the consent of the borough. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

2. **Right to lease franchise.**—There being no authority vested in the company to lease its unexercised franchises of appropriation and construction, the Philadelphia & Reading R. Co., no matter how ample are the terms of the demise, can take nothing more than the power "to run, use, and operate" such road, and do such other acts

as are necessary to the successful operation of an existing road. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.—QUOTING *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.*, 81* Pa. St. 112.

The lease did not by its terms vest the lessee with the authority, of its own motion, to put in force unexercised franchises of construction and appropriation vested in the lessors; but, on the contrary, by implication, reserved the exclusive right of the latter to put such power in force. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

The company can alone put in force its franchises which were unexercised at the time of the demise. It must be understood, however, that that applies to the franchises of appropriation and construction of lateral roads beyond the limits of corporate acquisition at the time of the demise. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

The receivers of the Philadelphia & R. R. Co. cannot, either with or without the authority of the circuit court, exercise a franchise of the lessor company not demised to the company. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

Whether such franchise was ever demised or not to the Philadelphia & R. R. Co. is immaterial, for being unexercised it could not pass into the possession of the receivers. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

The receivers, having no authority to construct the frog, siding, turnouts, switches, and branch roads crossing Washington street, are mere trespassers, and have no standing in court. *Lewis v. Germantown, N. & P. R. Co.*, 16 Phila. (Pa.) 608.

PHILADELPHIA & R. R. CO.

1. **Construction of road and branches.**—The rights which the commonwealth enjoyed under the act of March 21, 1831, and the ordinance of the councils of Philadelphia passed April 28, 1831, relative to the construction and continuance of a railroad from the intersection of Vine and Broad streets, down Broad to Cedar street, were transferred to the Philadelphia & Reading R. Co. by the canal commissioners' deed of December 27, 1850, and the act authorizing said sale; and nothing short of the exercise of the power of eminent domain, by a taking accompanied with

compensation, can defeat the rights thus acquired by said company. *Philadelphia & R. R. Co. v. Philadelphia*, 47 Pa. St. 325.

Under Pa. Acts of April 13, 1846, and of April 12, 1864, the company may make lateral or branch roads from its main line to points in counties through which the main line passes, and may appropriate such land as is necessary on payment of damage. *French v. Philadelphia & R. R. Co.*, 13 Phila. (Pa.) 187.

2. Election of officers.—If the election for officers of the company is not held at the annual meeting, but at a subsequent one called for that purpose, such election is to be governed by the same rules as if it had been held at the annual meeting. *McCalmonts v. Philadelphia & R. R. Co.*, 15 Phila. (Pa.) 153.

3. Reorganization.—The voting trustees appointed under the reorganization of the company in 1887 are not the representatives of the shareholders alone, but of the lien creditors also, and apparently occupy a position analogous to that of a disinterested third person chosen by a debtor and his creditor to hold the pledge for the benefit of both. Whether they have a right to elect officers of the corporation in defiance of the wishes of the shareholders is not sufficiently clear to warrant a preliminary injunction against their so doing, especially when it might prevent the holding of the election. *Shelmerdine v. Welsh*, 20 Phila. (Pa.) 199.

PHOTOGRAPHS.

Admissibility and effect of, as evidence, see EVIDENCE, 236, 587.
— of, in evidence, see DEATH BY WRONGFUL ACT, 245; EVIDENCE, 40.

PHYSICAL CONDITION.

Of injured person, opinion of witness as to, see WITNESSES, 100.

PHYSICAL EXAMINATION.

Admissibility of evidence of objection to, see EVIDENCE, 66.

1. Compulsory examination, when properly ordered.*—In an action for

* Surgical examination of plaintiff's person, see notes, 47 AM. & ENG. R. CAS. 414; 18 Id. 216.

Power of court to order injured persons to submit to private medical examination, or to exhibit effect of injury to jury, see notes, 49 AM. REP. 726; 50 Id. 156; 14 L. R. A. 466, 3 AM. ST. REP. 554.

damages for personal injuries the plaintiff may be required by the court, upon a proper application therefor by the defendant, to submit his person to an examination for the purpose of ascertaining the character and extent of his injuries. *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 375, 14 Am. Ry. Rep. 359.—CRITICISED AND DISAPPROVED IN *Roberts v. Ogdensburgh & L. C. R. Co.*, 29 Hun (N. Y.) 154. DISAPPROVED IN *McQuigan v. Delaware, L. & W. R. Co.*, 129 N. Y. 50. DISTINGUISHED IN *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578. NOT FOLLOWED IN *McQuigan v. Delaware, L. & W. R. Co.*, 21 Civ. Pro. (N. Y.) 396; *Neuman v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 412; *Joliet St. R. Co. v. Call*, 143 Ill. 177. QUOTED IN *Atchison, T. & S. F. R. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659.—*Alabama G. S. R. Co. v. Hill*, 44 Am. & Eng. R. Cas. 441, 90 Ala. 71, 8 So. Rep. 90. *Atchison, T. & S. F. R. Co. v. Thul*, 10 Am. & Eng. R. Cas. 783, 29 Kan. 466, 44 Am. Rep. 659.—QUOTING *Lloyd v. Hannibal & St. J. R. Co.*, 53 Mo. 515; *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa 378. —NOT FOLLOWED IN *Neuman v. Third Ave. R. Co.*, 18 J. & S. (N. Y.) 412.—*White v. Milwaukee City R. Co.*, 18 Am. & Eng. R. Cas. 213, 61 Wis. 536, 21 N. W. Rep. 524, 50 Am. Rep. 154. *McNaier v. Manhattan R. Co.*, 22 N. Y. S. R. 840, 51 Hun 644, mem., 4 N. Y. Supp. 310; affirmed in 123 N. Y. 664, mem., 34 N. Y. S. R. 1010.

The fact that plaintiff in an action for personal injuries was a young woman of nervous temperament, and of delicate and refined feelings, is not a sufficient cause for overruling a motion for a physical examination of her person by physicians, where it appears that her attending physician had already made several examinations, and that no ill consequences would result from the proposed examination. *Alabama G. S. R. Co. v. Hill*, 44 Am. & Eng. R. Cas. 441, 90 Ala. 71, 8 So. Rep. 90.

In such case it is error to refuse to order a physical examination of plaintiff's person on the ground that an examination had already been made by plaintiff's physician, who had deposed to the injuries complained of, where the opinions and conclusions of such physician are not concurred in by several other reputable surgeons. *Alabama G. S. R. Co. v. Hill*, 44 Am. & Eng. R. Cas. 441, 90 Ala. 71, 8 So. Rep. 90.

2. When not properly ordered.—

In an action for an injury to a passenger the courts of the United States have no power to order, on the application of defendant, and in advance of the trial, that plaintiff, without his or her consent, submit to a surgical examination as to the extent of the injury. *Union Pac. R. Co. v. Botsford*, 47 *Am. & Eng. R. Cas.* 406, 141 *U. S.* 250, 11 *Sup. Ct. Rep.* 1000.—APPROVED IN *Joliet St. R. Co. v. Call*, 143 *Ill.* 177. DISTINGUISHED IN *Baltimore & O. R. Co. v. Andrews*, 53 *Am. & Eng. R. Cas.* 523, 50 *Fed. Rep.* 728, 1 *C. C. A.* 636. FOLLOWED IN *McQuiglan v. Delaware, L. & W. R. Co.*, 21 *Civ. Pro. (N. Y.)* 396. QUOTED IN *Pennsylvania Co. v. Newmeyer*, 129 *Ind.* 401.

The trial court has no inherent power to, and, in the absence of a statute conferring the right, may not, in advance of the trial of an action for personal injuries, compel the plaintiff, on the application of the defendant, to submit to an examination of his person by surgeons appointed by the court, with a view to enable them to testify on the trial as to the existence or extent of the alleged injury. *McQuiglan v. Delaware, L. & W. R. Co.*, 48 *Am. & Eng. R. Cas.* 490, 129 *N. Y.* 50, 21 *Civ. Pro.* 396, 29 *N. E. Rep.* 235, 41 *N. Y. S. R.* 382; *affirming* 60 *Hun* 576, 38 *N. Y. S. R.* 1021, 15 *N. Y. Supp.* 973;—DISAPPROVING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 375. DISTINGUISHING *Briggs v. Morgan*, 2 *Hagg. Const.* 324; *Devanbagh v. Devanbagh*, 5 *Paige* 554; *Newell v. Newell*, 9 *Paige* 25. OVERRULING *Walth v. Sayre*, 52 *Hew. Pr. (N. Y.)* 334.—APPROVED IN *Joliet St. R. Co. v. Call*, 143 *Ill.* 177.—*Roberts v. Ogdensburgh & L. C. R. Co.*, 29 *Hun (N. Y.)* 154.—CRITICISING AND DISAPPROVING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 375. DISTINGUISHING *Harrold v. New York El. R. Co.*, 21 *Hun* 268.—FOLLOWED IN *McQuiglan v. Delaware, L. & W. R. Co.*, 21 *Civ. Pro. (N. Y.)* 396. See *Neuman v. Third Ave. R. Co.*, 18 *J. & S.* 412.—*Neuman v. Third Ave. R. Co.*, 18 *J. & S. (N. Y.)* 412; *appeal dismissed (P)* 97 *N. Y.* 632, *mem.*—DISTINGUISHING *Harrold v. New York El. R. Co.*, 21 *Hun* 268. FOLLOWING *Roberts v. Ogdensburgh R. & L. C. Co.*, 29 *Hun* 155. NOT FOLLOWING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 375; *Miami & M. Turnpike Co. v. Baily*, 37 *Ohio St.* 104; *Atchison, T. & S. F. R. Co. v. Thul*, 29 *Kan.* 466, 44 *Am. Rep.* 659.—*Archer v. Sixth Ave. R.*

Co., 20 *J. & S. (N. Y.)* 378, *affirmed in* 108 *N. Y.* 632, *mem.*, 15 *N. E. Rep.* 75, 13 *N. Y. S. R.* 899.—DISTINGUISHING *Mulhado v. Brooklyn City R. Co.*, 30 *N. Y.* 370.—*McQuiglan v. Delaware, L. & W. R. Co.*, 129 *N. Y.* 50, 29 *N. E. Rep.* 235, 21 *Civ. Pro.* 396.—FOLLOWING *Roberts v. Ogdensburgh & L. C. R. Co.*, 29 *Hun* 154; *Union Pac. R. Co. v. Botsford*, 141 *U. S.* 250. NOT FOLLOWING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 375, 19 *Alb. L. J.* 234.

In the absence of a statute authorizing it, a party to an action is not required to submit his person to an examination of his injuries by surgeons appointed by the court for that purpose. *Pennsylvania Co. v. Newmeyer*, 52 *Am. & Eng. R. Cas.* 454, 129 *Ind.* 401, 28 *N. E. Rep.* 860.—QUOTING *Union Pac. R. Co. v. Botsford*, 141 *U. S.* 250.—*Lloyd v. Hannibal & St. J. R. Co.*, 53 *Mo.* 509, 12 *Am. Ry. Rep.* 474.—MODIFIED IN *Sidekum v. Wabash, St. L. & P. R. Co.*, 30 *Am. & Eng. R. Cas.* 640, 93 *Mo.* 400, 10 *West. Rep.* 278, 4 *S. W. Rep.* 701. QUOTED IN *Atchison, T. & S. F. R. Co. v. Thul*, 29 *Kan.* 466, 44 *Am. Rep.* 659; *Shepard v. Missouri Pac. R. Co.*, 85 *Mo.* 629.—*Peoria, D. & E. R. Co. v. Rice*, 46 *Ill. App.* 60.—APPLYING *Parker v. Enslow*, 102 *Ill.* 272; *Chicago & E. R. Co. v. Holland*, 122 *Ill.* 461.—*Joliet St. R. Co. v. Call*, 143 *Ill.* 177, 32 *N. E. Rep.* 389.—APPROVING *Union Pac. R. Co. v. Botsford*, 141 *U. S.* 250; *McQuiglan v. Delaware, L. & W. R. Co.*, 129 *N. Y.* 50. FOLLOWING *Parker v. Enslow*, 102 *Ill.* 272. NOT FOLLOWING *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 *Iowa* 375.—*Peoria, D. & E. R. Co. v. Rice*, 144 *Ill.* 227, 33 *N. E. Rep.* 951. *Stuart v. Havens*, 17 *Neb.* 211, 22 *N. W. Rep.* 419.—FOLLOWING *Sioux City & P. R. Co. v. Finlayson*, 16 *Neb.* 578; *White v. Milwaukee City R. Co.*, 61 *Wis.* 536, 21 *N. W. Rep.* 524.

It is not error to refuse such examination in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury. *Gulf, C. & S. F. R. Co. v. Norfleet*, 45 *Am. & Eng. R. Cas.* 207, 78 *Tex.* 321, 14 *S. W. Rep.* 703. *International & G. N. R. Co. v. Underwood*, 27 *Am. & Eng. R. Cas.* 240, 64 *Tex.* 463.—REVIEWED IN *Missouri Pac. R. Co. v. Johnson*, 37 *Am. & Eng. R. Cas.* 128, 72 *Tex.* 95, 10 *S. W. Rep.* 325.—*Sioux City & P. R. Co. v. Fin-*

affirmed in 108
 75, 13 N. Y.
 Mulhade v.
 N. Y. 370.—
 W. R. Co.,
 235, 21 Civ.
 s v. Ogdens-
 154; Union
 U. S. 250.
 Chicago, R.
 19 Alb. L. J.

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 Co. v. New-
 454, 129 Ind.
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 Co., 53 Mo.
 MODIFIED IN
 P. R. Co., 30
 Mo. 400, 10
 QUOTED
 v. Thul, 29
 , Shepard v.
 629.—Peoria,
 l. App. 60.—
 102 Ill. 272;
 land, 122 Ill.
 43 Ill. 177, 32
 Union Pac.
 S. 250; Mc-
 R. Co., 129 N.
 Enslow, 102
 roeder v. Chi-
 375.—Peoria,
 ll. 227, 33 N.
 , 17 Neb 211,
 WING SIOUX
 16 Neb. 578;
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 S. F. R. Co.
 Cas. 207, 78
 International
 , 27 Am. &
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 nson, 37 Am.
 95, 10 S. W.
 R. Co. v. Fin-

layson, 16 Neb. 578, 20 N. W. Rep. 860, 49
 Am. Rep. 724.—DISTINGUISHING Schroeder
 v. Chicago, R. I. & P. R. Co., 47 Iowa 375.
 —FOLLOWED IN Stuart v. Havens, 17 Neb.
 211.

In an action against a railway company
 to recover for personal injuries to the plain-
 tiff occasioned by negligence, the defendant
 asked for an order of court that the plain-
 tiff submit to an examination by certain
 physicians named in the motion, which was
 overruled. Something over a year later the
 defendant sent two physicians of its selec-
 tion to examine as to plaintiff's physical
 condition, one of whom had before made a
 thorough examination, who was not ad-
 mitted, but the other was, and made an ex-
 amination. Still later another of the physi-
 cians named in the motion was allowed to
 make a thorough examination of plaintiff.
 Held, that as the defendant had the benefit of
 an examination by three of its physicians,
 it could not complain of the overruling of
 its motion. *Chicago & E. R. Co. v. Hol-
 land*, 30 Am. & Eng. R. Cas. 590, 122 Ill.
 461, 13 N. E. Rep. 145, 11 West. Rep. 51;
affirming 18 Ill. App. 418.—APPLIED IN
Peoria, D. & E. R. Co. v. Rice, 46 Ill. App.
 60. REVIEWED IN *Joliet St. R. Co. v. Call*,
 42 Ill. App. 41.

3. Discretionary power of the court.—The right of the defendant in an
 action against him for a personal injury to
 have the plaintiff's injuries personally ex-
 amined by physicians so that the latter
 may testify as to their character and extent
 is not an absolute one. It is a matter as to
 which the trial court has a discretion which
 will not be interfered with unless manifestly
 abused. *Shepard v. Missouri Pac. R. Co.*,
 85 Mo. 629, 55 Am. Rep. 390.—QUOTING
Loyd v. Hannibal & St. J. R. Co., 53 Mo.
 515.—QUOTED IN *Sidekum v. Wabash, St.
 L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640,
 93 Mo. 400, 10 West. Rep. 278, 4 S. W. Rep.
 701. REVIEWED IN *Owens v. Kansas City,
 St. J. & C. B. R. Co.*, 33 Am. & Eng. R. Cas.
 524, 95 Mo. 169, 15 West. Rep. 88, 8 S. W.
 Rep. 350.—*Sidekum v. Wabash, St. L. &
 P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93
 Mo. 400, 10 West. Rep. 278, 4 S. W. Rep.
 701.—MODIFYING *Loyd v. Hannibal & St. J.
 R. Co.*, 53 Mo. 515. QUOTING *Shepard v.
 Missouri Pac. R. Co.*, 85 Mo. 634.—RE-
 VIEWED IN *Owens v. Kansas City, St. J. &
 C. B. R. Co.*, 33 Am. & Eng. R. Cas. 524,
 6 D. R. D.—62

95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep.
 350.—*Norton v. St. Louis & H. R. Co.*, 40
 Mo. App. 642. *Owens v. Kansas City, St. J.
 & C. B. R. Co.*, 33 Am. & Eng. R. Cas. 524,
 95 Mo. 169, 15 West. Rep. 88, 8 S. W. Rep.
 350.—REVIEWING *Shepard v. Missouri Pac.
 R. Co.*, 85 Mo. 629; *Sidekum v. Wabash,
 St. L. & P. R. Co.*, 93 Mo. 400.—*Joliet
 St. R. Co. v. Call*, 42 Ill. App. 41; *affirmed
 in* 143 Ill. 177, 32 N. E. Rep. 389.—REVIEW-
 ING *Chicago & E. R. Co. v. Holland*, 122
 Ill. 461.

It is within the discretion of the trial
 court to require a plaintiff, suing for a
 physical injury alleged to be permanent,
 to submit to an examination by competent
 physicians at the instance and expense of
 defendant, to ascertain the nature, ex-
 tent, and probable duration of the injury.
 By Ga. Code, § 206, every court has power
 to control, in furtherance of justice, the con-
 duct of all persons connected with a judicial
 proceeding before it, in every matter apper-
 taining thereto. *Richmond & D. R. Co. v.
 Childress*, 41 Am. & Eng. R. Cas. 216, 82 Ga.
 719, 9 S. E. Rep. 602, 3 L. R. A. 808.

It is not error in an action for personal
 injuries for the court upon a second trial to
 refuse to require plaintiff to submit to an
 examination by medical experts, the motion
 to that effect not having been made until
 after plaintiff has put in his evidence and
 rested, and the motion not being supported
 by any affidavit showing any necessity for
 it, or any belief as to what such examination
 would develop. *Terre Haute & I. R. Co.
 v. Bruner*, 128 Ind. 542, 26 N. E. Rep.
 178.

4. Refusal to submit to.—When the
 court orders an examination of plaintiff's
 person, in an action against a railroad for
 personal injury, it ought to appoint either
 experts of its own selection, or such as may
 be agreed upon by the parties; and it is not
 error to refuse to compel him to submit
 to examination by a physician named
 by the defendant, to whom he objects.
Missouri Pac. R. Co. v. Johnson, 37 Am. &
 Eng. R. Cas. 128, 72 Tex. 95, 10 S. W. Rep.
 325.—REVIEWING *International & G. N. R.
 Co. v. Underwood*, 64 Tex. 463.

5. Procedure.—Where an examination
 of plaintiff's person by physicians or sur-
 geons appointed by the court is demanded
 by defendant, with a view to determine
 the nature and extent of the injuries re-

ceived, the selection of such experts is entirely within the discretion of the trial judge, who is not required to yield to the suggestions or wishes of either party; and his refusal to appoint a particular physician at the instance of defendant is not reviewable on error or appeal. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

Where medical experts are ordered by the court to examine a plaintiff, and such experts are called and questioned by defendant as to the result of their examination, plaintiff may ask on cross-examination how the examination was conducted, and what questions were propounded to him. *Louisville, N. A. & C. R. Co. v. Falvey*, 23 Am. & Eng. R. Cas. 522, 104 Ind. 409, 3 N. E. Rep. 389, 4 N. E. Rep. 908.

Physicians who were present at the examination, on behalf of plaintiff, should be allowed to testify to the particulars in which, in their opinion, defendant's medical witnesses failed to make proper or full examinations. *Laughlin v. Grand Rapids St. R. Co.*, 26 Am. & Eng. R. Cas. 377, 62 Mich. 220, 28 N. W. Rep. 873.

A defendant asked that plaintiff should submit to a physical examination, and the court said that if it appeared necessary during the progress of the trial he would grant the request, but the request was not subsequently renewed. *Held*, that it must be treated as abandoned. *Sidekum v. Wabash, St. L. & P. R. Co.*, 30 Am. & Eng. R. Cas. 640, 93 Mo. 400, 10 West. Rep. 277, 4 S. W. Rep. 701.

When a physician examines a patient in order to be enabled to prescribe for her, the fact that he made the examination at the instance of a third person through whose negligence the patient was injured will render him incompetent to testify to the results of such examination, unless it appears that the patient was advised that he came to examine her in the interest of such third person, and not in her own. *Weitz v. Mound City R. Co.*, 53 Mo. App. 39.

If a personal examination is desired, the application should be made before the trial begins and experts are agreed upon by the parties or appointed by the court. *Stuart v. Havens*, 17 Neb. 211, 22 N. W. Rep. 419.

In an action for personal injuries, it is proper for plaintiff to exhibit the injured member to a surgeon in the presence of the jury. *Mulhady v. Brooklyn City R. Co.*, 30 N. Y. 370.—DISTINGUISHED IN *Archer v. Sixth*

Ave. R. Co., 20 J. & S. (N. Y.) 378. QUOTED IN *Looram v. Second Ave. R. Co.*, 11 N. Y. S. R. 652; *Cunningham v. Union Pac. R. Co.*, 4 Utah 206.

The New York Act of 1893, ch. 721, which gives a defendant, when sued for personal injuries, the right to demand that plaintiff submit to a physical examination, contemplates that the application for the examination shall be made as an addition to an application for the ordinary examination of an adversary before trial. *Lyon v. Manhattan R. Co.*, 27 N. Y. Supp. 966, 7 Misc. 401.

Upon application for an order for examination of the injured party, unless assented to, opposition should be made at the time to the order. After such order, and its execution without opposition, the party affected has no right to attack it in an appeal to the jury. *Gulf, C. & S. F. R. Co. v. Butcher*, 52 Am. & Eng. R. Cas. 615, 83 Tex. 309, 18 S. W. Rep. 583.

In an action for personal injuries, plaintiff complained of pain and weakness in the hip down to the time of the trial; and at the request of defendant she submitted to an examination at the trial by a number of physicians, one half selected by either side. They all testified that there was no appearance of physical conditions that would cause the pain complained of, but one, called by the plaintiff, testified that he thought he could tell whether she suffered pain from the movement of the hip, judging from the examination and what she said, and that it was his opinion that she did suffer. *Held*, that the evidence was properly admitted. *Quaife v. Chicago & N. W. R. Co.*, 48 Wis. 513, 33 Am. Rep. 821, 4 N. W. Rep. 658.

PHYSICIANS.

As experts, see WITNESSES, 164-173.

Declarations of pain and suffering made to, see EVIDENCE, 209.

Employment of, see MEDICAL SERVICES, 1-14.

Evidence of statement to, as to cause of injury, see EVIDENCE, 210.

Privileged communications with, see WITNESSES, 88-90.

Right of, to compensation, see MEDICAL SERVICES, 15-19.

Statement of, to patient, when deemed hearsay, see EVIDENCE, 169.

— when deemed hearsay, see EVIDENCE, 163.

PHYSICIANS AND SURGEONS.

- Competency of evidence of advice of, see EVIDENCE, 26.
 — — — failure to call, see EVIDENCE, 43.
 Implied powers of, see AGENCY, 18.
 Incompetency of, as a defense to action for causing death, see DEATH BY WRONGFUL ACT, 165.

PIERS.

- When deemed fixtures, see FIXTURES, 5.

PILOT.

- Of engine, contributory negligence in riding on, see EMPLOYÉS, INJURIES TO, 372, 373.
 — engines, duty to employes as to safety of, see EMPLOYÉS, INJURIES TO, 133.
 Liability for injury to person riding on, see TRESPASSERS, INJURIES TO, 84.

PIRACY.

- When a defense to carrier, see CARRIAGE OF MERCHANDISE, 19.

PLACE.

- Admissibility of evidence as to condition of track at other places than that of accident, see EVIDENCE, 90.
 Agreement to deliver goods at specified, see CARRIAGE OF MERCHANDISE, 254.
 Assumption of risk while riding in perilous, a question for jury, see EMPLOYÉS, INJURIES TO, 726-732.
 At which traveler should stop, look, and listen, see CROSSINGS, INJURIES, ETC., AT, 276, 277.
 Contracts to locate station at particular, see STATIONS AND DEPOTS, 33.
 — — — — validity of, see CONTRACTS, 59, 60.
 Contributory negligence in riding in dangerous, see EMPLOYÉS, INJURIES TO, 370-380.
 Discrimination by carrier as between, see DISCRIMINATION, 37-49.
 Duty to provide safe, in which to work, see EMPLOYÉS, INJURIES TO, 38-44.
 Exemplary damages for ejection from train in dangerous, see EJECTION OF PASSENGERS, 118.
 Expulsion from sleeping car at improper, see SLEEPING, ETC., COMPANIES, 17.
 Failure of vice-principal to provide safe, liability of company, see FELLOW-SERVANTS, 92.
 For ejection of trespasser, what proper, see TRESPASSERS, INJURIES TO, 90.

For passenger to ride, duty of carrier to provide safe, see CARRIAGE OF PASSENGERS, 181.

- payment of coupons, see COUPONS, 8.
 Getting off train at dangerous, contributory negligence, see CARRIAGE OF PASSENGERS, 403-414.
 Of accident, allegation of, in complaint, see CARRIAGE OF PASSENGERS, 541.
 — — evidence to show, see ANIMALS, INJURIES TO, 464.
 — — when need not be alleged in pleading, see EMPLOYÉS, INJURIES TO, 514.
 — business of defendant, jurisdiction as dependent upon, see JURISDICTION, 5.
 — — where process may be served, see PROCESS, 19.
 — construction of roads, measure of damages for breach of contract as to, see DAMAGES, 51.
 — crossing railways, fixing, in award, see CROSSING OF RAILROADS, 53, 54.
 — — track, negligence of traveler as to, see CROSSINGS, INJURIES, ETC., AT, 202, 203.
 — delivery by carrier of live stock, see CARRIAGE OF LIVE STOCK, 51.
 — — of baggage by company, see BAGGAGE, 62.
 — — — goods carried, see EXPRESS COMPANIES, 45, 46.
 — — what proper or sufficient, see CARRIAGE OF MERCHANDISE, 262, 263.
 — deposit of land damages, notice of, see EMINENT DOMAIN, 392.
 — egress from train, duty to provide safe, see CARRIAGE OF PASSENGERS 236-242.
 — ejection of trespasser from train, see EJECTION OF PASSENGERS, 68.
 — employment, assumption of risk as to, see EMPLOYÉS, INJURIES TO, 187.
 — entering cars, fixing, by company, see CARRIAGE OF PASSENGERS, 78.
 — entry by animal on track, evidence to show, see ANIMALS, INJURIES TO, 463.
 — — — — presumption as to, see ANIMALS, INJURIES TO, 474.
 — — on track, how alleged, see ANIMALS, INJURIES TO, 619, 620.
 — — — when question of fact, see ANIMALS, INJURIES TO, 548.
 — expulsion of passenger, see EJECTION OF PASSENGERS, 64-68.
 — giving notice of condemnation proceedings, see EMINENT DOMAIN, 292.
 — holding coroners' inquests, see CORONERS, 1.
 — injury, evidence of, as controlled by the pleadings, see PLEADING, 111.
 — — statute requiring notice of, see EMPLOYÉS, INJURIES TO, 501.

Of issuing attachment, see ATTACHMENT, ETC., 41.

— killing animal, presumption as to, see ANIMALS, INJURIES TO, 475.

— — — when question of fact, see ANIMALS, INJURIES TO, 549.

— — stock, burden of proof to show, see ANIMALS, INJURIES TO, 499.

— meeting of commissioners to assess damages, see EMINENT DOMAIN, 505.

— — — directors, see DIRECTORS, ETC., 19.

— payment of coupon, see COUPONS, 3.

— — stating, in railway aid bond, see MUNICIPAL AND LOCAL AID, 311.

— presenting claim for loss, stipulation as to, see BILLS OF LADING, 96.

— registration of mortgages, see MORTGAGES, 80.

— residence or business as situs of property for taxation, see TAXATION, 127, 128.

— service of attachment, see ATTACHMENT, ETC., 45.

— — — process, see PROCESS, 40.

— shipment, limiting damages to market value at, see CARRIAGE OF MERCHANDISE, 462.

— trial by jury in assessment of land damages, see EMINENT DOMAIN, 546.

— — what proper, and how changed, see TRIAL 5-19.

— work, assumption of risk from unsafe, see EMPLOYÉS, INJURIES TO, 286.

— — duty to warn infant employe as to, see EMPLOYÉS, INJURIES TO, 462.

— — notice of danger and peril connected with, see EMPLOYÉS, INJURIES TO, 226.

— — promise of employer to repair defects in, see EMPLOYÉS, INJURIES TO, 250.

Riding in perilous, when contributory negligence, see CARRIAGE OF PASSENGERS, 457-498.

To move for new trial, see NEW TRIAL, 98.

— store goods is that of destination, see CARRIAGE OF MERCHANDISE, 371.

— what, ordinances regulating speed apply, see STREETS AND HIGHWAYS, 322.

— work, alleging negligence in failing to provide safe, see EMPLOYÉS, INJURIES TO, 519.

— — evidence of failure to provide safe, see EMPLOYÉS, INJURIES TO, 562.

— — negligence in failing to provide safe, see EMPLOYÉS, INJURIES TO, 667.

— — person charged with duty to provide, is a vice-principal, see FELLOW-SERVANTS, 212.

— — sufficiency of evidence to show unsafety of, see EMPLOYÉS, INJURIES TO, 606.

Where a cattle-guard must be built, see CATTLE-GUARDS, 7-14.

Where dividends are payable, see DIVIDENDS, 5.

— fences must be built, see ANIMALS, INJURIES TO, 95-108; FENCES, 52-68.

— signals must be given by statute or ordinance, see STREETS AND HIGHWAYS, 335.

Working in dangerous, in the dark, when contributory negligence, see EMPLOYÉS INJURIES TO, 319.

See also LAW OF PLACE; LOCUS IN QUO.

PLACE OF BUSINESS.

Of consignee, delivery of goods at, see CARRIAGE OF MERCHANDISE, 90, 215.

— corporation, when deemed its residence, see CITIZENSHIP, ETC., 4, 5.

— defendant, when proper venue for action for causing death, see DEATH BY WRONGFUL ACT, 106.

PLAINTIFF.

Competency of, to prove contents or value of lost baggage, see BAGGAGE, 114.

Death of, as ground of abatement, see ABATEMENT, 4-6.

When sustains burden of proof, see EVIDENCE, 143.

PLANK-ROAD COMPANIES.

Condemnation of land of, see EMINENT DOMAIN, 123.

PLANS.

Filing of, generally, see LOCATION OF ROUTE, 16.

— — under Canadian statutes, see EMINENT DOMAIN, 1221.

Of construction as evidence, see EVIDENCE, 237.

— elevated railway, adoption of, see ELEVATED RAILWAYS, 13.

Proof of dedication by, see STREETS AND HIGHWAYS, 7.

Reference to, in deeds, see DEEDS, 20.

Under English compulsory purchase laws, see EMINENT DOMAIN, 1137-1142.

Use of, in condemnation proceedings, see EMINENT DOMAIN, 332-340.

PLATFORM CAR.

Contributory negligence in riding on side of, see EMPLOYÉS, INJURIES TO, 378.

PLATFORMS.

Absence of guards at edge of, see ELEVATED RAILWAYS, 205.

Boarding train elsewhere than at, contributory negligence, see CARRIAGE OF PASSENGERS, 371.

Duty to provide safe, see CARRIAGE OF PASSENGERS, 238.

— — remove ice and snow from, see CARRIAGE OF PASSENGERS, 210.

— — stop alongside of, see CARRIAGE OF PASSENGERS, 216, 229, 264.

Erection of, when constitutes a taking of property, see EMINENT DOMAIN, 166.

Injuries caused by snow and ice on, see ELEVATED RAILWAYS, 212.

— to passenger by opening between car and, see ELEVATED RAILWAYS, 207.

— — riding on, see CABLE RAILWAYS, 12.

Joint use of, by two or more companies, see STATIONS AND DEPOTS, 149.

Liability for defects in, see CARRIAGE OF PASSENGERS, 268, 269.

— — personal injuries at, see STATIONS AND DEPOTS, 76-88.

— to passenger for defects in, see CARRIAGE OF PASSENGERS, 189.

Near track, duty of company to fence, see EMPLOYÉS, 78.

— — effect of notice or knowledge of, see EMPLOYÉS, INJURIES TO, 232.

Negligence in allowing passengers to ride on, see STREET RAILWAYS, 352.

Of car, contributory negligence in riding on, see CARRIAGE OF PASSENGERS, 472-483.

— — injury to passenger while standing on, see ELECTRIC RAILWAYS, 26.

— crowded car, injury to passenger on, see ELEVATED RAILWAYS, 213.

Ordinances as to safety of, see STREETS AND HIGHWAYS, 314.

Riding on, by child, whether negligence, a question of fact, see CHILDREN, INJURIES TO, 111.

Right of street-car company to make rule prohibiting riding on, see STREET RAILWAYS, 312.

Rules forbidding standing on, see CARRIAGE OF PASSENGERS, 86.

Stepping off, by passenger, when contributory negligence, see CARRIAGE OF PASSENGERS, 445.

PLATS.

Admissibility and effect of, as evidence, see EVIDENCE, 231.

— of, in evidence, see ANIMALS, INJURIES TO, 437.

Filing, see PUBLIC LANDS, 42.

Of streets, admissibility of, in evidence, see DEATH BY WRONGFUL ACT, 246.

PLEA.

Form and sufficiency of, generally, see PLEADING, 33-60.

In abatement, see CROSSING OF STREETS AND HIGHWAYS, 110.

— action against carrier of cattle, see CARRIAGE OF LIVE STOCK, 141.

— — for causing death, see DEATH BY WRONGFUL ACT, 153, 156.

— — — loss of baggage, see BAGGAGE, 111.

— — — taxes, see TAXATION, 317.

— — of trespass, see TRESPASS, 14.

— — on bill or note, see BILLS, ETC., 22.

— — — contracts, see CONTRACTS, 96.

— — — stock subscriptions, see SUBSCRIPTIONS TO STOCK, 94-98.

— condemnation proceedings, necessity and sufficiency of, see EMINENT DOMAIN, 350-354.

— ejectment, see EJECTMENT, 26.

— — by landowner, see EMINENT DOMAIN, 1026.

— equity, see PLEADING, 86.

— suits against carriers of goods, see CARRIAGE OF MERCHANDISE, 734.

— — by stockholders, see STOCKHOLDERS, 128.

— — for injuries to employees, see EMPLOYÉS, INJURIES TO, 544-549.

— trespass by landowner for wrongful interference with property, see EMINENT DOMAIN, 1069.

Of confession and avoidance, alleging contributory negligence, see CONTRIBUTORY NEGLIGENCE, 78.

— "not guilty by statute," proving contributory negligence under, see CONTRIBUTORY NEGLIGENCE, 80.

Striking out, on appeal from justice's court, see JUSTICE OF THE PEACE, 18.

To action against carrier of passengers, see CARRIAGE OF PASSENGERS, 554.

— suit on construction contract, see CONSTRUCTION OF RAILWAYS, 108.

PLEADING.

Admissions in, see EVIDENCE, 200.

Allegations in, when create estoppel, see ESTOPPEL, 12.

Alleging or negating contributory negligence, see CONTRIBUTORY NEGLIGENCE, 52-81.

Amendment of, after statutory period has run, effect of, see LIMITATIONS OF ACTIONS, 13.

— — as ground for continuance, see TRIAL, 23.

And proof of incorporation, see CORPORATIONS, 20.

Averments as to contributory negligence, see CROSSINGS, INJURIES, ETC., AT, 227.

Competency of evidence as to matters not alleged, see EVIDENCE, 61.

- Counts charging liability both as carrier and as warehouseman, see CARRIAGE OF MERCHANDISE, 361.
- Discretion of court in allowing amendments of, see APPEAL AND ERROR, 17.
- Disregarding irregularities in, on appeal, see EMINENT DOMAIN, 903.
- Estoppel to prove damages different from case made by, see EMINENT DOMAIN, 642.
- Evidence admissible under — see ANIMALS, INJURIES TO, 381, 382. — FELLOW-SERVANTS, 457.
- — in action for damages caused by fire, see FIRES, 172, 173.
- under, in justice's court, see ANIMALS, INJURIES TO, 630.
- How acts ultra vires should be pleaded, see ULTRA VIRES, 2.
- an estoppel should be pleaded, see ESTOPPEL, 6.
- a release should be pleaded, see RELEASE, 12.
- exemption from taxation should be pleaded, see TAXATION, 153.
- misnomer should be pleaded, see NAME OF RAILROAD, 3.
- In actions against carriers, see CARRIAGE OF MERCHANDISE, 723-739.
- — of passengers, see CARRIAGE OF PASSENGERS, 537-554.
- — elevated railway company, see ELEVATED RAILWAYS, 96-100.
- — lessor companies, see LEASES, ETC., 52.
- — railway company for injuries in streets or highways, see STREETS AND HIGHWAYS, 383-385.
- — by and against express companies, see EXPRESS COMPANIES, 83.
- — husband for personal injuries to wife, see HUSBAND AND WIFE, 19.
- — for causing death, see DEATH BY WRONGFUL ACT, 125-156.
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I. AT LAW AND UNDER CODES.

1. *General Principles.*

1. Interpretation of pleadings, generally. — Construing the pleadings most strongly against the pleader, the court presumes where plaintiff sues for damages on account of injuries causing the death of his minor son while in defendant's employment that the employment was with his consent, the contrary not being averred, and that the minor was over fourteen years of age. *Lovell v. DeBardelaben C. & I. Co.*, 90 Ala. 13, 7 So. Rep. 756.

After an infant has attained the age of fourteen years the presumption is indulged that he is capable of exercising judgment and discretion, but before that age the contrary presumption prevails. *Lovell v.*

DeBardelaben C. & I. Co., 90 Ala. 13, 7 So. Rep. 756.

2. Facts, not conclusions of law, must be stated.—Defendant company was sued as the guarantor of the bonds of another company, and the complaint alleged the making of the guaranty for value received by authority of the board of directors, and that the company had authority to do so. The company demurred on the ground that the averment as to the authority to make the guaranty was only a conclusion of law, and therefore that the complaint showed that the guaranty was *ultra vires*. *Held*, that the demurrer was not well taken. *Bryce v. Louisville, N. A. & C. R. Co.*, 25 N. Y. Supp. 1043, 73 Hun 233.

3. Form of allegations.*—When it is alleged that it is the duty of a corporation to do, or not to do, a given thing, it is necessarily implied therefrom that the corporation knew that it was its duty to do, or not to do, the thing. *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. Rep. 1021; *affirming* 33 Ill. App. 271.

When an enumeration of particulars would lead to great prolixity in pleading, a general statement is sufficient. *Smith v. Boston, C. & M. R. Co.*, 36 N. H. 458.

Where the only averment directly affecting the question of negligence is that a person has acted negligently, or the opposite, the averment must be regarded as one of fact, and effect given to it accordingly. *Washburn v. Chicago & N. W. R. Co.*, 68 Wis. 474, 32 N. W. Rep. 234.

4. How statutes should be pleaded.—In suing at common law, in any case where the provisions of a public statute are applicable as a general rule, it is not necessary to set them forth or refer to them, as the court will take judicial notice of them. There is an exception to this rule in cases where the remedy given by the statute is cumulative and differs from that given by the common law. In such case, if the relief given by the statute is sought, the pleader must manifest that purpose or intent by apt words of reference to the statute. *Chicago & A. R. Co. v. Dillon*, 32 Am. & Eng. R. Cas. 1, 123 Ill. 570, 15 N. E. Rep. 181, 13 West. Rep. 286; *affirming* 24 Ill. App. 203.

One desiring to avail himself of the provisions of a public statute is required only

to state facts which bring his case clearly within its provisions. *Emerson v. St. Louis & H. R. Co.*, 111 Mo. 161, 19 S. W. Rep. 1113.

Where a statute of another state constitutes a part of the organization of a corporation suing in Indiana, it is not necessary to its introduction in evidence by the plaintiff that it should have been pleaded. *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

Where plaintiff's right of action is based upon a foreign statute, it is sufficient to allege that the provisions of the statute have been complied with without setting out specifically the various steps going to make up the compliance. *Rothschild v. Rio Grande Western R. Co.*, 45 N. Y. S. R. 809, 63 Hun 632, 18 N. Y. Supp. 548.

An administrator brought an action in Rhode Island against a railroad company for personal injuries to his intestate caused by the company in Massachusetts and resulting in death. The declaration was demurred to because it contained no allegation that the cause of action survived in Massachusetts. *Held*, that the demurrer should be sustained. *O'Reilly v. New York & N. E. R. Co.*, 42 Am. & Eng. R. Cas. 50, 16 R. I. 388, 29 Cent. L. J. 210, 6 L. R. A. 719, 17 Atl. Rep. 906.

In an action founded on the N. J. statute entitled "An act to lease certain lands of the state to the Newark & New York Railroad Company, and to enlarge the powers of said company," an averment that defendants accepted the act necessarily implies that they accepted and agreed to the provisions of the lease embodied in the act, and is sufficient, without showing the particular facts relied on to prove the acceptance. *State v. Newark & N. Y. R. Co.*, 34 N. J. L. 301.

Plaintiff sued for a personal injury at a crossing in another state, where a statute required railroad companies to give a train signal on approaching highway crossings; but the complaint made no mention of the statute. *Held*, that it was competent to prove the statute, because it was some evidence bearing on the question of negligence. *Van Raden v. New York, N. H. & H. R. Co.*, 56 Hun 96, 30 N. Y. S. R. 300, 8 N. Y. Supp. 914.—*APPLYING Archer v. New York, N. H. & H. R. Co.*, 106 N. Y. 589.

5. What need not be pleaded.—It is not a subject to be pleaded and proved whether a box car, or other particular ob-

* Pleading as to duty of fencing, see note, 19 AM. & ENG. R. CAS. 580.

ject, is naturally calculated to frighten horses, but this is to be determined by the experience, observation, and intelligence of the court and jury as applied to the facts of the case before them. *Cleveland, C., C. & I. R. Co. v. Wynant*, 35 *Am. & Eng. R. Cas.* 328, 114 *Ind.* 525, 14 *West. Rep.* 512, 17 *N. E. Rep.* 118.

6. Exhibits.—Exhibits attached to a complaint consisting of copies of writings which are not the foundation of the action form no part of the complaint, and cannot be looked to by the court in determining its sufficiency. *Wilkinson v. Peru*, 61 *Ind.* 1.

Where a railway company agrees verbally to give an injured employé steady employment during his life, if he will execute a written release of all claims for damages against the company, the employé, in an action against the company for a breach of the agreement, need not file with his complaint a copy of the release as an exhibit, the action being not on the release, but for breach of contract. *Pennsylvania Co. v. Dolan*, 6 *Ind. App.* 109, 32 *N. E. Rep.* 802.

2. Declaration. Complaint. Petition.

7. Naming and describing the parties.*—In a suit against a railroad company it may be designated by its corporate name. *Ramsay v. Richmond & D. R. Co.*, 91 *N. Car.* 418.—FOLLOWING *Stanly v. Richmond & D. R. Co.*, 89 *N. Car.* 331.

A declaration in an action for a personal injury, after stating that defendant was the owner of a certain railroad, running through certain towns, and of certain cars for the conveyance of passengers, averred that, on the day specified, defendant was the owner of, and was running and propelling upon said road, a certain train of passenger cars, for a certain reasonable reward paid to defendant. *Held*, that it sufficiently appeared that defendant was a common carrier. *Fuller v. Naugatuck R. Co.*, 21 *Conn.* 557.

In such case it was not necessary to allege that defendant had power by its charter to become a common carrier; for being engaged in this business, and having in its pursuit made a contract pertaining to it, it ought not to be allowed to say to the contracting party that it had no power to do

so. *Fuller v. Naugatuck R. Co.*, 21 *Conn.* 557.

Where suit is brought against the Montgomery & West Point R. Co. by name, the addition of the words "otherwise called the Western R. Co." is mere surplusage. *Montgomery & W. P. R. Co. v. Boring*, 51 *Ga.* 582.

A complaint under Ind. Rev. St. 1881, § 4025, against a railroad company for killing stock which avers that the act was done by "the defendant, or some lessee thereof, or other person unknown to the plaintiff," is bad on demurrer. *Wabash, St. L. & P. R. Co. v. Rooker*, 15 *Am. & Eng. R. Cas.* 558, 90 *Ind.* 581.

All corporations operating railroads in Indiana are made common carriers by statute. An averment that a corporation is engaged in operating a line of railroad is equivalent to an averment that it is a common carrier. *Pennsylvania Co. v. Clark*, 2 *Ind. App.* 146, 27 *N. E. Rep.* 586.

A demurrer to a declaration in an action for breach of contract will be sustained when the contract declared upon is a contract between plaintiff and a third party, and there is no averment showing the relation of defendant to that party, nor to the contract. *Melville v. Baltimore & P. R. Co.*, 2 *Mackey (D. C.)* 63.

Where several common carriers, each having its own line, associate and form what, to the shipper, is a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers divide among themselves, then they are jointly and severally liable to the shipper with whom they have contracted for a loss taking place on any part of the whole line, and the word "partners," or any particular word to describe the relation existing between the carriers, need not be used in the petition. *Wyman v. Chicago & A. R. Co.*, 4 *Mo. App.* 35.

A reference to its charter in the complaint of a corporation plaintiff does not so incorporate the charter into the complaint as to render the statement of its right to sue defective by reason of the failure to allege the performance of conditions precedent to its corporate existence. *Cheraw & C. R. Co. v. White*, 14 *So. Car.* 51.

In a suit against a railway company for damages caused at a period subsequent to its purchase by another company, it was alleged that the latter company "have or

* Misnomers. Pleadings and writs containing "railroad" for "railway," see note, 50 *AM. & ENG. R. CAS.* 618.

claim to have purchased" the property and franchises of the former. *Held*, on general demurrer, that the reasonable intendment from the language used was that the pleader intended to exclude the idea that any such sale as the statutes contemplate, which would have absolved the former road from its obligations to the public, had taken place. *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.—FOLLOWED IN *East Line & R. R. Co. v. Lee*, 71 Tex. 538, 9 S. W. Rep. 604.

A description of the defendant as the Missouri Pacific R. Co., giving the name of the president of the company, does not raise the presumption that the company is incorporated, and is an insufficient description when specially excepted to. *Missouri Pac. R. Co. v. Douglass*, 16 Am. & Eng. R. Cas. 98, 2 Tex. App. (Civ. Cas.) 32.

8. Laying the venue.*—In an action against a railroad company on a contract, instituted in a county other than the one where its chief office is located, the pleadings should show that the contract was either made or was to be performed in the county where such suit is brought (Ga. Code, § 3406). *Corley v. Georgia R. & B. Co.*, 49 Ga. 626.

In actions for personal injuries, the venue laid in the declaration need not be proved unless the jurisdiction has been properly denied by plea. *Central R. & B. Co. v. Gamble*, 77 Ga. 584, 3 S. E. Rep. 287.

Ohio Rev. St. § 5027, prescribing the counties in which a railroad may be sued, relates solely to the jurisdiction of the person, and it is not necessary that the petition should state that the road passes into or through the county where the action is brought. A railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to such jurisdiction. *Ohio Southern R. Co. v. Morey*, 43 Am. & Eng. R. Cas. 97, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. Rep. 269.

9. Averment of corporate existence.—(1) *In federal courts.*—Where a suit is brought in a federal court for Pennsylvania, in which plaintiff is described as a citizen of France, against a railroad company, without any averment that it is a corporation under

the laws of Pennsylvania, or that its place of business is there, or that its corporators, managers, or directors are citizens of Pennsylvania, the court has not jurisdiction. *Piquignot v. Pennsylvania R. Co.*, 16 How. (U. S.) 104.

An averment that a corporation is a body politic under the laws of another state, and doing business there, is a sufficient averment of the corporate existence abroad, so far as jurisdiction is concerned. *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553.—APPLIED IN *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188. QUOTED IN *Dinsmore v. Philadelphia & R. R. Co.*, 11 Phila. (Pa.) 483.

(2) *In state courts.*—In an action by a corporation, the declaration need not specially allege a compliance with every particular circumstance relating to its organization, which is required in order to its becoming invested with the privileges and powers conferred by its charter. Although it may be necessary to prove these matters specially, the allegation may be more general. *Selma & T. R. Co. v. Tipton*, 5 Ala. 787.

An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation. *People v. Central Pac. R. Co.*, 41 Am. & Eng. R. Cas. 653, 83 Cal. 393, 23 Pac. Rep. 303.

California general incorporation act of 1862, providing that the due incorporation of a company, "claiming in good faith to be a corporation," shall not be inquired into collaterally in private suits, does not prevent a private person from denying the existence *de jure* or *de facto* of an alleged corporation. Where the corporation sues, it is an indispensable allegation that plaintiff is a corporation, and the opposite party may deny the allegation. *Oroville & V. R. Co. v. Plumas County Sup'rs*, 37 Cal. 354.

The designation of the defendant in the complaint as "The Cincinnati, Hamilton and Indianapolis Railroad Company" sufficiently indicates that the defendant is a corporation. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. Rep. 571. *O'Donald v. Evansville, I. & C. S. L. R. Co.*, 14 Ind. 259. *Root v. Illinois C. R. Co.*, 29 Iowa 102. *Adams Exp. Co. v. Harris*, 40 Am. & Eng. R. Cas. 151, 120 Ind. 73, 21 N. E. Rep. 340.

A corporation may sue in its corporate name without averring in the complaint

* Where venue may be laid in suits against corporations in state courts, see note, 57 AM. & ENG. R. CAS 96.

how it became a corporation or that it is such; and a default, or answer in denial of the complaint, admits the capacity of plaintiff to sue. *Heaton v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275.

An allegation that the plaintiff is a corporation duly organized and engaged in building a railroad implies that it has assumed the responsibilities of a common carrier. *Chicago, N. & S. W. R. Co. v. Newton*, 36 Iowa 299.

A claim a defendant corporation is estopped by its acts and course of dealing to deny its corporate capacity must be specially pleaded. *Folsom v. Star U. L. F. Freight Line*, 54 Iowa 490, 6 N. W. Rep. 702.

An action which is based solely on the failure to meet the requirements of the ordinances of an incorporated city, but which omits to plead or aver anything whatever as to the charter of said city, unless the charter is declared to be a public act, cannot be maintained. *Wisdom v. Wabash, St. L. & P. R. Co.*, 19 Mo. App. 324.—REVIEWED IN *O'Brien v. Wabash, St. L. & P. R. Co.*, 21 Mo. App. 12.

In actions for torts by incorporated companies, the correct mode of pleading is to show a case in the declaration to all appearances standing aloof from the statutory right of the company; but if a color of right to do the act in question is shown in the company, then the abuse of such right must be laid. *Stephens & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

Where defendant is sued as a corporation, the complaint must state whether it is a foreign or domestic corporation, and if foreign, the state or country of its creation must be given; otherwise it is demurrable. *Chandler v. Erie Transfer Co.*, 19 Civ. Pro. 385, 13 N. Y. Supp. 573.

Where a complaint alleges corporate existence in plaintiff, and no facts or circumstances appear on the face of the complaint showing a want of corporate existence or of capacity to sue, a demurrer is properly overruled. *Cheraw & C. R. Co. v. White*, 14 So. Car. 51.—FOLLOWED IN *Cheraw & C. R. Co. v. Garland*, 14 So. Car. 63.

The almost universal practice in suits against railway companies is to allege the corporate capacity of the defendant. It would seem that if the provision of the statutes on the subject does not positively require such allegation it contemplates such

mode of procedure. *Galveston, H. & S. A. R. Co. v. Smith*, 81 Tex. 479, 17 S. W. Rep. 133.

Under the Texas statutes which declare that in pleading the charter or act of incorporation of a railroad company it shall be sufficient to allege that such company is duly incorporated, an allegation in a petition that plaintiff is "a body duly and legally incorporated by and under the law of the state of Texas" is sufficient. *Texas & P. R. Co. v. Virginia R. L. & C. Co.*, (Tex.) 35 Am. & Eng. R. Cas. 201, 7 S. W. Rep. 341.

A corporation should sue and be sued by its true name, and if it is sued by its true name it is not necessary to show in the declaration how it was incorporated, or to aver in the declaration that it is a corporation duly constituted, or that it is authorized by law to sue or be sued in its corporate name; but these questions may be put in issue by defendant, or raised upon the trial of the general issue. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.—EXPLAINED IN *Central Land Co. v. Calhoun*, 16 W. Va. 361.

10. Allegation of consolidation.—A petition by a consolidated company against a county to compel a delivery of bonds for stock subscribed by one of the companies before consolidation is sufficient on demurrer to enable the court to decide on the legality of the consolidation, where it avers the consolidation, whereby the petitioner succeeded to all the rights, franchises, and property of the former company, the legal intentment being that the consolidation was lawful. *Maconpin County Court v. People ex rel.*, 58 Ill. 191.

An averment that by various transfers defendant has succeeded to all the rights, privileges, and immunities of, and become subject to the same penalties as, the North Missouri R. Co. is a sufficient averment that defendant is the successor of that company. *Roberts v. Wabash, St. L. & P. R. Co.*, (Mo.) 25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783.

An allegation that defendant, as such successor, is bound by a certain act, as a part of the charter of said company, necessarily implies that everything necessary to make said act a part of said charter has been done. Things which are necessarily implied need not be alleged. *Roberts v. Wabash, St. L. & P. R. Co.*, (Mo.) 25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783.

Acts authorizing consolidation of defendant corporations need not be specifically alleged in the complaint. *Pronty v. Lake Shore & M. S. R. Co.*, 6 Hun (N. Y.) 246; *appeal dismissed* (P) 64 N. Y. 641, *mem.*

An averment that certain corporations by authority of law consolidated and became a new corporation under a stated name is sufficient as to the consolidation without showing the various steps taken to effect the consolidation. *Collins v. Chicago, St. P. & F. du L. R. Co.*, 14 Wis. 492.

11. Averment of diverse citizenship to give federal courts jurisdiction.—A corporation is not, strictly speaking, a citizen, and therefore to sustain a suit by or against a corporation in the federal courts it is regarded as a suit by or against the stockholders, and for jurisdictional purposes it is conclusively presumed that the stockholders are citizens of the state under whose laws the corporation was created. *Loneragan v. Illinois C. R. Co.*, 55 Fed. Rep. 550. *Frisbie v. Chesapeake & O. R. Co.*, 57 Fed. Rep. 1.—FOLLOWING *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44.

For the purpose of federal jurisdiction it is not sufficient merely to allege that a defendant corporation is a citizen of a certain state. It must be averred that the corporation was created under the laws of the state named. *Loneragan v. Illinois C. R. Co.*, 55 Fed. Rep. 550.—FOLLOWING *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Muller v. Dows*, 94 U. S. 444.

An averment in a complaint that the defendant corporation is duly established by law and has its principal place of business in a certain city and state is not sufficient to give a federal court jurisdiction on account of diverse citizenship. It must be shown under what law the corporation was established. *New York & N. E. R. Co. v. Hyde*, 56 Fed. Rep. 188.—APPLYING *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553; *Southern Pac. R. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. Rep. 44; *Wolfe v. Hartford L. & A. Ins. Co.*, 148 U. S. 389, 13 Sup. Ct. Rep. 602.

Where a citizen of one state sues a corporation, an averment that it is a corporation operating a railroad in another state and having an agent there is not sufficient to give a federal court jurisdiction on account of citizenship. *St. Louis, I. M. & S. R.*

Co. v. Newcom, 56 Fed. Rep. 951, 6 C. C. A. 172, 12 U. S. App. 503.

Such an averment is not sufficient to warrant the inference that the corporation was organized in the state where it is alleged as doing business simply because there is a state law regulating foreign corporations, which does not amount to incorporation when complied with. The averment of incorporation must be direct, not argumentative. *St. Louis, I. M. & S. R. Co. v. Newcom*, 56 Fed. Rep. 951, 6 C. C. A. 172, 12 U. S. App. 503.

12. Statement of cause of action, generally.—A complaint which states facts constituting a cause of action of either a legal or an equitable nature is not demurrable because framed with a view to relief of another kind than that to which the facts show the plaintiff to be entitled. *Canty v. Latterner*, 15 Am. & Eng. R. Cas. 380, 31 Minn. 239, 17 N. W. Rep. 385.

In an action against a carrier for failing to carry goods, it is no defense that plaintiff engaged to procure insurance on the goods carried, and failed so to do. Nor is it necessary, in declaring against the carrier, to set forth such engagement, nor to allege that it has been fulfilled, nor to aver an excuse for non-fulfillment. *Brenan v. Shelton*, 2 Bailey (So. Car.) 152.

A complaint in ejectment against a railroad company incorporated under the laws of the state which shows that plaintiff has been the owner of the land sought to be recovered for more than twenty-five years, during all of which time defendant has held adverse possession, is bad on demurrer as showing a cause barred by the statute of limitations. *Sherlock v. Louisville, N. A. & C. R. Co.*, 115 Ind. 22, 14 West. Rep. 843, 17 N. E. Rep. 171.—DISTINGUISHING *Cox v. Louisville, N. A. & C. R. Co.*, 48 Ind. 178.

A summary petition for interdict was presented against a railway company for alleged contravention of the Railway Clauses Consolidation Act 1845, § 83, which was alleged also to be a contravention of the Railway and Canal Traffic Act 1854, § 2. The latter act alone provided a summary remedy. *Held*, that the statement in the petition that the thing complained of had been done in contravention of the express prohibition contained in said section 83, as well as in contravention of the Railway Traffic

Act. did not make the petition incompetent. *Hosie v. Edinburgh & G. R. Co.*, 19 *Sc. Sess. Cas. 2d Ser.* 65, 2 *Ky. & C. T. Cas.* 16.

13. — In actions on contracts, generally.—Plaintiff sued defendant company for commissions on materials purchased to be used in constructing its road, not claiming any contract with defendant, but basing his claim upon a contract with another road which had consolidated with defendant; but the special contract was not declared on, neither was there any count on a *quantum meruit*. *Held*, in the absence of any previous existing authority or a subsequent ratification of his services, that a judgment for plaintiff could not be sustained. *Louisville, N. A. & C. R. Co. v. Cherrie*, 18 *Ill. App.* 646.

Plaintiff sued two railroad companies jointly for a breach of contract, and set out in his complaint that he made a conveyance of a right of way to the first company in consideration that it would build a side track, depot, and other station buildings on his land, and furnish him hedge plants to fence the railroad; that the second company afterwards took a lease of the road for ninety-nine years, and entered upon it, agreeing to assume and discharge all the obligations of the first company, which it had failed to do, charging specially a breach of the conditions upon which the right of way was conveyed. *Held*, sufficient to constitute a cause of action against the second or lessee company. *Kansas Pac. R. Co. v. Hopkins*, 18 *Kan.* 494, 15 *Am. Ry. Rep.* 287.

Plaintiff sued defendant company for not maintaining an opening on a twenty-foot strip of land opposite a hotel for convenient access to and from the premises, as by a deed of conveyance it was bound to do. The complaint alleged that plaintiff's damages were caused by the defendant maintaining a fence along the twenty-foot strip. *Held*, that this could not prevent his recovering, where the opening that the company should have maintained was within the greater distance alleged. *Avery v. New York C. & H. R. R. Co.*, 17 *N. Y. S. R.* 392, 2 *N. Y. Supp.* 109; *reversed in* 121 *N. Y.* 31, 30 *N. Y. S. R.* 471, 24 *N. E. Rep.* 20.—**QUOTING** *Avery v. New York C. & H. R. R. Co.*, 106 *N. Y.* 142, 8 *N. Y. S. R.* 612.

A judgment creditor of a county sued to enforce his judgment, alleging in his complaint that the ordinary revenues of the

county were only sufficient to pay current expenses, and that the county had no property from which the judgment could be collected except certain stock in a railroad company, which he alleged was not necessary nor useful for the corporate purposes of the county, and prayed that a sufficient amount of it might be condemned to pay his judgment; but he omitted to refer to the private statute which permitted the county to subscribe to the stock of the railroad. *Held*, that the complaint did not state a sufficient cause of action. *Hughes v. Craven County Com'rs*, 107 *N. Car.* 598, 12 *S. E. Rep.* 465.

It is not necessary to set forth in the petition the minute details of a contract on which suit is brought to authorize its introduction in evidence. It is sufficient if it sets forth the contract according to its true and legal import and effect, as a whole. *Wooters v. International & G. N. R. Co.*, 4 *Am. & Eng. R. Cas.* 100, 54 *Tex.* 294.

A railway company alleged the purchase of a right of way and depot grounds from defendants, that they executed a warranty deed therefor and the right thereto has failed. *Held*, sufficient to support a judgment for damages for breach of warranty. *Ackerman v. Huff*, 36 *Am. & Eng. R. Cas.* 589, 71 *Tex.* 317, 9 *S. W. Rep.* 236.

14. — contracts for work, services, etc.—A complaint in the general form for work and labor done on a railroad is not demurrable because it sets out the manner of the employment and the character of the work done with unnecessary particularity, when the facts stated do not show a special contract or increase the liability of defendant beyond such general employment. *Fl. Wayne, J. & S. R. Co. v. McDonald*, 48 *Ind.* 241.

The rule of pleading that a party who has fully performed a special contract for work and materials is not bound to declare upon the contract, but may declare generally for the value of the work, and the contract may be referred to to determine the value, has not been changed by the Code. *Higgins v. Newtown & F. R. Co.*, 66 *N. Y.* 604; *affirming* 3 *Hun* 611.

If a petition alleges that work was done at the request of a defendant railway company, it is sufficient, and need not state evidence of the fact, averring the name of the agent or servant of the company who contracted for or directed the work. *Texas & St. L. R. Co. v. Ross*, 62 *Tex.* 447.

Plaintiff, a public weigher, at the request of defendant company removed his weighing apparatus to the platform of defendant, and after occupying it for three months defendant caused his weighing apparatus to be removed and refused to permit him to occupy the platform any longer. In the removal and in the loss of his buildings, etc., consequent upon the removal, he alleged he was injured, and his alleged damages were itemized. *Held*, that the facts did not show a cause of action. *Crockett v. Galveston, H. & S. A. R. Co.*, 80 *Tex.* 292, 16 *S. W. Rep.* 38.

15. — contracts for carriage of goods or passengers. — In an action founded on an express or implied contract against a carrier for negligence the declaration must correctly state the contract or the particular duty or consideration from which the liability results and on which it is based, and a variance in the description of the contract, though in an action *ex delicto*, may be fatal as in an action *ex contractu*. The declaration will be defective if it fails to show that by express contract, or by implication of law in respect to defendant's particular character or situation, he was bound to do or omit the act for which he is charged. *Wabash Western R. Co. v. Friedman*, 146 *Ill.* 583, 30 *N. E. Rep.* 353, 34 *N. E. Rep.* 1111.

In a complaint upon a bill of lading which contains, in addition to the usual provisions, a clause that the goods shall be delivered on "presentation of duplicate hereof," it is unnecessary to aver the reasons that influenced, and purposes that controlled, the shippers or the carrier in inserting the clause, and such averments do not add anything to the legal effect of the bill of lading. *Jeffersonville, M. & I. R. Co. v. Irvin*, 46 *Ind.* 180.

Where a bill of lading is pleaded as a contract and set out *in extenso* as part of plaintiff's petition, he is bound by all the provisions therein contained. *Tardos v. Chicago, St. L. & N. O. R. Co.*, 35 *La. Ann.* 15.

A complaint seeking to charge the lessee of a railroad with damages for refusing to transport complainant, to whom the lessor had issued a pass for life, did not allege any obligation on the part of the lessee by contract or otherwise to carry complainant over the road free. *Held*, bad on demurrer, and that the judge below was right in dis-

missing it. *Turner v. Richmond & D. R. Co.*, 70 *N. Car.* 1.

A photographer shipped his "outfit" by rail and sued the company, alleging that a part of the outfit was lost and never was delivered, and that none of it was delivered with reasonable promptness, by which he lost large profits that he might have made in his business if he had received the outfit in time. *Held*, that the complaint showed a good cause of action as to part of the damages at least, and that a general demurrer thereto was improperly sustained. *Galveston, H. & S. A. R. Co. v. Jesse*, 7 *Tex. App. (Civ. Cas.)* 351.

Plaintiff, a female passenger, alleged in her complaint that she purchased a ticket of defendant company at a certain station; that in consideration of such purchase the company contracted to furnish her a suitable and customary place of waiting for the arrival and departure of the train in a ladies' waiting room, but, on request, refused to furnish her a sufficiently lighted room, and accompanied the refusal with grossly insulting language. *Held*, that this stated a cause of action upon contract. *Bishop v. Chicago & N. W. R. Co.*, 67 *Wis.* 610, 31 *N. W. Rep.* 219.

16. — bonds and obligations for payment of money. — A complaint, in an action upon a written obligation for the payment of money, which alleges that the obligation was given by defendant, an electric street-railroad company, to repay plaintiff and other property owners for paving the street, in consideration that plaintiff would not take any steps to prevent the electric company from tearing up the paving and laying its tracks; and which also alleges facts showing that the franchise of the company is void, having been granted by the city council without power, and that plaintiff and other property owners could and would have prevented defendant from laying its tracks on the street but for the promise to pay, shows a want of consideration for the promise, and states no cause of action. *Amestoy v. Electric Rapid Transit Co.*, 95 *Cal.* 311, 30 *Pac. Rep.* 550.

An allegation in a petition that railroad bonds have been "issued," and that they have been "issued and sold," is equivalent to an allegation that they have been negotiated and are in the hands of third parties. *Dunham v. Isitt*, 15 *Iowa* 284.

An employé of a railroad company gave

the usual bond conditioned for the faithful performance of his duties and for the application of funds coming to his hands as agent. *Held*, that a declaration in an action upon the bond which sets forth only the obligatory part of the bond is fatally defective. *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 467.

17. — in actions to set aside conveyances.—In a suit to set aside a conveyance to a railroad company of twelve acres of land the petition stated that the consideration was the location of a depot on said land, and that the land was to be used for depot purposes alone; that the grantor did not know what quantity of land was necessary for such purposes and relied upon the company, which represented that about twelve acres were required; that only three acres had been or could be used for that purpose, and that the remaining nine acres were not used for any purpose except a small portion by other parties by permission of the company. *Held*, that the petition was demurrable on the grounds: (1) That it contained no allegation that the consideration was expressed in the deed, and none that defendant or his grantors, purchasers from the company, took with actual notice thereof. (2) That it contained no allegation that the representation made was fraudulent or knowingly false. The allegation as made shows nothing more than the expression of an opinion. (3) It appeared that there was a right of entry for condition broken, and there was no allegation of an entry or claim of forfeiture for more than twenty years. There was, therefore, an adequate remedy at law, and laches. (4) The only allegation of connection between the grantor and plaintiff was that "plaintiffs are the only parties interested in said real estate adversely to defendant"; and conditions of the above character enure only to the grantor and his heirs. *Jones v. St. Louis, K. C. & N. R. Co.*, 20 Am. & Eng. R. Cas. 371, 79 Mo. 92.

A complaint alleged that plaintiff being the owner of a license to build and operate a street railway assigned it in escrow to another, who, in breach of the trust reposed in him, assigned it to defendant corporation, which is endeavoring to act under it, and plaintiff seeks to have the assignment set aside and defendant enjoined from operating the road. *Held*, that it was error to dismiss the action on the ground that the

complaint did not set out a cause of action. *Atkinson v. Asheville St. R. Co.*, 113 N. Car. 581, 18 S. E. Rep. 254.

18. Assigning breaches.—In pursuance of California Act of April 4, 1864, "to aid the construction of the Central Pacific Railroad Company," the state entered into an agreement whereby bonds were issued, upon which the state paid interest due, and brought suit against the company to recover it back. The complaint alleged that the state "has duly performed all the conditions mentioned in said act of the legislature," and charged a breach on the part of the company. *Held*, that the facts constituting the breach and the amount of damages sustained must be specifically alleged. *People v. Central Pac. R. Co.*, 76 Cal. 29, 18 Pac. Rep. 90.

A declaration upon a promise by defendant to move a certain barn and sheds of plaintiff from certain premises of plaintiff and put the barn in good repair in consideration that plaintiff would convey to defendant a right of way for its railroad across said premises which avers performance of the consideration and breach of the promise is good on general demurrer. *Detroit, H. & J. R. Co. v. Forbes*, 30 Mich. 165.

The charter of defendant company required it to construct a suitable bridge over any navigable water crossed "with a pivot draw with two openings, each seventy-five feet in width, at right angles to the main channel." *Held*, that an averment admitting that the company constructed a bridge with two openings, "yet they did locate said openings in said draw in a manner not at right angles to the main channel," did not show any breach of duty, inasmuch as the openings may have exceeded in width those mentioned in the charter. *Stephens & C. Transp. Co. v. Central R. Co.*, 34 N. J. L. 280.

19. Averment of performance on plaintiff's part.—Where a contractor sues to recover money for work done under a contract which provides for payment from time to time upon estimates made by an engineer, it must be averred that such estimates have been made. *Loup v. California Southern R. Co.*, 11 Am. & Eng. R. Cas. 589, 63 Cal. 97.

A declaration alleging that defendant by a written agreement was to deliver a certain amount of bonds to plaintiff on or before a specified day, upon condition that plaintiff

should deliver to defendant bonds for the same amount, without also averring that plaintiff executed and tendered his bonds, is bad on demurrer. *Alexandria R. Co. v. National Junction R. Co.*, 1 MacArth. (D.C.) 203.

A bond was executed by the officers of a railroad company as obligors to certain taxpayers as obligees, reciting that the board of commissioners of the county had ordered a special tax to aid in the construction of the company's railroad, and that one of said taxpayers, for himself and the others, had appealed from such order, which would occasion delay and injury to the interests of the obligors, and stipulating that if such taxpayer would dismiss his appeal and thereby permit the collection of such tax, and if such obligees, naming them, would pay the special tax, the obligors would refund to such taxpayers on or before a day named "severally, the taxes they may severally pay for said purpose into the county treasury," if such railroad was not completed to a certain point by said day. The complaint in an action on such bond failed to allege that the entire tax had been paid. Held, that the complaint was defective for this reason, as the bond contemplated the payment of the whole of such tax. *Hicks v. Zion*, 58 Ind. 548.

Where a condition precedent requires that certain money shall be expended in finishing and furnishing a railroad, it is not a sufficient averment of performance to allege that it was expended in building, finishing, and furnishing such railroad. *Batchelder v. Wendell*, 36 N. H. 204.

A treasurer of a corporation cannot be indebted until a demand be made of him; but an allegation that he is indebted, with a statement of the items of moneys received by him, is an allegation that all that is essential to make him indebted has been done. The summons is a sufficient demand; and if none be made the debt is recoverable, but not the costs. *Second Ave. R. Co. v. Coleman*, 24 Barb. (N. Y.) 300.

A declaration in a suit to recover interest on railroad bonds is demurrable that recites that the interest warrants are payable at a certain bank without averring an actual presentation or an offer to present and deliver them at the bank for payment. *Osborne v. Preston & B. R. Co.*, 9 U. C. C. P. 241.

20. Statement of cause of action in actions for torts, generally.—A count purporting to be in case and alleging negli-

gent wrongful acts of defendant, is not to be regarded as a count in trespass simply because it alleges among such negligent acts other acts of force which in themselves would have been proper matter for a count in trespass. *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69.

A declaration showing on its face that the injury complained of was purely accidental is demurrable. *Hardwick v. Georgia R. & B. Co.*, 85 Ga. 507, 11 S. E. Rep. 832.

A complaint to recover damages for a wilful injury must show that the injurious act was purposely or intentionally committed with the intent wilfully and purposely to inflict the injury complained of. *Gregory v. Cleveland, C. & I. R. Co.*, 31 Am. & Eng. R. Cas. 440, 112 Ind. 385, 14 N. E. Rep. 228.

In a complaint for a wilful injury there must be language used which can be construed as charging that defendant had an intent either actual or constructive to commit the injury; but it is not necessary to use words indicating an act amounting to a crime or importing actual malice towards the owner of the property injured, nor to show that plaintiff was without contributory negligence, nor that the property injured was rightfully at the place of injury. *Chicago, St. L. & P. R. Co. v. Nash*, 1 Ind. App. 298, 27 N. E. Rep. 564.—FOLLOWED IN *Ohio & M. R. Co. v. McDanel*, 5 Ind. App. 108; *Ohio & M. R. Co. v. Craycraft*, 5 Ind. App. 335.

21. — Injury to lands.—In an action for an injury to the reversion the declaration must either state an injury of such a nature as to be necessarily injurious to the reversion, or must explicitly allege that it was injurious. An averment that the act complained of is prejudicial to the tenant's interest does not render the count illegal. The averment that the reversionary interest is prejudiced is an essential part of the count and must be sustained by proof. *Tinsman v. Belvidere Del. R. Co.*, 25 N. J. L. 255.

An allegation that a railroad company knowingly permitted a third person to use the property of defendant in a manner that was *per se* injurious to the adjacent land of plaintiff imputes an actionable wrong to it. *Topf v. West Shore & O. Terminal Co.*, 19 Am. & Eng. R. Cas. 7, 46 N. J. L. 34.—DISTINGUISHING *Cuff v. Newark & N. Y. R. Co.*, 35 N. J. L. 17.

A declaration which avers that defendant, wrongfully and injuriously intending, etc., filled in upon its lands a great quantity of earth, and raised an embankment of great height, and thereby forced a large quantity of said earth into and upon plaintiff's lot, beneath the surface of the same, and thereby upheaved the surface of the same, and caused the foundation and walls of the dwelling houses thereon to crack and topple over, discloses a good cause of action. *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233, 23 Atl. Rep. 810.

In an action on the case against a railroad for an injury to plaintiff's land, it is not necessary to plead specially. *Hills v. Boston & M. R. Co.*, 18 N. H. 179.

Where a petition alleges that a crop was in fine condition during certain months, that during that period it was destroyed through the negligence of defendant, that it would have made a specified amount per acre, and was worth a specified sum per acre, these allegations show what the crop would produce at maturity, and not what the immature crop was worth at the time it was destroyed, and a demurrer thereto is properly sustained. *Texas & P. R. Co. v. Bayliss*, 62 Tex. 570.

A township alleged that it was proprietor of a certain public road, and complained that defendant, in constructing its railway, so negligently and unskillfully made certain drains that great injury was thereby occasioned to plaintiff's road, and it was compelled to expend large sums of money in repairing the same. *Held*, good on demurrer, as showing a special injury to plaintiff sufficient to sustain the action. *Sarnia v. Great Western R. Co.*, 17 U. C. Q. B. 65.

22. — obstructing streets, highways, or streams.—Plaintiffs, who had a brick yard on a navigable stream, alleged that defendant, by an unlawful obstruction therein, shut them off from the natural market for their wares, but omitted to state the place at which the obstruction was placed. *Held*, on general demurrer, that as a matter of substance such description was unnecessary, and that considered as a matter of venue in the body of the pleading it was a matter of form, and within section 139 of N. J. Practice Act. *Mehrfhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.*, 51 N. J. L. 56, 16 Atl. Rep. 12.

A declaration charged that defendant company unlawfully obstructed a public

street adjoining plaintiff's residence, and thereby prevented a free passage to and from it; that it unlawfully kept up dangerous fires, generated about his premises noxious vapors and smoke, jarred and disjoined his house, and made his residence unwholesome and uncomfortable. *Held*: (1) that a demurrer to the declaration was not well taken; (2) that the court could not determine on the demurrer whether the company had power to do such things or not; (3) that if its acts were lawful they must be shown by plea, or in some other way, and not on demurrer. *Parrot v. Cincinnati, H. & D. R. Co.*, 3 Ohio St. 330.

Plaintiff charged that he was the owner in fee of certain real estate with a canal appurtenant thereto, which he had a right to navigate, which had been constructed by the owners of the premises; that defendant company obstructed said premises by entering thereon and erecting a bridge over the canal and occupying a portion of the premises by a bridge which, when open, was swung over the premises. *Held*, that, if plaintiff established the facts by evidence, he was entitled to a judgment restraining the company from swinging the bridge over his premises. *Scheu v. New York, L. & W. R. Co.*, 12 N. Y. S. R. 99.

A complaint, under Wash. Gen. St. § 1570, fails to state a cause of action when its only allegation of damage is "that the expense of relocating and opening that portion of the road so destroyed and appropriated by defendant as aforesaid is and will be the sum of thirty thousand dollars." *Weymouth v. Port Townsend Southern R. Co.*, 6 Wash. 575, 34 Pac. Rep. 154.

In an action for negligence in constructing a railway across a highway, an allegation that the company "tore up, changed, destroyed, and excavated said highway," does not show that the *locus in quo* was no longer a public highway, and amounts only to an allegation that the use of said highway by the public was interrupted or destroyed. *Washburn v. Chicago & N. W. R. Co.*, 68 Wis. 474, 32 N. W. Rep. 234.

23. Statement of cause of action in actions for negligence, generally.*—A complaint in a negligence case, if it contain averments embracing causes for which plaintiff may recover, is not demurrable

* As to sufficiency of complaint in actions based on negligence, see note, 13 AM. ST. REP. 94.

because of averments of special damages embracing causes as to which he is not entitled to recover; these latter averments may be treated as surplusage. *Government St. R. Co. v. Hanlon*, 53 Ala. 70.

Under the liberal rules of pleading recognized by Ala. Code, § 2978, "when the gravamen of the action is the alleged nonfeasance or misfeasance of another, it is sufficient, as a general rule, to aver the facts out of which the duty to act springs, and that defendant negligently failed to do and perform, etc.; and it is not necessary to define the *quo modo*, or to specify the particular acts of diligence he should have employed." *Mobile & M. R. Co. v. Crenshaw*, 8 Am. & Eng. R. Cas. 340, 65 Ala. 566.

Very general averments of negligence, little short of mere conclusions, meet all the requirements under the Alabama system of pleading. So a general allegation that an employé was injured through the negligence of others, and through certain defects in appliances, is sufficient. *Mary Lee C. & R. Co. v. Chambliss*, 97 Ala. 171, 11 So. Rep. 807.—FOLLOWING *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307.

Although negligence of a particular kind is not specially alleged, it may still be a ground of recovery if it is fairly covered by the averments of the petition. *Neville v. Chicago & N. W. R. Co.*, 79 Iowa 232, 44 N. W. Rep. 367.

Uniting immaterial charges of negligence with those that are material and necessary in a declaration will not preclude a recovery, it being the duty of the trial court to eliminate the immaterial charges from the consideration of the jury, and limit their consideration to the other acts alleged which, if found to exist, constitute negligence. *Thompson v. Toledo, A. A. & N. M. R. Co.*, 91 Mich. 255, 51 N. W. Rep. 995.

A petition charging negligence is not insufficient because it does not anticipate and negative facts which are proper matters of defense and which are set up in the answer. *Mangold v. St. Louis, I. M. & S. R. Co.*, 24 Mo. App. 52.

Where from the nature of the case plaintiff would not be expected to know the exact cause or the precise negligent act, and where such facts are peculiarly within the knowledge of defendant, it is sufficient in a general way to allege the fact. *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R.

Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.

Where negligence is the gist of an action, it must be charged in the petition; but it is not necessary that it be averred in terms, if such facts are stated as will raise a presumption of negligence. So a complaint against a company for injuring mules while being shipped is sufficient where it charges that they were not properly loaded and transported by the company, whereby they were injured. *Missouri Pac. R. Co. v. Graves*, 2 Tex. App. (Civ. Cas.) 594.

A declaration for negligence is good if it contains the substantial elements of a cause of action, the duty violated, the breach thereof properly averred, with such matters as are necessary to render the cause of action intelligible, so that judgment according to law and the very right of the case can be given. *Poling v. Ohio River R. Co.*, 38 W. Va. 645, 18 S. E. Rep. 782.

24. — injuries, generally. — (1)

Time and place of injury.—In an action against a railroad company to recover damages for injuries to live stock, it is sufficient averment of time and place to state that the injury was done "on or about the 20th of September, 1887," and "at a place on said railroad about seventy-five or one hundred yards distant from Cowles Station in said county." *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

An allegation that the plaintiff was injured while walking upon the track of defendant constructed in a certain street, which street and track were "necessarily used" by the public, must be construed to mean that the street was so narrow or otherwise obstructed that there was not room to walk along it without going upon the track, and is sufficient on general demurrer, even though special exceptions might have been sustained. *Lewis v. Galveston, H. & S. A. R. Co.*, 39 Am. & Eng. R. Cas. 372, 73 Tex. 504, 11 S. W. Rep. 528.

A complaint alleging that defendant negligently and wilfully permitted one of its turntables to remain in a dangerous and unsafe condition, and that its servants carelessly and negligently run its cars against the table while it was being turned, thereby injuring plaintiff's child of tender years, who was thereon, is sufficient on demurrer. *Ekman v. Minneapolis St. R. Co.*, 34 Minn. 24, 24 N. W. Rep. 291.

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(2) *Charging negligence.*—It is not sufficient merely to allege that plaintiff was injured through the negligence of defendant company "in using defective machinery" and "in running its cars." *Waldhier v. Hannibal & St. J. R. Co., 2 Am. & Eng. R. Cas.* 146, 71 *Mo.* 514.—DISTINGUISHED IN *Schneider v. Missouri Pac. R. Co., 75 Mo.* 295; *Palmer v. Missouri Pac. R. Co., 76 Mo.* 217; *Condon v. Missouri Pac. R. Co., 78 Mo.* 567; *Carlisle v. Keokuk N. L. Packet Co., 82 Mo.* 40; *Dickson v. Missouri Pac. R. Co., 104 Mo.* 491; *Otto v. St. Louis, I. M. & S. R. Co., 12 Mo. App.* 168; *White v. Wabash Western R. Co., 34 Mo. App.* 57; *East Line & R. R. Co. v. Brinker, 68 Tex.* 500. FOLLOWED IN *Price v. St. Louis, K. C. & N. R. Co., 3 Am. & Eng. R. Cas.* 365, 72 *Mo.* 414; *Edens v. Hannibal & St. J. R. Co., 5 Am. & Eng. R. Cas.* 459, 72 *Mo.* 212; *Harrison v. Missouri Pac. R. Co., 7 Am. & Eng. R. Cas.* 382, 74 *Mo.* 364, 41 *Am. Rep.* 318; *Ellis v. Wabash, St. L. & P. R. Co., 17 Mo. App.* 126; *Abbott v. Kansas City, St. J. & C. B. R. Co., 20 Am. & Eng. R. Cas.* 103, 83 *Mo.* 271, 53 *Am. Rep.* 581. QUALIFIED IN *Wills v. Cape Girardeau S. W. R. Co., 44 Mo. App.* 51. REFERRED TO IN *Siela v. Hannibal & St. J. R. Co., 82 Mo.* 430. REVIEWED IN *Woodward v. Oregon R. & N. Co., 18 Oreg.* 289.

It is not necessary for plaintiff suing for a personal injury to charge gross neglect. An allegation of ordinary neglect is sufficient to enable him to recover compensatory damages. *Ramsey v. Louisville, C. & L. R. Co., 89 Ky.* 99, 20 *S. W. Rep.* 162.

Where a complaint alleges that plaintiff was injured through the gross negligence of defendant's engineer and fireman, but does not allege that the engineer or fireman inflicted the injury wilfully, wantonly, or through malice, the word "gross" must be treated as a mere expletive, and the use of it as characterizing the negligence alleged makes no material difference in the meaning of the complaint. *McAdoo v. Richmond & D. R. Co., 41 Am. & Eng. R. Cas.* 524, 105 *N. Car.* 140, 11 *S. E. Rep.* 316.—FOLLOWED IN *High v. Carolina C. R. Co., 112 N. Car.* 385.

In an action for personal injuries not resulting in death, inflicted January 20, 1887, it is not necessary to allege that the injury was caused by the gross negligence of defendant, a railway company, as would have been necessary had death resulted. *Avey v.*

Galveston, H. & S. A. R. Co., 81 Tex. 243, 16 *S. W. Rep.* 1015.

(3) *Stating facts constituting negligence and nature of injury.*—A party suing for negligent injury is bound to set forth in his declaration the material facts relied on as his cause of action and to prove the same combination of circumstances. *Batterson v. Chicago & G. T. R. Co., 8 Am. & Eng. R. Cas.* 123, 49 *Mich.* 184, 13 *N. W. Rep.* 508. *Pittsburgh, C. & St. L. R. Co. v. Adams, 23 Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187. *Edens v. Hannibal & St. J. R. Co., 5 Am. & Eng. R. Cas.* 459, 72 *Mo.* 212.—FOLLOWING *Waldhier v. Hannibal & St. J. R. Co., 71 Mo.* 514; *Buffington v. Atlantic & P. R. Co., 64 Mo.* 246.—DISTINGUISHED IN *Otto v. St. Louis, I. M. & S. R. Co., 12 Mo. App.* 168. FOLLOWED IN *Abbott v. Kansas City, St. J. & C. B. R. Co., 20 Am. & Eng. R. Cas.* 103, 83 *Mo.* 271, 53 *Am. Rep.* 581. REVIEWED IN *Woodward v. Oregon R. & N. Co., 18 Oreg.* 289.

A declaration by a married woman for injury to her person which alleges a definite personal injury which incapacitated her to walk without crutches embraces by necessary implication the impairment of her capacity to labor. *Atlanta St. R. Co. v. Jacobs, 88 Ga.* 647, 15 *S. E. Rep.* 825.—APPROVED IN *Metropolitan St. R. Co. v. Johnson, 90 Ga.* 500.

A complaint must show that the injury was the natural and proximate result of the wrongful act of the defendant; but this need not be specifically alleged. A statement of facts which shows a direct connection between the wrongful act of the defendant and the injury is sufficient. *Dugan v. St. Paul & D. R. Co., 40 Minn.* 544, 42 *N. W. Rep.* 538.

A complaint is sufficient if it alleges the injuries received by plaintiff and facts from which negligence of defendant may be reasonably inferred. *Madden v. Port Royal & W. C. R. Co., 52 Am. & Eng. R. Cas.* 286, 35 *So. Car.* 381, 14 *S. E. Rep.* 713.

It is not essential that the petition should specially aver that the injury is permanent in order to recover. *Cook v. Missouri Pac. R. Co., 19 Mo. App.* 329.

The future and permanent effect of injuries necessarily resulting to plaintiff need not be specially alleged, but damages are recoverable under the general *ad damnum* clause. If the complaint sets out in detail

the injuries received, and shows that they are of a permanent character, so that the court can see that they will necessarily render plaintiff less capable of attending to his business, an instruction to the effect that the jury may take into consideration "the permanent loss and damage, if any is proved, arising from any disability resulting to plaintiff from the injury in question which renders him less capable of attending to his business than he would have been if the injury had not been received" is proper. It is only damages which are not the necessary result of the injury which must be specially pleaded. *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. Rep. 266.

A declaration for the dislocation of plaintiff's shoulder, and alleging consequent suffering and other invisible and internal ailments, should not be held to any technicality of construction. The injury which is visible and open to common observation may be described and tested easily, and should be described reasonably. But internal and invisible ailments, which are only inferred from scientific deduction, and on which there is always room for some difference of opinion, cannot be held so to close a rule. *Laughlin v. Grand Rapids St. R. Co.*, 26 Am. & Eng. R. Cas. 377, 62 Mich. 220, 28 N. W. Rep. 873.

Where the manner in which cars are moved upon a passing vehicle, causing injury, is shown, the designation of it as a running switch is immaterial; besides, it is not descriptive where the pleading shows the actual facts and that the term was not properly used. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

25. — injuries to passengers.— In an action by a passenger to recover damages from a company for wrongfully expelling him from its train, it is not necessary for the declaration to allege that the passenger, at the time of his expulsion, was complying with the reasonable rules of the company, or to allege that he was not about to violate any such reasonable rule at the time of his expulsion. *South Fla. R. Co. v. Rhodes*, 37 Am. & Eng. R. Cas. 100, 25 Fla. 40, 5 So. Rep. 633, 3 L. R. A. 733.

A declaration by a husband alleging that his wife, being a passenger on one of defendant's cars, undertook to alight, and that while so doing the car suddenly started, causing her to fall to the ground, "thereby producing such serious bodily injuries as

to deprive him for a long time of her company and services, and entail upon him heavy expense for nursing and medical attention, all to his damage" in the sum of \$1000, sets forth substantially a cause of action, and though wanting in sufficient fullness and detail as to the manner in which the injury was caused, and its consequences, of which advantage could be taken by special demurrer at the first term, should not at the trial term be dismissed on the ground that the allegations as to the nature and extent of the injuries were too vague, uncertain, and indefinite to put defendant on notice as to the nature of the case to be proved. *James v. Atlanta St. R. Co.*, 90 Ga. 695, 16 S. E. Rep. 642.—APPLYING *Ellison v. Georgia R. Co.*, 87 Ga. 691.

The above is applicable to a declaration filed by the wife against the same defendant stating in substantially the same terms the manner in which she was injured, and alleging that "by reason of said fall she was badly injured in her body, so that she suffered great pain, and still does, and will continue to do so, and will remain permanently injured," and that "said fall also caused great mental shame and distress," all to her damage in the sum of \$5000. *James v. Atlanta St. R. Co.*, 90 Ga. 695, 16 S. E. Rep. 642.

In an action for the death of a passenger the complaint, after alleging that defendant company owned a railroad and operated trains thereon between certain points in the state, averred that "on or about the 24th day of August, 1890, * * * the intestate of the plaintiff, being then rightfully on a train of cars of the defendant, * * * was by the wrongful act, neglect, and default of the defendant slain and killed." Held, on demurrer, that the complaint was not sufficient. It should aver that he was on the train as a passenger, by contract express or implied, and the time and place of the injury and the time of death, where it seems that the time of injury and death was not the same. *Conley v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 490, 109 N. Car. 692, 14 S. E. Rep. 303.

26. — injuries at crossings.*— Where the action is for personal injuries, an allegation that the train which caused

* Negligence at a crossing. What is a sufficient averment thereof, see 23 AM. & ENG. R. CAS. 297, *abstr.*

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the injuries was running at a dangerous rate of speed is not sufficient, where it fails to state any relation which such speed had to plaintiff's injury. *Pike v. Chicago & A. R. Co.*, 39 Fed. Rep. 754.

Where a company is sued for negligently causing an injury at a crossing, the act done or omitted constituting negligence must be averred and proved, and if not alleged, proof of it will not be allowed. *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.

A petition which merely states that a view is obstructed from one place to another without showing what benefit or advantage there was in such view, or what damage results from the obstruction, does not state a cause of action. *Lyon v. McDonald*, 47 Am. & Eng. R. Cas. 217, 78 Tex. 71, 14 S. W. Rep. 261.

27. — injuries to persons on track, trespassers, etc.—Plaintiff, who sued for personal injuries, alleged that he went on a trestle on defendant's road, in the night-time, about the time he knew a train was due, away from a highway crossing, and that he could have avoided injury if the engineer had blown his whistle, but did not allege what he did to avoid the injury, nor that the fireman or engineer saw him before the injury, nor that the injury was wilful. *Held*, that the complaint was doubly defective, (1) in showing contributory negligence; (2) in failing to show a statement of facts which, if established, would make the company liable. *Georgia Pac. R. Co. v. Richardson*, 80 Ga. 727, 7 S. E. Rep. 119.

Plaintiff's declaration not alleging that he had permission from the owner of an electric system on which he had entered at the time he was injured to come in contact with its wires or to climb its pole in the prosecution of his business for another company, or that defendant knew of his presence at the scene of the injury, which was up in the air, some twenty-three feet or more from the ground, the declaration set forth no cause of action, and a general demurrer thereto should have been sustained. *Augusta R. Co. v. Andrews*, 89 Ga. 653, 16 S. E. Rep. 203.

A person having by statute a claim against a railroad company for damages for personal injuries caused by gross negligence, although upon a train under such circumstances that the relation of carrier and passenger did not exist, an allegation in an action for injuries

caused by the company's gross negligence that plaintiff was a passenger is merely redundant, and will not defeat a recovery. *Way v. Chicago, R. I. & P. R. Co.*, 34 Am. & Eng. R. Cas. 286, 73 Iowa 463, 35 N. W. Rep. 525.

A complaint alleging that plaintiff was on the track of defendant's road, and without any warning to him, and without any fault on his part, a locomotive was negligently run against him, etc., is substantially good. Such complaint is also good if it is alleged that defendant wilfully and purposely and with great force ran the locomotive against plaintiff. *Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239, 6 Am. Ry. Rep. 358.—DISTINGUISHED IN *Cincinnati, H. & I. R. Co. v. Carper*, 31 Am. & Eng. R. Cas. 36, 112 Ind. 26.

28. — injuries to vessels.—Under Massachusetts statutes the superintendent of a railroad drawbridge has no right to open it within fifteen minutes of the time that a train is due. Plaintiff's declaration alleged that he was passing a stream in a vessel, which was injured by coming under defendant's drawbridge and the tide rising, by reason of defendant's superintendent wilfully and negligently refusing to open the draw. *Held*, not sufficient, as it did not show that the request was made at a time when the superintendent had any right to open the bridge. *Jennings v. Fitchburg R. Co.*, 146 Mass. 621, 6 N. Eng. Rep. 269, 16 N. E. Rep. 468.

29. — destruction of property by fire.—Plaintiff sued to recover for the loss of property by fire, and alleged that it was by reason of defendant wrongfully storing combustibles, in violation of an ordinance, in a certain place. *Held*, that the complaint was sufficient on demurrer where it averred an unlawful storing of such combustibles, and showed with reasonable certainty that the loss was the proximate cause of such act. *Wright v. Chicago & N. W. R. Co.*, 7 Ill. App. 438.

30. Negating contributory negligence.*—A complaint against a turnpike company for injury in consequence of the careless and obviously defective construction of defendant's road, which avers that "plain-

* Duty to negative contributory negligence in complaint, see notes, 22 AM. & ENG. R. CAS. 651; 19 Id. 194; 38 Id. 183, 222, abstr.; 41 Id. 484, abstr. See also CONTRIBUTORY NEGLIGENCE, 52-81.

tiff was using great care when, without any fault or carelessness of plaintiff," the injury occurred, and it was "caused wholly by the negligence and carelessness of the defendant, and without the fault or negligence of the plaintiff," sufficiently negatives contributory negligence, and is good on demurrer. *Wilson v. Trafalgar & B. C. Gravel Road Co.*, 83 Ind. 326.

A general allegation that plaintiff was without fault is sufficient to negative contributory negligence; but if after such allegation the complaint gives particulars showing that as a matter of fact plaintiff was not free from neglect, such particulars will control the allegation. *Toledo, St. L. & K. C. R. Co. v. Wingate*, (Ind.) 58 Am. & Eng. R. Cas. 232, 37 N. E. Rep. 274.

A petition claiming damages from a railroad company bound to keep certain streets in repair, resulting from plaintiff's stepping into a hole in a crossing, which was dangerous, and negligently left by the company notwithstanding full notice, is not amenable to an exception of no cause of action because it recites that the injury resulted while plaintiff was alighting from a car moving slowly and with slackening speed preparatory to stopping, and also that plaintiff was an active and vigorous person accustomed to alight in this way, and showing no unfavorable conditions tending to render the act exceptionally rash or hazardous. *Ober v. Crescent City R. Co.*, 52 Am. & Eng. R. Cas. 576, 44 La. Ann. 1059, 11 So. Rep. 818.

31. Joinder of causes of action.*

—A declaration containing a count in trespass for forcible expulsion from the cars, and also a count for negligently damaging plaintiff's tool chest, carried by defendant, is bad for misjoinder of causes of action. *Havens v. Hartford & N. H. R. Co.*, 26 Conn. 220.

Where a landowner conveys a right of way over his lands in consideration that the company will locate a depot thereon, a complaint seeking to recover damages equal to the value of the right of way conveyed, and damages to the remainder of the land for failing to locate the depot, states but a single cause of action. *Louisville, St. L. & T. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030.

* Cause of action for failure to erect cattle-guards cannot be joined with cause of action for flooding lands, see 44 AM. & ENG. R. CAS. 494, *abstr.*

An original declaration against a common carrier declared only upon the common law liability for refusing to receive grain when tendered for transportation, and afterwards under leave of court additional counts were filed for not carrying the grain after its acceptance. The defendant pleaded the statute of limitations, that the cause of action in the new counts did not accrue within five years before such counts were filed. Held, that it was error to sustain a demurrer to the plea, the additional counts introducing an entirely different cause of action. *Phelps v. Illinois C. R. Co.*, 94 Ill. 548.

While the injuries are distinct in character, they both proceed in a general sense from the same wrong and are "transactions connected with the same subject of action," within the meaning of N. Y. Code of Civ. Pro. § 484, authorizing the union of two or more of such causes of action in one complaint. *Lamming v. Galusha*, 135 N. Y. 239, 31 N. E. Rep. 1024, 47 N. Y. S. R. 831; reversing 63 Hun 32, 22 Civ. Pro. 16, 43 N. Y. S. R. 592, 17 N. Y. Supp. 328.

A claim for both legal and equitable relief may be united in one action, where they are not inconsistent with each other. Thus plaintiff may sue a railroad company for damages for obstructing a way, and may ask for equitable relief to compel the company to open the way. *Getty v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 269.

Where a complaint contains three distinct grounds of recovery—(1) the erection of an embankment between plaintiff's farm and the channel of a river, thus depriving him of the navigation of the river; (2) the building of the company's road across the mouth of a bay adjoining plaintiff's farm and its failure to construct such a bridge as is necessary to provide a free passage for vessels from the river to the bay; and (3) the omission of the company to construct passes or roads across the railroad for the purpose of enabling plaintiff to farm and manage his lands—it is bad on demurrer. *Getty v. Hudson River R. Co.*, 8 How. Pr. (N. Y.) 177.

Plaintiff sued an elevated railroad and two individuals to recover damages for the erection and maintenance of an elevated road in the street. The complaint alleged that the individual defendants were sureties on a bond given by the company for the payment of such damages as should be adjudged to be paid by the company;

but it appeared that no adjudication of damages had ever been had. *Held*, that the complaint was bad on demurrer, as joining a cause of action on contract with one in tort, and as alleging a cause of action on the bond before any had accrued. *Hart v. Metropolitan El. R. Co.*, 27 N. Y. S. R. 813, 7 N. Y. Supp. 753, 15 Daly 391.

A claim in a division court for \$40 for detention of plaintiff as a passenger was removed by certiorari into the queen's bench, where the declaration was on contract for \$500 for delaying plaintiff in his journey, in not starting the train at the time named. An application to set aside the declaration was refused, the two claims being held sufficiently similar, considering the want of technicality in division-court pleadings. *Hunter v. Grand Trunk R. Co.*, 6 Ont. Pr. 67.

32. Rule requiring separate statement of distinct causes of action.—Where plaintiffs unite in the same complaint three substantive grounds of injury, one for building an embankment on the company's own land, one for building an embankment on a highway near plaintiff's store, and a third for erecting an embankment on plaintiff's land, the injuries are not separately stated, and a demurrer for that cause will be sustained. *Durkee v. Saratoga & W. R. Co.*, 4 How. Pr. (N. Y.) 226.—REVIEWED IN *Bass v. Upton*, 1 Minn. 408 (Gil. 292).

Where plaintiff states as his ground of complaint the negligence of defendant in leaving open switches and the act of an engineer in running his train at a greatly excessive speed, the complaint states two causes of action which should be separately stated, and plaintiff may be required on motion to state the two causes properly or elect which he will retain for trial. *Reed v. Northeastern R. Co.*, 37 So. Car. 42.

33. What counts may be joined.—A count seeking recovery for personal injuries occasioned by falling in a ditch dug by defendant in a public highway, and averring that the injury was caused by the gross negligence of defendant in cutting the ditch and leaving it exposed, is in case, and so also is a like count which alleges a duty of defendant to furnish bridges, barricades, or other usual means to protect the public from injury, which defendant failed to provide, thereby causing the injury. *South & N. Ala. R. Co. v. Chappell*, 61 Ala. 527.

A plaintiff is entitled to recover upon a complaint setting forth two counts, one for being wrongfully ejected from a train, and one for being misdirected in regard to his train, though the latter only of these counts be proved. *Alabama G. S. R. Co. v. Heddlston*, 31 Am. & Eng. R. Cas. 116, 82 Ala. 218, 3 So. Rep. 53.

An action against a common carrier for negligence in the performance of its duty as a carrier under a contract to carry is an action upon the case *ex delicto* and may be joined with a count in trover or trespass *vi et armis*; but if the action be for negligence alone under the contract to carry, or if the counts in trover or trespass *vi et armis* be abandoned, plaintiff cannot repudiate the contract, either expressed or implied, under which the carrier received the goods, and recover for an unlawful taking. *Southern Exp. Co. v. Palmer*, 48 Ga. 85.—FOLLOWING *Southern Exp. Co. v. Shea*, 38 Ga. 519; *Cohen v. Southern Exp. Co.*, 45 Ga. 148.

The first count in plaintiff's declaration was for damages for negligently setting fire, from a locomotive, to plaintiff's property. The second count alleged the granting to defendant of a right of way on condition that it should make and keep in repair suitable fences, which it failed to do, whereby cattle destroyed plaintiff's crops. *Held*, that both counts were in tort and therefore properly joined. *Philadelphia, W & B. R. Co. v. Constable*, 39 Md. 149, 11 Am. Ry. Rep. 276.

In an action against a railroad company to recover damages for a personal injury plaintiff may set forth his case in different ways in different counts, charging defendant with running upon him while he was in the highway, with committing an assault and battery upon him, and with compelling him to leap from the car while it was in motion, whereby he was thrown down and injured. *Lovett v. Salem & S. D. R. Co.*, 9 Allen (Mass.) 557.

A count in contract for non-delivery of goods may be joined with a count in tort for a misdelivery if there is a doubt as to the legal effect of the facts relied upon to maintain the action. *Mahon v. Blake*, 125 Mass. 477.

In trespass by a passenger for expulsion from a train at a place not a regular station for non-payment of fare the first count charged that the trespass was committed by defendant corporation, while the second

averred that defendant by its conductor committed the trespass. *Held*, not a misjoinder of counts, as they charge a single trespass by defendant. *Illinois C. R. Co. v. Latimer*, 128 Ill. 163, 21 N. E. Rep. 7; *affirming* 28 Ill. App. 552.

Under the Missouri Code a count in equity to set aside a release of damages for personal injuries may be joined with a count at law for the recovery of the damages. *Blair v. Chicago & A. R. Co.*, 89 Mo. 383, 1 S. W. Rep. 350.

A complaint which seeks to enjoin the operation of an elevated railroad in a street and to recover damages which alleges that plaintiffs are entitled to light and air from the street both because they are the owners of the fee of the street, and because they are abutting owners, and therefore have an easement in the light and air coming from the street, is not bad as uniting inconsistent claims. *Sobel v. New York El. R. Co.*, 31 N. Y. S. R. 114, 56 Hun 642, 9 N. Y. Supp. 342.

A complaint against a company for failing to construct a farm crossing contained two counts, the first based upon a covenant contained in a deed, and the second upon a statute requiring companies to construct such crossings. *Held*, that the two counts were each for a separate cause of action and therefore not inconsistent, and the court properly refused to compel plaintiff to elect upon which he would rely. *Haynes v. Buffalo, N. Y. & P. R. Co.*, 38 Hun (N. Y.) 17.

Counts in assumpsit, in tort, and upon the facts of the case may be joined in one declaration under Tenn. Code, §§ 2746-2748. *Louisville & N. R. Co. v. Guthrie*, 10 Lea (Tenn.) 432.

34. What counts may not be joined.—A shipper cannot unite in one action against a carrier two counts, one for damages for the detention of the property and the other based upon a contract. *Hoagland v. Hannibal & St. J. R. Co.*, 39 Mo. 451.—*VERRULED IN* *House v. Lowell*, '45 Mo. 381.

Plaintiff in the first two counts of his complaint claimed damages against a railroad for killing his animals, through its failure to fence, and for the conversion of said animals, and in the third count claimed damages for breach of contract to carry cattle safely, the damage and loss resulting by reason of weak and insufficient cars, and

the conversion of such cattle as were killed, and also putting his claim upon the company's liability as a common carrier. *Held*, that the third count was bad on demurrer as a joinder of an action arising out of contract with an action in trover. *Cohwell v. New York & E. R. Co.*, 9 How. Pr. (N. Y.) 311.

35. What matters may be included in one count.—A declaration that contains a single count which sets out eight interest coupons, for a certain amount each, only distinguished from each other by a reference to the numbers of the different bonds from which they were detached, is not bad for duplicity; and where each coupon is less than the amount necessary to give the court jurisdiction, they may be aggregated for that purpose. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.—*QUOTING* *Hotchkiss v. Butler*, 18 Conn. 287. *REVIEWING* *Tucker v. Randall*, 2 Mass. 283.

But where the bonds from which such coupons were detached are under seal, a count in assumpsit to recover such interest cannot be added. *New London City Nat. Bank v. Ware River R. Co.*, 41 Conn. 542.

In a suit to enjoin the collection of a township tax levied to aid a railroad, it is good pleading to state in a single paragraph all the facts leading to and resulting in the levy of the tax, and then to set forth in the same paragraph, but in separately numbered clauses or specifications, each several ground of objection to the validity of the tax, and the sufficiency of each clause or specification may be tested by a demurrer for the want of facts. *Scott v. Hansheer*, 94 Ind. 1.

Injuries both to the person and to property are properly included in one count for damages when the cause of all the injuries was the same. *Lamb v. St. Louis C. & W. R. Co.*, 33 Mo. App. 489.—*QUOTING* *Binnicker v. Hannibal & St. J. R. Co.*, 83 Mo. 660.

The obvious purpose of a pleader to allege special damages will not be controlled by the mere fact that he commences each allegation as if it were a new count. *So held*, where plaintiff sued a carrier for failing to transport certain bags which were to be filled with corn and sent back to him, by reason of which he claimed special damages in having to pay an additional sum for barrels to put the corn in, and in having to pay more for the corn and a higher freight

rate. *Burnside v. Grand Trunk R. Co.*, 47 N. H. 554.

A count declaring upon the negligence of defendant, whereby plaintiff and his wife were injured in the same accident, and claiming damages for the injury to plaintiff himself, and also for the loss of his wife's services, is not bad for duplicity. *Devino v. Central Vt. R. Co.*, 63 Vt. 98, 20 Atl. Rep. 953.

30. Election between counts.—A complaint in an action for killing plaintiff's horses contained two counts: first, neglect to keep in repair a fence according to contract; second, negligence in running the train. *Held*, that a motion to require plaintiff to elect whether he would rely upon the breach of contract or the tort was properly overruled. *Pittsburgh, C. & St. L. R. Co. v. Hedges*, 41 Ohio St. 233.

Under a declaration containing two counts, each alleging a single burning of plaintiff's property near defendant's track, proof of more than two fires may be given, and the court may afterwards require plaintiff to elect upon which he will rely. *Chicago & A. R. Co. v. Smith*, 10 Ill. App. 359.

37. Withdrawal of counts.—Plaintiff sued for an injury to stock, and filed a declaration in two counts. The first was in due form and stated the county, state, and term of court, the names of the parties, and the nature of the action, etc. The second count commenced, "And whereas, also, the said defendant before and on the day aforesaid, in the county, was a railroad corporation," etc. At the trial the first count was withdrawn. *Held*, that it was still a part of the declaration so far as it contained a statement of the time, place, etc., of the occurrence so as to make the second count, by reference thereto, complete. *Cleveland, C., C. & St. L. R. Co. v. Rice*, 48 Ill. App. 51.

38. Prayer for relief.—Where the declaration sets forth a cause of action and lays damages in general terms, it is not vitiated by a clause which sets up that "the entire injury is to her peace, happiness, and feelings," although this theory of the injury be incorrect. The action is maintainable for the real injury embraced in the facts set out in the declaration. *Cox v. Richmond & D. R. Co.*, 87 Ga. 747, 13 S. E. Rep. 827.

Where the action is based upon tort, an averment that the act complained of resulted in "damage to the plaintiff," in a sum specified, is sufficient in a prayer for

relief. *Louisville, N. A. & C. R. Co. v. Smith*, 58 Ind. 575, 19 Am. Ry. Rep. 18.

Under Mo. Rev. St. § 809, though it would be more formal to conclude each count with a prayer for the amount entitled to be recovered under it, it is immaterial if each count contains a statement of the amount entitled to be recovered under it and the concluding count prays judgment for the aggregate amount, the concluding paragraph being regarded part of each count. *Briggs v. Missouri Pac. R. Co.*, 82 Mo. 37.

3. Plea. Answer.

39. General rules.—Where a railroad company in answer to an action to recover the value of animals killed by its machinery desires to set up the fact that its road is in the possession of, and being operated by, a receiver appointed by a federal court, the answer should be accompanied by the original or a copy of the order of the latter court for the appointment of the receiver. *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498.

But for the opposite holding, see *Ohio & M. R. Co. v. Anderson*, 10 Ill. App. 313.

A corporation aggregate must make its answer, not, as in common cases, under oath, but under the common seal; and if a sworn answer is desired, some officer of the corporation must be made a defendant who can answer under oath. *Fulton County Sup'r's v. Mississippi & W. R. Co.*, 21 Ill. 338.—*QUOTING* *Fulton Bank v. New York & S. Canal Co.*, 1 Paige (N. Y.) 311.

Where an inevitable accident is relied upon as a defense, all the facts which it is contended constitute such accident must be stated. *Burns v. Cork & B. R. Co.*, 13 Ir. R. C. L. 543.

Where several defendants are charged as common carriers in case, and they plead, traversing only the delivery to them of the parcel, without saying "or any or either of them," the plea is good. *Parke v. Davis*, 6 U. C. Q. B. 411.

There is no authority for allowing a corporation to file an answer without seal except by consent. *Gildersleeve v. Wolfe Island R. & C. Co.*, 3 Chan. Chamb. (U. C.) 358.

Where a stay of proceedings is asked to enable defendants to apply at law for a mandamus to compel the head of a railway corporation to affix the corporate seal to an answer, but it is not shown that the majority of the shareholders approved of the

answer, the application will be refused with costs. *Gildersleeve v. Wolfe Island R. & C. Co.*, 3 Chan. Chamb. (U. C.) 358.

40. Time to plead.—Where a stockholder after the entry of a judgment against his company, but at the same term, is, upon his motion and good cause shown, made a party defendant with leave to file an answer, and thereupon answers to the merits, gives notice of appeal, and perfects his appeal to the circuit court, it is error in the appellate court to strike from the files and suppress such answer because of its having been filed after judgment. *Henry v. Jeans*, 48 Ohio St. 443, 28 N. E. Rep. 672.—DISTINGUISHING *Holbrook v. Connelly*, 6 Ohio St. 199.

41. Plea in abatement, generally.—Where the representative of a railroad corporation is served with process, he may plead in abatement in his own name that the corporation is extinct; or he may make the same defense by motion to dismiss the suit, or by suggestion of his attorney on record, supported by affidavits showing the facts. *Kelley v. Mississippi C. R. Co.*, 2 Flipp. (U. S.) 581, 1 Fed. Rep. 564.—QUOTING *East Tenn. & G. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607. REVIEWING *Bronson v. La Crosse & M. R. Co.*, 2 Wall. (U. S.) 283.

Such person may, by plea, deny that he sustains any such relation to the corporation as authorizes the service of process on him. *Kelley v. Mississippi C. R. Co.*, 2 Flipp. (U. S.) 581, 1 Fed. Rep. 564.

In an action on contract against a company objection to the jurisdiction because it did not have its principal office or place of business in the county where sued, and because its chief officer did not reside therein, is waived by answer to the merits of the action. When the residence of the chief officer of a corporation created by the laws of the state, and its principal office and place of business, are not in the county in which a transitory action is brought against such corporation, unless the facts appear in the petition, objection to the jurisdiction of the court over the person of defendant cannot be made by demurrer. Such objection must be made by plea, but after answer to the merits such plea cannot be maintained. *Baker v. Louisville & N. R. Co.*, 4 Bush (Ky.) 619.—FOLLOWED IN *Chesapeake, O. & S. W. R. Co. v. Heath*, 87 Ky. 651.

Where a company is sued for damages for appropriating a right of way through plaintiff's premises, a defense of an arbitra-

tion and award must be made by an answer in abatement, and not by a motion to dismiss. *Hynes v. Sabula A. & D. R. Co.*, 38 Iowa 258.

A plea of the bankruptcy of plaintiff and the transfer of his property and rights to an assignee after the commencement of the suit, in abatement of the action, without any prayer of any kind, is subject to demurrer. *Chicago & N. W. R. Co. v. Jenkins*, 9 Am. & Eng. R. Cas. 113, 103 Ill. 588.

A plea in abatement not questioning the jurisdiction over the subject-matter, but raising a personal privilege of defendant as to the venue, should aver fully not only what is necessary to be answered, but anticipate and exclude all such supposable matter as would if alleged on the opposite side defeat the plea. *Houston & T. C. R. Co. v. Graves*, 50 Tex. 181.—REVIEWING *Breen v. Texas & P. R. Co.*, 44 Tex. 304.

42. Pleading defect of parties.—An answer alleging want of proper parties is the correct mode of raising the question of fact, where a plaintiff suing in a name importing *prima facie* a corporation in fact is not assuming to act as such, but only as a partnership. *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275.

An answer in an action against a railroad company for damages alleging that subsequent to the commencement of the action plaintiff had been adjudged a bankrupt, and an assignee of his estate appointed, is insufficient on demurrer. *Pittsburgh C. & St. L. R. Co. v. Nuzum*, 60 Ind. 141. *See also appeal* 50 Ind. 141.

To constitute a sufficient defense to an action for personal injuries, a railway company must not only, under a statute authorizing the reference to private acts by title, substance, and date of approval, in pleadings, plead that by virtue of a private act referred to in the authorized manner it had sold its road, but must also show that it had complied with any conditions imposed by the statute upon the sale, e. g., that the purchasing company should be a connecting but not a parallel or competing line. *East Line & R. R. Co. v. Rushing*, 34 Am. & Eng. R. Cas. 367, 69 Tex. 306, 6 S. W. Rep. 834.

A bill was filed by the holders of debentures payable to bearer to enforce payment. The company by answer objected that the person to whom the debentures were issued was a necessary party to the suit, but did

not name the person. *Held*, that the company must be presumed to know who this person was; that there was no presumption that plaintiff knew him; and that, the person not being named in the answer, the objection could not be insisted on at the hearing. *Woodside v. Toronto St. R. Co.*, 14 *Grant's Ch. (U. C.)* 409.

43. Plea of another action pending.—An answer of a former action pending must state or show identity of cause of action in the two actions. *Wilson v. St. Paul, M. & M. R. Co.*, 44 *Minn.* 445, 46 *N. W. Rep.* 909.

Where an assignee of an employé sues to recover damages for an injury, an answer that the assignor, previous to the assignment, commenced an action for the same claim in his own name, that there has been no order dismissing it, and that defendant has not stipulated that it should be dismissed, is not sufficient where it fails to aver that the action is still pending. *Hawley v. Chicago, B. & Q. R. Co.*, 71 *Iowa* 717, 29 *N. W. Rep.* 787.

The defense that the court has no jurisdiction of an action against the trustees in a railroad mortgage for breach of trust and misapplication of the funds in their hands by reason of the pendency of another suit is not available unless it is pleaded. *Hollister v. Stewart*, 38 *Am. & Eng. R. Cas.* 599, 111 *N. Y.* 644, 19 *N. E. Rep.* 782.

44. Pleas in bar, generally.—Where a railroad is sued for a personal injury and sets up matter that amounts to a plea in bar, it cannot afterwards plead to the jurisdiction of the court, as that suit was brought in the wrong district. *Texas & P. R. Co. v. Saunders*, 151 *U. S.* 105, 14 *Sup. Ct. Rep.* 257.

A declaration charged defendants with obstructing the navigation of a stream by building a bridge across it. The ninth plea—after setting out the incorporation of defendants and the powers thereby given to them to cross streams provided that the free and uninterrupted navigation thereof should not be interfered with by their railway—alleged that they had erected the bridge under such powers for the purpose of the railway, and thereby unavoidably a little impeded the navigation for a short time. *Held*, bad, as showing no defense. *Snure v. Great Western R. Co.*, 13 *U. C. Q. B.* 376. —QUOTED IN *McArthur v. Northern & P. J. R. Co.*, 17 *Ont. App.* 86.

45. The general issue.—A plea which avers that "the allegations contained in said complaint are untrue," or "denies each and every allegation contained in said complaint," is no more nor less than the general issue. *Louisville & N. R. Co. v. Trammell*, 93 *Ala.* 350, 9 *So. Rep.* 870. —OVER-RULING *Mobile & M. R. Co. v. Gilmer*, 85 *Ala.* 422; *Equitable Accident Ins. Co. v. Osborn*, 90 *Ala.* 201.

A plea of the general issue in a suit brought by a corporation admits the corporate existence of the plaintiff and the right to sue; and if the act creating the corporation and defining its powers is a public law, the court is bound to take judicial notice of it, and also judicially know whether the corporation has the power to make such a contract as is stated in the declaration. *Aldermen, etc., v. Finley*, 10 *Ark.* 423. *Dunning v. New Albany & S. R. Co.*, 2 *Ind.* 437.

But an allegation in a complaint that defendant is an incorporated company is not put in issue by a general denial, and the plaintiff need not, under such circumstances, prove the incorporation. *Rembert v. South Carolina R. Co.*, 39 *Am. & Eng. R. Cas.* 252, 31 *So. Car.* 309, 9 *S. E. Rep.* 968.

In an action against a railroad company, an allegation that it was consolidated with another company before the commencement of the action need not be specifically denied, as provided by Iowa Rev. § 2925, but a general denial of each and every allegation of the petition makes it incumbent upon plaintiff to prove such consolidation. Sections 2923, 2924, 2925 of the Revision, providing that an allegation of corporate capacity shall be taken as true unless denied by a specific statement of the facts relied upon, do not apply to an allegation of consolidation. *Koons v. Chicago & N. W. R. Co.*, 23 *Iowa* 493.

A declaration which charges defendants as corporations "owning, occupying, and doing business on and over" a certain railroad (naming it), "under the laws of the state of Michigan," is not open to the objection, under the plea of the general issue, that it does not allege defendants to be corporations, or otherwise competent to be sued. *Grand Rapids & I. R. Co. v. Southwick*, 30 *Mich.* 444.

The existence of a corporation plaintiff is not put in issue by a general denial of an alleged cause of action. *Dietrichs v. Lincoln*

& *N. W. R. Co.*, 13 *Neb.* 43, 13 *N. W. Rep.* 13.

Most matters of defense to actions on the case against common carriers may be given in evidence under the general issue, and it is seldom advisable to resort to a special plea. *Hoyt v. Allen*, 2 *Hill (N. Y.)* 322.

Where an action is to recover damages for a collision with plaintiff's horse and wagon, and the complaint charges that it was caused by the negligence of defendant's employes, an answer denying "every allegation in the complaint" is sufficient to put in issue defendant's liability; and it is not necessary to allege that the injury was caused by other persons for whose acts defendant is not liable. *Schular v. Hudson River R. Co.*, 38 *Barb. (N. Y.)* 653.

A plea setting up a different contract from the one declared on is bad as amounting to the general issue. *Kimball v. Boston, C. & M. R. Co.*, 13 *Am. & Eng. R. Cas.* 55, 55 *Vt.* 95.

46. Non est factum.—Defendants, railway corporations, pleaded as to certain agreements alleged to have been made by them under seal that the alleged deeds were not their deeds, and that they did not undertake and promise as alleged. *Held*, that under *Rev. St. c. 94, § 152*, an objection could not under these pleas be taken to the authenticity of the seals affixed to the agreements as the seals of defendant companies. *Gregory v. Halifax & C. B. R. & C. Co.*, 16 *Nov. Sc.* 436.

47. Nul tiel corporation.—Where a suit is brought by a domestic corporation created by a public law of which the courts take judicial notice, a plea of *nul tiel* corporation is bad on demurrer, or on motion to strike out; but if the statute creating the corporation requires something to be performed as a condition precedent to its existence, the plea is good, and plaintiff must reply a performance. *Hammelt v. Little Rock & N. R. Co.*, 20 *Ark.* 204.

Where an express company is sued as a corporation, a plea in abatement in the name of certain individuals admitting that they, "together with others," were doing business under the name by which they were sued, but denying the existence of a corporation, is bad as failing to disclose the names of the persons who are designated as "others." *American Exp. Co. v. Haggard*, 37 *Ill.* 465.

To a suit by a corporation there may, at its commencement, be an answer of *nul tiel*

corporation; but such answer is in abatement, and must precede an answer to the merits, and on the trial of the issue formed on such answer the proof is limited to the question of the existence *de facto* of a corporation under an authority sanctioning such a corporation *de jure*. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

If the answer denies the existence, at the commencement of the suit, of a corporation which is shown to have once existed, it must particularly set forth the manner in which the corporate powers ceased. *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 *Ind.* 275.

A denial of the plaintiff's corporate existence may in some instances be a plea in bar; but when establishing the truth of the plea will not authorize a judgment that will bar a future action, but will abate the present action, the plea is in abatement. *Oregon C. R. Co. v. Wait*, 3 *Oreg.* 92, 6 *Am. Ry. Rep.* 517.

When the name and description of plaintiff corporation leave no doubt of its identity as the corporation entitled to sue the cause of action, the objection that it has not sued by its proper corporate name cannot be taken under the general issue, or by plea of *nul tiel* corporation, but only by plea in abatement. *Woonsocket Union R. Co. v. Sherman*, 8 *R. I.* 564.

Under New York Code the corporate existence of a plaintiff need not be proved at the trial, where the answer contains no affirmative allegation that plaintiff is not a corporation. *Dry Dock, E. B. & B. R. Co. v. North & E. R. R. Co.*, 22 *N. Y. Supp.* 556, 51 *N. Y. S. R.* 771, 3 *Misc.* 61.

48. Special pleas, generally.—A declaration alleged that defendant, a railroad company, was bound to keep in repair a certain highway at a point where it crossed the railroad, and that plaintiff in traveling upon the highway was injured by its defective condition at that point. Defendant pleaded specially (1) that the highway was not a legally laid out one; (2) that if it was it was laid out many years after the railroad was constructed. The court ordered defendant to plead the general issue instead of the special pleas, on the ground that they amounted to the general issue. Defendant, instead of thus pleading, afterwards filed a demurrer to the declaration, which the court heard and overruled. *Held*: (1) that the first special plea amounted to

the general issue, and was properly rejected; (2) that the second plea contained matter of avoidance, and should have been allowed to stand; (3) that its disallowance was not a matter of discretion, but was an error; (4) that if defendant was to be regarded as having been in contempt, by reason of not obeying the order of the court, to plead the general issue, the acceptance of the demurrer by the court was a waiver of the order and healed the contempt. *Allen v. New Haven & N. Co.*, 10 *Am. & Eng. R. Cas.* 298, 49 *Conn.* 243.

Where the action is for personal injuries, and the company files a special plea that subsequent to the injury defendant agreed to employ plaintiff, and that he agreed not to sue for the injury, such plea is defective where it fails to allege what services were paid for, or how much was paid, or to whom plaintiff agreed that he would not sue, and where it does not disclose the nature of the defense aimed at, whether for accord and satisfaction, covenant not to sue, or estoppel. *Brunswick & W. R. Co. v. Clem*, 80 *Ga.* 534, 7 *S. E. Rep.* 84.

In an action by a passenger against a carrier for negligence, where the allegations of the petition are such as to involve the issue, it is not necessary to plead specially that the injury occurred through the act of God. Evidential facts should not be pleaded. *Gillespie v. St. Louis, K. C. & N. R. Co.*, 6 *Mo. App.* 554.

49. Plea of justification.—An action was brought against a railroad company alleging that an infant had been injured through the negligence of defendant's servants in not locking or securing a turntable. *Held*, that a plea which admitted that a child was injured by a turntable belonging to and used by defendant at the time and place alleged, but denied that defendant was at fault or negligent, was not a plea of justification. To constitute a plea of justification the facts alleged must be such as are not admissible under the plea of the general issue. *Chapman v. Atlanta & W. P. R. Co.*, 74 *Ga.* 547.

A plea setting up the charter of defendant, authorizing it to construct and operate a railroad, is no justification for the injury complained of, although it be averred in the plea that the company constructed its railroad upon its own lands, with reasonable care and prudence, doing no unnecessary damage to the property of others. *Costigan*

v. Pennsylvania R. Co., 54 *N. J. L.* 233, 23 *Atl. Rep.* 810.

50. Pleading matter in confession and avoidance.—In an action for injury to stock shipped on the company's cars, the company answered "that plaintiff received the stock from defendant in good condition, and paid the freight thereon, and gave defendant no notice that said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock." *Held*, on demurrer, that the answer was not good in confession and avoidance, and at best could be deemed only an argumentative denial. *Ohio & M. R. Co. v. Nickless*, 73 *Ind.* 382.—DISTINGUISHED IN *Hicks v. International & G. N. R. Co.*, 62 *Tex.* 38.

Where an employé riding as a passenger was killed in a collision, and in an action therefor the defendant pleads that the collision took place solely through the negligence of its servants who were fit and competent persons, and that such negligence was wholly unauthorized by the company, and without its leave or knowledge, such plea does not amount to the general issue. *Hutchinson v. York, N. & B. R. Co.*, 5 *Ex.* 343, 14 *Jur.* 837, 19 *L. J. Ex.* 296, 6 *Railw. Cas.* 580.—QUESTIONED IN *Morgan v. Vale of Neath R. Co.*, 33 *L. J. Q. B.* 260, 12 *W. R.* 1032.

In an action for the loss of goods, defendant's plea that it gave notice to plaintiff that it would not carry any package containing several parcels addressed to several parties unless the addresses and contents were declared, and that it would not be responsible unless such declaration was made, and that each of the packages alleged to have been lost contained several parcels addressed to and intended for different persons, and that the addresses and contents were not declared, was an argumentative traverse of the bailment alleged in the declaration. *Crouch v. London & N. W. R. Co.*, 7 *Ex.* 705, 21 *L. J. Ex.* 207.

In an action against carriers for delay in carrying goods, a plea setting up special conditions on which the goods were received, exempting defendant from liability, is good. *Bates v. Great Western R. Co.*, 24 *U. C. Q. B.* 544.

51. Plea of contributory negligence.—Contributory negligence when pleaded by itself is an admission of negli-

gence on the part of the defendant, but not when interposed with the plea of not guilty. *Louisville & N. R. Co. v. Hall*, 39 *Am. & Eng. R. Cas.* 298, 87 *Ala.* 708, 4 *L. R. A.* 710, 6 *So. Rep.* 277.

A plea averring contributory negligence is no answer to a complaint claiming damages for injuries alleged to have been wilfully inflicted by defendant's servants while in the discharge of their duties. *Alabama G. S. R. Co. v. Frazier*, 93 *Ala.* 45, 9 *So. Rep.* 303.

Contributory negligence is a defense which necessarily implies negligence on the part of the defendant, and is therefore a plea of confession and avoidance. *Watkins v. Southern Pac. R. Co.*, 38 *Fed. Rep.* 711.

Where a child four or five years old sues for a personal injury, it is *prima facie* exempt from responsibility, and if the company wishes to set up contributory negligence as a defense it must plead exceptional maturity or capacity in order to make evidence admissible that the child was able to take care of itself, when the question of its capacity becomes one for the jury. *Westbrook v. Mobile & O. R. Co.*, 39 *Am. & Eng. R. Cas.* 374, 66 *Miss.* 560, 6 *So. Rep.* 321.

Where a company sets up contributory negligence as a defense to an action against it for an injury to a person crossing its track, a general averment in the answer is sufficient without specifying the particular acts constituting the contributory negligence. *Neier v. Missouri Pac. R. Co.*, (Mo.) 1 *S. W. Rep.* 387.—APPROVING *Schneider v. Missouri Pac. R. Co.*, 75 *Mo.* 295; *Carlisle v. Keokuk N. L. Packet Co.*, 82 *Mo.* 40.

Though contributory negligence be not pleaded in an answer, yet it is admissible as a defense under a general denial, the rule being that the fact that the answer sets up a number of defenses other than contributory negligence, without pleading contributory negligence specially, does not preclude defendant from relying on such defense under the plea of general denial. *Texas & P. R. Co. v. Pollard*, 2 *Tex. App. (Civ. Cas.)* 424.

Where a railway company is sued for running against plaintiff's carriage, a plea that the damage was the result of negligence of both parties amounts to the general issue and is bad. *Armitage v. Grand Junction R. Co.*, 6 *D. P. C.* 340, 3 *M. & W.* 244, 1 *H.*

& H. 26. *S. P.*, *Woolf v. Beard*, 8 *C. & P.* 373.

52. Counterclaim.—Plaintiff brought suit to recover for services and for cost of boarding persons employed by defendant company. The company pleaded a counterclaim, which the court struck out on the ground that the company had not denied under oath the correctness of plaintiff's verified account. *Held*, error. A defendant is entitled to plead a counterclaim without denying under oath the justness and correctness of plaintiff's verified account. *Galveston, H. & S. A. R. Co. v. Schwartz*, 2 *Tex. App. (Civ. Cas.)* 664.

53. When an answer is proper or necessary.—In a suit against a railroad company it may be designated as a company by its corporate name without an averment of its corporate capacity, and if this is disputed it should be by answer, and not by demurrer. *Stanly v. Richmond & D. R. Co.*, 16 *Am. & Eng. R. Cas.* 545, 89 *N. Car.* 331.—FOLLOWED IN *Ramsay v. Richmond & D. R. Co.*, 91 *N. Car.* 418.

The defense of accord and satisfaction should be interposed by answer in an action upon a contract to furnish materials and labor for bridges and culverts. It cannot be availed of on motion to dismiss, supported by affidavit, where the accord is disputed. *George v. Chicago, Ft. M. & D. M. R. Co.*, 85 *Iowa* 590, 52 *N. W. Rep.* 512.

Where a company destroys insured property by fire, and the insurance company pays the amount of the insurance and then sues the railroad company, the defense that the insured should have brought the action must be made by answer; otherwise it is waived. *Home Ins. Co. v. Pennsylvania R. Co.*, 11 *Hun (N. Y.)* 182.

Where a female sues for a personal injury in her maiden name instead of that acquired by marriage, since the adoption of the Code it is not ground for abatement, and the only mode of presenting a defense for such misnomer is by answer, and if not so presented no advantage can be taken at the trial. *Traver v. Eighth Ave. R. Co.*, 4 *Abb. App. Dec. (N. Y.)* 422, 6 *Abb. Pr. N. S.* 46, 3 *Keyes* 497.

54. What may be pleaded as a defense.—In an action for forcibly entering upon land and digging the soil, excavating pits, and making embankments, an answer that defendants entered as the servants of a railroad company which had

legally appropriated the injured property as a right of way will justify the entry and bar the suit. *Green v. Boody*, 21 Ind. 10.

To an action against a company to recover for work and labor an answer is sufficient which alleges that in proceedings before a justice of the peace of another state against plaintiff as principal and defendant as garnishee a judgment was rendered against defendant, and the statutes of the foreign state authorizing such proceedings need not be set up. *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. Rep. 83.

In an action against a railroad company to recover land upon which it has built its road, where the answer of the company sets up title in itself, but alleges, pursuant to Minn. Gen. St. 1878, ch. 34, §§ 33-38, its readiness and willingness to pay plaintiff for the land provided on the trial he establishes his right to recover the land, the relief demanded in the answer is not "affirmative" within the meaning of the statute. *Koerper v. St. Paul & N. P. R. Co.*, 40 Minn. 132, 41 N. W. Rep. 656.

55. Sufficiency of the denials, generally.—Where a defendant, sued as a corporation, answers, denying that it is a corporation, or has ever been organized or attempted to be organized as one, such denial is sufficiently specific under Iowa Code, § 2717. *Folsom v. Star U. L. F. Freight Line*, 54 Iowa 490, 6 N. W. Rep. 702.

A petition against a railroad company alleged that "defendant carelessly, negligently, and wantonly ran its engine and cars over and upon plaintiff's mare." The answer denied that "defendant carelessly, negligently, and wantonly ran over said mare." *Held*: (1) that this was not a denial of the injury complained of; (2) that under these pleadings the court erred in instructing the jury that such denial "puts plaintiff upon proof of his cause of action." *Harden v. Atchison & N. R. Co.*, 4 Neb. 521.

In an action for personal injury it was shown that the track of defendant ran along a certain street in a city. The complaint alleged in positive terms that this was "a public street of said city." The answer denied that plaintiff was rightfully or lawfully walking on its track at the time of the injury, or that the public was accustomed to walk thereon, or that it had any right so to do. *Held*, that these averments in the

answer did not constitute a denial of the allegation in the complaint that defendant's track was on a public street. *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

In the decision of this case on the demurrer, reported in 43 Ohio St. 228, 22 Am. & Eng. R. Cas. 129, it was held that, upon the averments of the petition, the plaintiffs might treat the easement of the Lake Shore & Michigan Southern railway company in that part of its right of way described in the contract between that company and the defendant, set forth in the petition, as abandoned, and recover of the defendant damages as upon an appropriation. The fact upon which the petition based the alleged abandonment was the making of the contract alluded to, by which the Lake Shore company undertook to transfer that part of its right of way therein described to the defendant for railroad purposes in perpetuity. The averments of the petition relating to the abandonment are that by the agreement between the two companies the Lake Shore & Michigan Southern railway company, for the consideration therein named, "abandoned to the defendant, and undertook to permit and license the defendant to use and perpetually occupy for its railroad," that part of the former company's right of way referred to; and "that, by the abandonment aforesaid," the easement of the Lake Shore & Michigan Southern railway company "ceased and terminated;" and "that portion of said lot so abandoned to and occupied by the defendant is of the value of ten thousand dollars." The answer does not controvert the making of the contract between the two companies as alleged in the petition, but denies that the Lake Shore company intended to or did thereby abandon any of its right of way, or that its easements or right of way ceased and determined by virtue of said agreement. *Held*: (1) These denials raise no issue of fact. They are the pleader's construction of the contract, and his opinion as to its legal effect. (2) By the former decision of this court, upon the demurrer, it was settled that the effect of the contract made between the Lake Shore company and the defendant was to work the abandonment claimed in the petition; and it was not error for the court, on the trial of the case, so to instruct the jury. *Pennsylvania Co. v. Platt*, 46 Am. & Eng. R. Cas. 558, 47 Ohio St. 366, 25 N. E. Rep. 1028.

56. Denials must be certain and specific.—An averment in an answer to an action upon a county bond issued in aid of a railway that no requisite of chapter 15 of the Code was observed is not sufficient, it being too general, and it is not error to sustain a demurrer thereto. *Clapp v. Cedar County*, 5 Iowa 15.

Suit was brought upon a subscription to stock, and the complaint alleged that the subscription was made by a third party for defendant, and that the latter afterwards ratified it. Defendant answered under oath, denying that he made any subscription to stock. *Held*, that the answer was defective as failing to meet the averments of the complaint. *Wilson v. Evansville & C. R. Co.*, 9 Ind. 510.

A denial must be direct and unambiguous, and must answer the substance of each direct charge; and such facts as are not denied by the answer, for the purposes of the action, are to be taken as true. *Harden v. Atchison & N. R. Co.*, 4 Neb. 521.

Where a complaint charges that the company did not safely and securely carry and convey the goods and deliver the same, a plea which does not distinctly deny this averment, but attempts to construe the complaint as alleging another and different claim, is bad on demurrer. *Pennsylvania R. Co. v. Wilson*, (Pa.) 3 Atl. Rep. 783.

57. Immaterial allegations in answers.—It is not necessary that a corporation formed under the laws of Great Britain to construct, own, operate, and lease railways in Oregon should specify in its memorandum of association the *termini* thereof, and therefore an allegation in an answer to a complaint in an action by such a corporation on a lease of its road that it had not made such a specification is immaterial. *Oregonian R. Co. v. Oregon R. & N. Co.*, 11 Sawy. (U. S.) 564, 27 Fed. Rep. 277.

A mere denial of the lessee corporation's power to execute a lease of a railway, in an action thereon by the lessor corporation to recover rent, is a conclusion of law and immaterial. *Oregonian R. Co. v. Oregon R. & N. Co.*, 11 Sawy. (U. S.) 564, 27 Fed. Rep. 277.

An allegation by the lessee corporation in such action that the lessor's road had no near connection with its road, that the capital stock of the latter was not contributed to operate leased roads, that the lease was not ratified by its stockholders, or that

it was signed by its president and secretary without the state of its origin, is immaterial. *Oregonian R. Co. v. Oregon R. & N. Co.*, 11 Sawy. (U. S.) 564, 27 Fed. Rep. 277.

58. Joinder of defenses.—In an action in replevin, the answer alleged payment by defendant, a warehouseman, at plaintiff's request of the carrier's charges for transporting goods shipped by plaintiff and consigned to defendant, and claimed a lien on them by reason thereof, and also alleged his charges as warehouseman in receiving and storing the goods at plaintiff's request, and claimed a lien on that account. *Held*, that the facts relating to each lien were (if good) a distinct defense, and although they were not "separately stated," plaintiff might demur to one, and reply to the other. *Bass v. Upton*, 1 Minn. 408 (Gil. 292).—REVIEWING *Durkee v. Saratoga & W. R. Co.*, 4 How. Pr. (N. Y.) 226; *Howard v. Michigan Southern R. Co.*, 5 How. Pr. 206.

In an action for personal injuries the complaint contained two counts, both alleging that the injuries were caused by the negligence of the driver of defendant's street-car. The second count also alleged negligence of defendant in allowing the car and the street at the place of injury to remain out of repair, but did not allege that such negligence contributed to the injury. *Held*, that, as the only negligence alleged as the direct cause of the injury was that of the driver, the two counts were substantially alike, and defendant was not prejudiced by a refusal to compel plaintiff to elect between them. *Shenners v. West Side St. R. Co.*, 74 Wis. 447, 43 N. W. Rep. 103.

59. Inconsistent defenses.—An answer may embrace inconsistent defenses. Each separate defense, however, which is set up in the answer, each plea in confession and avoidance, must constitute in itself a good defense to the action and be consistent in its averments. But distinct defenses, set up in separate pleas in the answer, may be inconsistent with each other without invalidating the answer. *International & G. N. R. Co. v. Kentle*, (Tex.) 16 Am. & Eng. R. Cas. 337.

A cause was tried upon the facts by the judge, and he struck out special defenses of defendant, but admitted evidence of those special defenses under the general denial. *Held*, that the special defenses were legal defenses properly pleaded, and it was error to strike them out. *International & G. N.*

R. Co. v. Kentle, (Tex.) 16 *Am. & Eng. R. Cas.* 337.

Under Wyom. Code, p. 45, § 91, a defendant has the right to plead any number of defenses which are not inconsistent in fact; and in determining this right two statements should never be held inconsistent if both may be true. On the trial defendant may avail himself of each defense which he may properly set forth in his answer, and will not be concluded from proving the truth of one plea by any implied admissions contained in another, or by implication of law arising therefrom. *Lake Shore & M. S. R. Co. v. Warren, (Wyom.)* 21 *Am. & Eng. R. Cas.* 302, 6 *Pac. Rep.* 724.

60. Matters admitted by answer or plea.—By pleading a general traverse defendants admit the competency of a claimant corporation to sue in its corporate capacity. *Southern Pac. Co. v. United States*, 28 *Ct. of Cl.* 77.

Plaintiff sued for personal injuries, and charged in his complaint that he was employed by defendant, and that one of its trains "was suddenly started by defendant or its agents, without notice or warning to plaintiff, while plaintiff was lawfully between two cars of said train," causing the injuries complained of. The company answered admitting that it was operating a railroad at the time and place, but filed a general denial as to the injuries. The evidence showed that there was only one road operated at the time and place mentioned. *Held*, that the company could not defend on the ground that the road was not operated by it. *Central R. Co. v. Stoermer*, 51 *Fed. Rep.* 518, 1 *U. S. App.* 276, 2 *C. C. A.* 360.

In an action to recover the value of hay burned, defendant, in the first division of its answer, after admitting certain averments of the petition, proceeded: "And it denies each and every other allegation in said petition, unless the same is herein otherwise admitted." In the second division certain other admissions were made. *Held*, that the word "herein" used in the first division referred to the whole answer and not to the first division only, and that therefore the first division did not set up a distinct defense unaffected by the admissions in the second division. Hence the erroneous admission of evidence to prove one of the facts admitted in the second division was without prejudice, and it was not error for

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the court to state these admissions in the instructions to the jury. *Comes v. Chicago, M. & St. P. R. Co.*, 78 *Iowa* 391, 43 *N. W. Rep.* 235. — **DISTINGUISHING** *Murphy v. Sioux City & P. R. Co.*, 55 *Iowa* 476; *Lewis v. Chicago, M. & St. P. R. Co.*, 57 *Iowa* 127.

Where a general denial is pleaded to a suit by a corporation, the *de facto* existence of the corporation is admitted. *Harrison v. Martinsville & F. R. Co.*, 16 *Ind.* 505.

The Mississippi statute of 1836, declaring that all pleas shall be deemed and adjudged as admitting the parties and the character of the parties suing, applies to corporations as well as other suitors. *Reed v. Benton & M. R. & B. Co.*, 5 *Miss.* 257.

The admission of an answer that defendant is a street-railroad corporation duly organized and existing under the general statutes of the state is, in effect, an admission that it is a common carrier of passengers, and the courts will take judicial notice of its rights and powers. *Burbridge v. Kansas City Cable R. Co.*, 36 *Mo. App.* 669.

In an action by a child to recover damages for injuries caused by a cable car, defendant pleaded that plaintiff's mother contributed to the injury by placing him in charge of a careless person who allowed him "to get in front of defendant's car." *Held*, that such plea admitted the ownership of the car and operation of the road by defendant, and it could not object that plaintiff had failed to prove either point. *Winters v. Kansas City Cable R. Co.*, 40 *Am. & Eng. R. Cas.* 261, 99 *Mo.* 509, 12 *S. W. Rep.* 652, 6 *L. R. A.* 536. — **APPROVING** *Erie City Pass. R. Co. v. Schuster*, 113 *Pa. St.* 412; *Bellefontaine & I. R. Co. v. Snyder*, 18 *Ohio St.* 399. **DISAPPROVING** *Hartfield v. Roper*, 21 *Wend. (N. Y.)* 615. **DISTINGUISHING** *Stillson v. Hannibal & St. J. R. Co.*, 67 *Mo.* 671; *Holly v. Boston Gas Light Co.*, 8 *Gray (Mass.)* 123; *Waite v. North Eastern R. Co.*, *El. Bl. & El.* 728; *Ohio & M. R. Co. v. Stratton*, 78 *Ill.* 88. **QUOTING** *Boland v. Missouri R. Co.*, 36 *Mo.* 484.

Under N. Y. Act of 1864, ch. 422, in suits by or against a corporation created by or under the laws of the state, it is not necessary to prove at the trial the existence of such corporation, unless an answer be filed denying the corporate existence. *Stone v. Western Transp. Co.*, 38 *N. Y.* 240. — **FOLLOWING** *Genesee Bank v. Patchin Bank*, 13 *N. Y.* 309.

In an action for damages in transit, if the petition alleges that plaintiffs were partners, and there is no denial of this allegation under oath, the partnership need not be proved. *Good v. Galveston, H. & S. A. R. Co.*, (Tex.) 40 Am. & Eng. R. Cas. 98, 11 S. W. Rep. 854.

4. Demurrer.

61. When a demurrer will lie.—

If it be necessary to allege the value of services of a person injured by a railroad, the point should be raised by demurrer. *Georgia Southern R. Co. v. Neel*, 68 Ga. 609.

In Georgia the railroad commissioners fix what are just and reasonable freight rates, and the schedule fixed is evidence in all courts of the legal rate. A suit was brought against a company alleging an overcharge, but the declaration did not allege either that no rates had been fixed by the commissioners, or that the charge made was beyond the rates fixed. *Held*, that the declaration was demurrable. *Sorrell v. Central R. Co.*, 75 Ga. 509.—REVIEWED IN *McGrew v. Missouri Pac. R. Co.*, 114 Mo. 210.

The plain inference from an averment in a declaration in a negligence case, that the train started "before plaintiff had reasonable time to safely alight," is that the train was negligently started while plaintiff was in the act of alighting, and if a more specific allegation is desired defendant should demur. *McCaslin v. Lake Shore & M. S. R. Co.*, 52 Am. & Eng. R. Cas. 290, 93 Mich. 553, 53 N. W. Rep. 724. *Mayton v. Texas & P. R. Co.*, 63 Tex. 77.

A demurrer is a defense within the meaning of N. Y. Code, § 3253. *New York El. R. Co. v. Harold*, 30 Hun 466.

62. When not.—A corporation can be held responsible for a tort, though it be wanton or malicious; and it may be responsible for assault and battery committed by one of its servants upon a co-servant; and under the existing rules of pleading in Minnesota, what was equivalent to a common count under the old practice is good as against an objection raised by demurrer. So a complaint which alleges that defendant, by one of its employes, committed an assault and battery upon plaintiff, another employe, is good on demurrer. *Lewis v. Chicago, St. P. & K. C. R. Co.*, 35 Fed. Rep. 639.

Where a court orders claims against a receiver of a road presented within a certain time, an objection that a claim was not

presented within the time fixed must be raised by plea, and not by demurrer. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Fed. Rep. 156.

Where a party intervenes in a proceeding against a road in the hands of a receiver, and files a claim, an objection that the intervener has appealed from a former order touching the claim cannot be made by demurrer, when the fact of such appeal does not appear on the face of the intervener's petition. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Fed. Rep. 156.

A declaration the allegations of which make out a case for recovery against a railroad as the last of a connecting line is not demurrable because, as a matter of fact, it may have been leased to another company, which is the real contracting party. If such facts exist, they cannot be reached by demurrer. *Southwestern R. Co. v. Bryant*, 67 Ga. 212.

Under N. Y. Code Civ. Pro. § 1775, a complaint which states that defendant is a corporation doing business in the state, but omits to aver whether it is a domestic or foreign corporation, or under the laws of what state or government it is created, is defective; but the defect must be taken advantage of by motion, and not by demurrer. *Rothschild v. Grand Trunk R. Co.*, 30 N. Y. S. R. 642, 19 Civ. Pro. 53, 10 N. Y. Supp. 36; affirmed at general term in 38 N. Y. S. R. 869, 14 N. Y. Supp. 807, 60 Hun 582, mem.

If any advantage can be taken of the omission to allege the corporate character of a defendant, the same is not available by demurrer, though it may be reached by motion. *Rothschild v. Grand Trunk R. Co.*, 38 N. Y. S. R. 869, 60 Hun 582, mem., 14 N. Y. Supp. 807.

63. General demurrer.—Where the action is for an injury resulting from negligence, the question that negligence is not alleged with sufficient particularity cannot be raised by general demurrer, and it is too late to raise it after answer. *Hobson v. New Mexico & A. R. Co.*, (Ariz.) 28 Am. & Eng. R. Cas. 360, 11 Pac. Rep. 545.—DISTINGUISHING *Hough v. Texas & P. R. Co.*, 100 U. S. 213; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433; *Abend v. Terre Haute & I. R. Co.*, 111 Ill. 202; *Seaver v. Boston & M. R. Co.*, 14 Gray (Mass.) 466; *Gilman v. Eastern R. Co.*, 10 Allen (Mass.) 233.

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QUOTING *Farwell v. Boston & W. R. Co.,*
4 Metc. (Mass.) 49, 38 Am. Dec. 339; *Ran-*
dall v. Baltimore & O. R. Co., 15 Am. &
Eng. R. Cas. 243, 109 U. S. 478, 3 Sup. Ct.
Rep. 322.

Where a passenger sues a carrier for
being assaulted by a conductor, a failure to
allege that the conductor was acting at the
time within the scope of his employment
cannot be reached by general demurrer.
Peoples v. Brunswick & A. R. Co., 60 Ga.
281.

And a failure to aver that the conductor
was an agent or servant of the company
does not render the petition bad on general
demurrer. *Texas & P. R. Co. v. Casey, 52*
Tex. 112.

A parent sued for an injury to a minor
son, who was an employé of defendant, and
filed a declaration in two counts. The first
count described the minor as of tender
years, and the second described him as
eighteen years old. Defendant filed a gen-
eral demurrer, insisting that if the minor
was eighteen he had assumed the risks in-
cident to his employment, and that it was
not therefore liable. *Held,* that, inasmuch
as the demurrer was general, it should have
been overruled. *Lynn v. Illinois C. R. Co.,*
63 *Miss. 157.*

When in a count in a declaration special
damages are laid, some grounds of which
are good and some bad, a general demurrer
to the entire count will not be sustained.
Hendrickson v. Pennsylvania R. Co., 8 Am.
& Eng. R. Cas. 368, 43 N. J. L. 464.

An action to recover damages for causing
death by negligence is not within rule 16
of N. J. supreme court, requiring certain
actions to be styled, in the process and
pleadings, actions of tort, and the objection
may be raised by a general demurrer. *Van*
Blarcom v. Delaware, L. & W. R. Co., 49
N. J. L. 179, 6 Atl. Rep. 503.

In an action for actual and exemplary
damages, the count for actual damages
being good, a defective statement of the
cause of action for exemplary damages can-
not be reached by general demurrer. *Tay-*
lor, B. & H. R. Co. v. Taylor, 79 Tex. 104,
14 S. W. Rep. 918.

64. Special demurrer.—Although a
declaration be defective in not setting forth
any particular act or omission constituting
negligence, yet where there is no special
demurrer on that ground, and the declara-
tion is good in substance, there is no error

in overruling a demurrer to the declaration.
Pullman Palace Car Co. v. Martin, 58 Am.
& Eng. R. Cas. 583, 92 Ga. 161, 18 S. E.
Rep. 364.

65. Demurrer for lack of jurisdic-
tion.—Under Miss. Code, p. 492, art. 87, it
is not necessary to state the venue in the
declaration, and therefore an objection that
a suit against a railroad is brought in the
wrong county cannot be raised by demurrer.
Hurt v. Southern R. Co., 40 Miss. 391.

Defendant company filed an answer to an
action against it to recover wages, alleging
that all the property of the original com-
pany that contracted the indebtedness had
been sold under decree, and that defendant
was the purchaser and a new organization,
not in existence when the indebtedness was
contracted, to which the plaintiff demurred.
Held, that the demurrer should be over-
ruled, as it was competent to set up the
defense by answer. *Barney v. Northern*
Pac. R. Co., 56 How. Pr. (N. Y.) 23.

Under N. Y. Code, § 488, providing that
a defendant may demur to a complaint
when it appears on the face thereof that the
court has no jurisdiction of the person,
or of the subject-matter of the action, an
objection that plaintiff is a non-resident,
which deprives the court of jurisdiction,
cannot be taken by demurrer, when such
facts do not appear on the face of the com-
plaint. *Gervais v. Chicago, R. I. & P. R.*
Co., 35 N. Y. S. R. 129, 58 Hun 610, 20 Civ.
Pro. 95, 12 N. Y. Supp. 312.

66. — for misjoinder of causes of
action.—A complaint claimed a penalty
for taking excessive fare, and also damages
for being ejected from defendant's cars on
another trip, on the same day. Defendant
demurred to the complaint for improperly
joining causes of action. *Held,* that under
New York Code of Civ. Pro. §§ 484, 488, the
demurrer must be overruled, because the
cause of action for the penalty was not a
good cause of action. *Sullivan v. New*
York, N. H. & H. R. Co., 19 Blatchf. (U. S.)
388, 11 Fed. Rep. 848.

An original petition alleged trespass in
unlawfully entering plaintiff's farm and wil-
fully throwing down fences, etc. The first
amended petition made another company a
defendant, and alleged the same matters of
trespass and the consolidation and merger
of the two corporations. The second
amended petition was filed and held bad on
demurrer, and the case was dismissed as to

the original defendant. The third amended petition alleged that the original defendant committed the trespass, and there arose on its part an obligation to pay plaintiff, and it then sold its line to the other company, and that it by the terms of sale and deed assumed and agreed to pay all liabilities of the original defendant, including the damages claimed in this suit. *Held*, that the last petition set out an action on contract and constituted a clear departure from the prior petitions which declared in trespass, and a demurrer thereto was properly sustained. *Drake v. St. Louis & S. F. R. Co.*, 35 Mo. App. 553.

Where a city and a railroad company are sued jointly for a failure of the latter to keep streets in repair under a contract with the city, and for leaving such streets in a dangerous condition, which caused an injury to plaintiff, a demurrer cannot be sustained to the complaint because it unites an action on contract against the railroad company with an action of tort against the city; nor on the further ground that it unites two causes of action against the railroad company, one in tort, and the other on contract; but where the demurrer seemed to have been interposed in good faith, and the pleadings had been amended without cost to the plaintiff, defendant should be permitted to answer without costs. *Bateman v. Forty-second St., M. & St. N. A. R. Co.*, 5 N. Y. Supp. 13.

67. — for failure of complaint to state facts sufficient to constitute a cause of action.—A paragraph of a complaint against a company for killing stock contained two causes of action, of one of which the court had no jurisdiction. *Held*, that a demurrer, for want of facts, did not reach the defect; that evidence in support of the cause of action of which the court had no jurisdiction should have been excluded on objection. *Wabash, St. L. & P. R. Co. v. Rooker*, 15 Am. & Eng. R. Cas. 558, 90 Ind. 581.

Where a defendant, in an action to recover damages for live stock lost *in transitu*, demurs "severally to each paragraph of the complain as amended because the same does not state facts sufficient to constitute a cause of action against defendant," the demurrer is regarded as addressed to each paragraph of the complaint. *Terre Haute & L. R. Co. v. Sherwood*, 55 Am. & Eng. R. Cas. 326, 132 Ind. 129, 31 N. E. Rep. 781.

A *qui tam* action was commenced against a railroad to recover a statutory penalty for a failure to ring a bell or sound a whistle in running a train over a highway crossing. Defendant demurred on the grounds (1) that the complaint did not state the direction in which the train was being run; (2) nor whether it was a freight or passenger train; (3) nor at what hour of the day or night it passed the crossing; (4) nor describe the highway by name, location, or *termini*. *Held*, that the demurrer should have been overruled as to the first, second, and third grounds, but sustained as to the fourth. *Ohio & M. R. Co. v. People*, 45 Ill. App. 583.—QUOTING AND FOLLOWING *Chicago & A. R. Co. v. Adler*, 56 Ill. 344.

Plaintiff alleged that while passing over the platform of defendant's car, which obstructed a crossing, she was "forcibly, wilfully, and violently" seized and thrown off by the driver and seriously injured; that the driver was acting at the time as "the servant and agent and in the employment of defendant." Defendant demurred to the complaint. *Held*, that the demurrer was properly overruled; that it might be assumed from his position that the driver was acting within the line of his instructions in keeping the platform clear, and that the act complained of was an error of judgment in the course of his employment for which the company was liable; also that the averment that the act was "forcibly, wilfully, and violently" done would not be considered as a charge that it was malicious, but that it was done in the performance of his duty, he using more force and violence than was necessary. *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *affirming* 5 Daly 221. — DISTINGUISHING *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

Where the action is against two or more defendants, the objection that no cause of action is stated against one of the defendants, and that no judgment is prayed against it, must be taken advantage of by demurrer, and not by a motion to strike out. *People v. New York City C. U. R. Co.*, 39 N. Y. S. R. 425, 15 N. Y. Supp. 225; *appeal dismissed in* 129 N. Y. 621, *mem.*, 41 N. Y. S. R. 945.

A demurrer "that the negligence complained of is not sufficiently and legally set out" is sufficient. *Conley v. Richmond & D. R. Co.*, 52 Am. & Eng. R. Cas. 490, 109 N. Car. 692, 14 S. E. Rep. 303.

Neither a general nor a special demurrer

should be sustained to a petition stating facts from which the court or jury trying the cause may find that negligence existed. *Rouland v. Murphy*, 66 Tex. 534, 1 S. W. Rep. 658.

An allegation in a complaint to enjoin the construction of a sewer by a city, which states that "plaintiff further alleges that said sewer can be constructed in the center of said street, if necessary, without injuring plaintiff's property, and without interfering with the operation of plaintiff's street railway," does not negative the presumption that the city is proceeding in such a manner as not unreasonably to interfere with the rights of plaintiff, and is demurrable for want of sufficient facts. *Spokane St. R. Co. v. Spokane*, 5 Wash. 634, 32 Pac. Rep. 456.

Plaintiff sued as the trustee in a railroad mortgage to secure bondholders, and alleged that it was a corporation existing under the laws of another state, and was authorized to act as trustee, and set out the statutes creating it by their title. *Held*, that a demurrer admitted the authority of plaintiff to act in the trust relation, and that the question was not raised by a demurrer to the complaint. *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114.

A demurrer to a single paragraph of a petition for the appointment of commissioners, which paragraph does not profess to state a cause of action, is properly overruled. *Shealy v. Chicago, M. & N. R. Co.*, 72 Wis. 471, 40 N. W. Rep. 145.

68. Interposing the statute of limitations by demurrer.—A declaration of trespass *quare clausum fregit* against a company for unlawfully building a railroad on plaintiff's land is not demurrable as showing on its face that the action is barred by the statute of limitations, because such demurrer admits the absence of a grant or rightful taking, upon a presumption of which the bar is given. *Atlantic & G. R. Co. v. Fuller*, 48 Ga. 423.

69. What matters are admitted by demurring.—Where a proceeding is instituted against a company to compel it to run more trains, and an answer is filed setting up its financial inability to do so, all the facts well pleaded in the answer are admitted by a demurrer thereto. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167.

A complaint alleged that defendant com-

pany "wrongfully, illegally, and injuriously" obstructed a certain street, to which defendant demurred. *Held*, that the demurrer admitted that the allegations of the complaint were true, and that defendant could not set up any claim that it was acting under a license or authority of law. *Scheckner v. Milwaukee & P. du C. R. Co.*, 21 Iowa 515.

70. Hearing and determining demurrers.—Where, in the declaration in an action for violation of the statute requiring signals to be given when a railroad train approaches a public crossing, the terms of the statute are set out in substance, and the exact point of the intersection of the railroad and public highway is set forth, a demurrer based on the supposed want of an allegation of time and place of the injury will not be sustained. *Ohio & M. R. Co. v. People*, 49 Ill. App. 225.

Where an entire answer is admitted by demurrer, it should be overruled if the answer contains in any part a defense to the action, although some one or more counts therein is vulnerable to a demurrer. *Holbert v. St. Louis, K. C. & N. R. Co.*, 38 Iowa 315.

A declaration contained but one count, alleging injury both to the person and personal property of plaintiff by reason of his horse becoming frightened in consequence of defendant's negligence in not having so constructed a bridge over its road, at a turnpike crossing, and in not so placing safeguards in and about it as to prevent horses on the turnpike from being frightened by passing engines and cars. Defendant demurred, assigning four causes of demurrer, the first three of which were founded on the terms of its charter, which was not offered in evidence, and the fourth on the declaration containing two distinct causes of action, and being, therefore, double. *Held*, that the demurrer was properly overruled because the first three causes assigned consisted of matter which could not be known to the court officially, and proof of which could only be furnished by the charter of defendant, and the fourth cause was insufficient. *Baltimore & O. R. Co. v. Ritchie*, 31 Md. 191.

On demurrer to a declaration against a corporation the charter of the corporation is not before the court. *Morrissey v. Providence & W. R. Co.*, 15 R. I. 271, 3 Atl. Rep. 10.

Upon demurrer to a declaration for in-

juries sustained by plaintiff by a collision with a train or cars upon the company's track plaintiff will, in the absence of averment to the contrary, be treated as a trespasser. *Patton v. East Tenn., V. & G. R. Co.*, 48 *Am. & Eng. R. Cas.* 581. 89 *Tenn.* 370, 15 *S. W. Rep.* 919.

It is proper to overrule a demurrer to a declaration grounded on the statement that the place of the accident was "at, near, or upon the crossing." *Tyler v. Kelley*, 89 *Va.* 282, 15 *S. E. Rep.* 509.

An averment that a railroad company sold a certain division of its road to another company "with all its depots, shops, rolling stock, and franchises"—*held*, on demurrer, to mean that only a franchise was sold necessary to operate that division of the road. *Wright v. Milwaukee & St. P. R. Co.*, 25 *Wis.* 46.

71. Rendering judgment against party who committed first fault in pleading.—Action was brought by an administrator to recover for the death of his intestate, an employé, by the wilful neglect of defendant. The answer pleaded in bar that deceased left no widow or child, to which it was stated in reply that he left as heirs a father, mother, sister, and brother. *Held*, that the court did right in overruling a demurrer to the answer, in sustaining a demurrer to the reply and dismissing the petition. *Jordan v. Cincinnati, N. O. & T. P. R. Co.*, 89 *Ky.* 40, 11 *S. W. Rep.* 1013.—**DISTINGUISHED** IN *Givens v. Kentucky C. R. Co.*, 89 *Ky.* 231. **REVIEWED** IN *Louisville & N. R. Co. v. Coniff*, 90 *Ky.* 560.

72. Review of decisions on demurrer.—Where a demurrer to a bad paragraph of a complaint is erroneously overruled, and it is not affirmatively shown by the record proper that the judgment rests on the good paragraphs, the judgment will be reversed. *Terre Haute & L. R. Co. v. Sherwood*, 55 *Am. & Eng. R. Cas.* 326, 132 *Ind.* 129, 31 *N. E. Rep.* 781.

In a suit to recover damages, actual and exemplary, where only actual damages are awarded, the action of the court in overruling a demurrer to so much of the petition as stated facts on which the claim for exemplary damages was based, will not be considered at the instance of defendant on appeal. *Galveston, H. & S. A. R. Co. v. Ware*, 30 *Am. & Eng. R. Cas.* 203, 67 *Tex.* 635, 4 *S. W. Rep.* 13.

A court will not decree a surrender of

negotiable bonds unless the bondholders are before the court, so that it may enforce its decree; but where the complaint does not show that certain bondholders are non-residents, the supreme court, on an appeal from an order sustaining a demurrer, cannot consider statements of counsel, or recitals in an order of publication in determining the residence of such bondholders. *Burhop v. Roosevelt*, 20 *Wis.* 338.

5. Replication and Subsequent Pleadings.

73. When a replication is proper or necessary.—A paragraph which is an argumentative denial of an alleged subscription, which is shown by the complaint to be in writing, without being sworn to, only operates as a general denial, and therefore does not require a reply under Indiana practice. *Denny v. Indiana & I. C. R. Co.*, 11 *Ind.* 292.

Under the Oregon statutes, which only require a replication where an answer sets up new matter, such replication is not necessary where the action is to recover for injuries alleged in the complaint to have been received through the negligence of defendant, and without any fault or negligence on the part of plaintiff, and an answer is filed which denies defendant's negligence and alleges contributory negligence on the part of plaintiff. *Watkins v. Southern Pac. R. Co.*, 38 *Fed. Rep.* 711.

Where an answer pleads the statute of limitations, that plaintiffs are not owners of the land in question, and are now by various acts estopped from making claim for compensation against the defendant, a reply is unnecessary under section 2665 Iowa Code, providing that there shall be no reply except a counterclaim or some matter in confession and avoidance be alleged. *Hartley v. Keokuk & N. W. R. Co.*, 85 *Iowa* 455, 52 *N. W. Rep.* 352.

A carrier sued for injuring a horse alleged in its answer that "in taking the horse from the cars plaintiff's agents, by their negligence and by reason of the wildness and unruliness of the horse, suffered him to jerk, rear, and fall; but he was not hurt or otherwise injured thereby." These allegations were not denied by the reply. *Held*, that as it is not alleged that but for this negligence the horse would not have fallen from the platform, and all injury of any kind is denied, the defense does not amount to contributory negligence, and no

bondholders may enforce complaint does not. If the bondholders are non-residents, an appeal cannot be taken, or recitals determining the result. *Burhop*

Pleadings.
Is proper which is an alleged substantive complaint sworn to, and therefore under Indiana *I. C. R.*

which only answer sets out is not necessary to recover for negligence. It is not necessary to have negligence of defendant or negligence of plaintiff. *Southern*

the statute of the owners of the property by varying claim for defendant, a release in 1865 Iowa. There is no reply in the matter in *Hart*, 85 Iowa

a horse taking the agents, by the wildness, suffered the loss was not the reply. These but for and not have all injury of the does not, and no

reply is necessary. *Owen v. Louisville & N. R. Co.*, 35 Am. & Eng. R. Cas. 687, 87 Ky. 626, 9 S. W. Rep. 698.

An express company was sued for the non-delivery in time of a package containing an old insurance policy and application for a paid-up one, whereby the right to the paid-up policy was forfeited. The company pleaded that the claim was not made at the shipping office within thirty days. *Held*, that plaintiff should demur, or reply matter in avoidance, if he wished to test the defense. By joining issue he admitted its completeness if proved. *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566.

Under the New York practice, where a complaint is filed claiming damages for a continuing injury from a stated time, and pleas are filed setting up a defense of a former recovery, and of another action pending, which do not apply to the whole time covered by the complaint, no replication is required. *Avery v. New York C. & H. R. R. Co.*, 6 N. Y. Supp. 547, 24 N. Y. S. R. 918; affirmed in 117 N. Y. 660, mem., 22 N. E. Rep. 1134.

Plaintiff sued to recover for the negligent killing of his intestate by defendant. Defendant set up in bar a release executed by the intestate after the injury. *Held*, that, there being no counterclaim, a reply was not proper, and plaintiff could, without reply, introduce evidence to show that the release was void for incapacity, imposition, etc. *Price v. Richmond & D. R. Co.*, 38 So. Car. 199, 17 S. E. Rep. 732.

74. Its form and sufficiency.—More general averments are allowed in replications than in declarations. So where plaintiff sues for injuries, and alleges that defendant company has constructed its road so as to endanger travel on a highway, and the company files a plea setting up the approval of a committee, as provided by its charter, a replication is good which sets up that such approval was obtained by fraud, without specifying in what the fraud consisted. *Durand v. New Haven & N. Co.*, 42 Conn. 211.

A demurrer to such replication admits the charge of fraud; and where the demurrer is overruled, and it is found that the road is not constructed as required by the company's charter, it is liable in substantial damages. *Durand v. New Haven & N. Co.*, 42 Conn. 211.

Where a plea that when deceased was

employed by defendant he executed a written agreement to examine closely all cars before working on them, is replied to by a general denial coupled with an allegation that the instrument was executed to another railway company, the reply does not admit the making of the agreement. *McDermott v. Iowa Falls & S. C. R. Co.*, 85 Iowa 180, 52 N. W. Rep. 181.

A replication alleging facts which if proven would show that the verdict of condemnation under which a railroad claims to have entered land was in fact no verdict at all, but merely a void act of unauthorized individuals, is not an attempt to attack the verdict collaterally. *West v. West & E. R. Co.*, 20 Am. & Eng. R. Cas. 402, 61 Miss. 536.

Where a company as defense to an action for damage sets up a release, it is proper to set up in reply matters which, if true, will avoid it, whether legal or equitable. *Bean v. Western N. C. R. Co.*, 107 N. Car. 731, 12 S. E. Rep. 600.

Plaintiff claimed damages for wrongful ejection from defendant's cars. The company filed a plea that plaintiff offered an excursion ticket good only on another day past. Plaintiff replied that defendants often carried plaintiff and others holding such tickets on other days than the day of issue, and alleged leave and license of an agent of the company. *Held*, bad on demurrer. *McElroy v. Railroad Co.*, 7 Phila. (Pa.) 206.

In a personal injury suit defendant pleaded accord and satisfaction. Plaintiff replied that the compromise thus pleaded was obtained by fraud and undue influence, but did not tender the money that had been paid on the compromise. The plea did not aver payment of money to plaintiff. No objection was made to the replication for want of such tender. When, upon trial, it was first suggested that no tender had been made, plaintiff produced the money in court and asked leave to amend the replication and make a formal tender. The amount was credited on plaintiff's recovery. *Held*, that the judgment would not be arrested for want of a tender with the replication. *Knoxville, C. G. & L. R. Co. v. Acuff*, 92 Tenn. 26, 20 S. W. Rep. 348.

In an action against a carrier for the loss of goods a replication that the loss arose from the felonious acts of the carrier's servants is a good answer to a plea that the value exceeded £10, and was not declared.

Metcalf v. London, B. & S. C. R. Co., 4 C. B. N. S. 307, 27 L. J. C. P. 205; see also 4 C. B. N. S. 311, 27 L. J. C. P. 333.

In an action against a carrier for the loss of goods, under the declaration and plea introduced, a replication that the goods were feloniously stolen by the company's servants without alleging gross negligence on the part of the company is bad. *Butt v. Great Western R. Co.*, 11 C. B. 140, 20 L. J. C. P. 241.—DISCUSSED IN *Great Western R. Co. v. Rimell*, 27 L. J. C. P. 201.

75. Verification.—In an action for personal injuries defendant pleaded a settlement and written release, to which plaintiff replied his mental incapacity at the time of the execution of the release and the making of the settlement, and his refusal to receive the money and notice to the company that he disaffirmed the settlement before the institution of suit. *Held*, that the reply need not be verified. It admitted the execution of the release upon which defendant relied as a defense, and was not, therefore, a plea of *non est factum*. The facts pleaded were abundantly sufficient to avoid the settlement and release. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869.

A petition alleged that defendant company drove certain Texas cattle from a wrecked train along and upon the public highway. The answer stated that after the wreck "the cattle were taken from the cars by the owner, who thereupon appointed agents who drove the cattle, under his authority and direction, to the next station." *Held*, that the issue was whether the company through its agents and employes drove the cattle, or whether the owner, by his agents, took charge of the cattle and drove them; and a failure to verify the reply did not admit that the owner took charge of the cattle and drove them away. *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550, 16 Pac. Rep. 951.

In a suit by a shipper against a carrier for injury to a horse the latter pleaded specially a contract limiting the value of the horse to \$100. The shipper, by replications not sworn to, denied that he had assented to said contract, and averred that it was illegal and invalid. The replications also put at issue other allegations of the plea. They were objected to for duplicity and because not sworn to. *Held*, bad. *Louisville & N. R. Co. v. Sowell*, 49 Am. & Eng. R. Cas. 166, 90 Tenn. 17, 15 S. W. Rep. 837.

76. Departure in replication.—A new assignment by plaintiff in an action against a carrier for the loss of goods alleging that the goods were feloniously stolen by the company's servants, is bad as not applying to the portion of the declaration to which defendant's plea (that the nature and value of the goods were not declared) was addressed. *Butt v. Great Western R. Co.*, 11 C. B. 140, 20 L. J. C. P. 241.—DISCUSSED IN *Great Western R. Co. v. Rimell*, 27 L. J. C. P. 201.

Where a declaration alleges that a railway company wrongfully erected an embankment causing plaintiff's house to be flooded, and the company pleads that the embankment was authorized by an act of parliament, a replication that the flooding of the house was caused by the negligent and improper construction of the embankment is not a departure in the pleading. *Brine v. Great Western R. Co.*, 2 B. & S. 402, 8 Jur. N. S. 410, 31 L. J. Q. B. 101, 10 W. R. 341, 6 L. T. 50.

In an action against a relief association by a mother, the designated beneficiary, to recover insurance, defendant pleaded a provision of its constitution and averred that certain parties entitled to damages on account of the accident had brought suit against the railroad company, and had recovered damages and had not released the company. Plaintiff replied that the death was not caused by negligence on the part of the railroad, and that the parties, the wife and child of the deceased, were not entitled to recover damages unless there was such negligence. *Held*, that the replication was no answer to the plea, and a demurrer to it was properly sustained. *Fuller v. Baltimore & O. E. Relief Assoc.*, 67 Md. 433, 10 Atl. Rep. 237.

In an action for breach of contract the answer set up a writing signed by plaintiff which differed in its terms from the contract alleged in the complaint. Plaintiff in reply admitted signing this writing, but alleged that it was not the actual agreement between the parties; that it was drawn up by defendant, who induced plaintiff, who could not read, to sign it by false and fraudulent representations that it was such a contract as they had agreed on, and such as alleged in the complaint. *Held*, that this reply was not a departure from the complaint, but supported it by avoiding the new matter set up in the answer. *Rosby v.*

St. Paul, M. & M. R. Co., 37 Minn. 171, 33 N. W. Rep. 698.

A declaration alleged that A subscribed for certain shares in plaintiff's company, and at the same time paid the per centum thereon as required by the charter, and A by his plea denied that he had paid the per centum as alleged. *Held*, that a replication by plaintiff that after the subscription and before any calls were made on the capital stock A paid the per centum required, was a demurrer should be sustained. *Fiser v. Mississippi & T. R. Co.*, 32 Miss. 359.

In an action to recover for the death of a passenger the declaration contained the usual averment that he was being carried by defendant for reward. Defendant pleaded that he was not received by it to be conveyed for reward as alleged, but on a free pass, by which he assumed the risk of accident. Plaintiff replied that the free pass on which he was traveling was delivered to him in accordance with the terms of an agreement leasing to defendant a right of way over a company bridge, in consideration of a certain rent, and of free transportation of the directors of the company over defendant's road and without any proviso as to the risk of accident; that the deceased was a director in the company, and that it was so carrying him at the time of the accident and not under the contract in the plea mentioned. *Held*, on demurrer, that the replication was good. *Woodruff v. Great Western R. Co.*, 18 U. C. Q. B. 420.

77. Replication *de injuria*.—In an action for the loss of goods delivered to a carrier a replication *de injuria* to a plea that plaintiff was a passenger and that the goods were delivered to be conveyed as luggage, and that no part thereof was an article of clothing of plaintiff, is bad. *Elwell v. Grand Junction R. Co.*, 5 M. & W. 669, 8 D. P. C. 225.

A replication *de injuria* is only allowed where the plea is in excuse and not in denial of the cause of action. It may be used in actions *ex contractu*, wherever a special plea in excuse of the alleged breach of contract can be pleaded, as a general traverse to put in issue every material allegation in the plea. Where defendant pleads that the power to cancel a subscription for stock is derived from the original agreement between the parties, and has been exercised, plaintiff cannot reply by the general traverse

de injuria. *Ruckman v. Ridgefield Park R. Co.*, 38 N. J. L. 98, 13 Am. Ry. Rep. 31.

78. Replication to plea of limitation.—In a civil action upon a bond under seal for the direct and unconditional payment of money the recovery must be had, if at all, upon the obligation or agreement to pay contained in the instrument itself, and cannot be had on any subsequent promise or contract of less solemnity. Hence, if to such an action the defense *non accrevit infra sex annos* be interposed, it cannot be overcome by a new promise, acknowledgment or part payment, as in like action upon simple contracts. *Toothaker v. Boulder*, 13 Colo. 219, 22 Pac. Rep. 468.

In an action for the obstruction of surface water by an embankment, where the answer is a general denial and a plea of the statute of limitations, and there is no reply, it is error to admit evidence tending to show, for the purpose of avoiding the plea of the statute, that defendant had, until within a short time before the action was begun, maintained a ditch to convey the water away. The matter in avoidance of the statute should have been pleaded if relied upon. (Iowa Code, § 2665.) *Willits v. Chicago, B. & K. C. R. Co.*, 80 Iowa 531, 45 N. W. Rep. 916.

Where a complaint shows that the full statutory period of limitation has run since the cause of action accrued, as to a part of the damages claimed, but facts are set up which show an avoidance of the statute, an answer insisting on the statute of limitations as a defense does not call for a reply. *Avery v. New York C. & H. R. R. Co.*, 6 N. Y. Supp. 547, 24 N. Y. S. R. 918; affirmed in 117 N. Y. 660 mem., 22 N. E. Rep. 1134.

A declaration charged defendant company with wrongfully and unlawfully erecting a bridge across a stream. Defendant pleaded (seeking to take advantage of the 16 Vic. c. 99, § 10), as to such of the causes of action as accrued more than six months before the suit, that plaintiffs ought not to maintain their action, because such causes did not accrue within six months. Plaintiff replied that the injury sued for was a continuing damage. It was not alleged, or shown in any way, that the bridge was erected under defendant's charter, or for the purposes of its railway. *Held*, on demurrer to the replication, that the plea was bad; that if the defense had been properly pleaded, the replication would have been

good. *Wisner v. Great Western R. Co.*, 13 U. C. Q. B. 383.

70. Replication to plea of set-off.

—A replication to a plea of set-off of the amount due on certain railroad bonds sold and delivered under the contract sued on, which avers that since the commencement of the action suit was brought to foreclose the mortgage securing these and various other bonds by a majority of the bondholders, with the consent of the trustee, and a decree and sale had, and the property of plaintiff, the mortgagor, bought in by a committee of the bondholders for the benefit of all the bondholders, in proportion to the bonds held by them, is bad as showing no payment in whole or in part, or any tender, and as failing to show any proceedings to foreclose, whereby defendant is bound and concluded. *Galena & S. W. R. Co. v. Barrett*, 2 Am. & Eng. R. Cas. 520, 95 Ill. 467.

80. Rejoinder.—In an action for damages to plaintiff's land, a plea of not guilty was interposed, on which issue was joined, and there was a special plea, to which there was a special replication concluding to the country. To this there was no rejoinder, and the record did not say that issue was joined upon it; but the parties went to trial, and the subjects of the special plea and replication were contested before the jury, which rendered a verdict for plaintiff. No objection having been taken to the want of joinder of issue in the court below, it seems that the objection cannot be taken on appeal. *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

II. IN EQUITY.

81. Naming and describing the parties.—The more recent rule is that, for the purpose of federal jurisdiction, no express averment need be made of the citizenship of the members of a corporation, but that they shall be conclusively presumed to be citizens of the state where the corporation is averred to have been created; but to warrant this presumption and to give the court jurisdiction corporate existence must be distinctly averred. So a bill alleging that complainant is "a joint stock association" created under the laws of another state is not sufficient. *Dinsmore v. Philadelphia & R. R. Co.*, 11 Phila. (Pa.) 453.—QUOTING *Pennsylvania v. Quicksilver Min. Co.*, 10 Wall. (U. S.) 553. RE-

VIEWING *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

A bill alleged that a particular railroad, with all its property, effects and franchises, was sold under proceedings by the state against delinquent railroads, and subsequently resold by the purchaser to an individual named, and by him to defendant, who had continued to operate the road under the charter of the original corporation, and had charged and received from complainants excessive freight. Held, on demurrer, that defendant was not the corporation, and that the bill was properly filed against him as an individual. *Ragan v. Aiken*, 9 Am. & Eng. R. Cas. 201, 9 Lea (Tenn.) 609, 42 Am. Rep. 684.

82. Stating the cause of action, generally.—Two individuals entered into an agreement with a company by which they engaged to purchase, pay for, insure, and ship to the company a certain quantity of railroad iron as a condition precedent to the liability of said company. In a bill filed by said individuals against the company, to enforce the agreement, it was averred "that there is now due to them from the company the sum of \$7000 and upwards, accruing to them under the contract, and that they proceeded to purchase the iron, and furnished it to the company, according to the stipulations of the contract, having advanced the money therefor." Held, a sufficient averment of performance. *Mobile & C. P. R. Co. v. Talman*, 15 Ala. 472.

A bill filed against two persons charging that they were stockholders of a construction corporation, stating the number of shares held by defendants, and that, at a certain time, the corporation, which has since been dissolved, became indebted in the sum of \$160, "for wood sold and delivered by complainant to the corporation," which debt is still unpaid, is not demurrable, because it does not expressly aver that the corporation had power to make the contract. *Spence v. Shapard*, 57 Ala. 598.

Where a bill distinctly alleges that defendants subscribed stock for the express purpose of constructing a branch railroad, and are liable in equity to account to complainants therefor, such statement embraces facts which constitute the right of complainants to enforce the claim asserted by them, and it is not necessary that the bill should state all the particulars of the subscriptions, in-

cluding the amount subscribed and due by each one. *Dunham v. Eaton & H. R. Co., 1 Bond (U. S.) 492.*

Where a bill is filed to set aside a voluntary conveyance of real estate on the ground of fraud, it is sufficient if it alleges that the conveyance was without consideration; but if a consideration be admitted, an averment of an offer to return the consideration is necessary. *Des Moines & M. R. Co. v. Alley, 3 McCrary (U. S.) 589, 16 Fed. Rep. 732.*

Less than one sixth in amount of the bondholders secured by a railroad mortgage filed a bill setting up that the company was in default in the payment of interest, and refused to pay unless the bondholders would take a less rate of interest; and that the net income of the company was sufficient to pay interest, but that the company was diverting it to unsecured debts, and that there was danger of the property becoming insufficient to pay the mortgage, and prayed that the mortgage trustees be required to take possession of the property. *Held*, on demurrer, that the bill could be maintained. *First Nat. F. Ins. Co. v. Salisbury, 4 Am. & Eng. R. Cas. 480, 130 Mass. 303.*

Complainant was the holder of a first mortgage bond of defendant, and agreed to come in under a plan to reorganize under a statute; the bill alleged that defendant, as reorganized, was about to issue to the other holders of such first mortgage bonds its own bonds, but did not show that such new bonds were to be secured by a mortgage. *Held*, that such statements did not lay a ground for equitable jurisdiction. But as the bill alleged that defendant would not disclose to complainant what the plan of reorganization was—*held*, further, that the right of such discovery laid a sufficient foundation for the suit. *Midland R. Co. v. Hitchcock, 4 Am. & Eng. R. Cas. 522, 34 N. J. Eq. 278; affirming 33 N. J. Eq. 86.*

Where a corporation files a bill as assignee to enforce a demand, it is sufficient to allege generally the due incorporation of plaintiff, and that it has power to purchase and hold the demand. *Camden & A. R. & T. Co. v. Remer, 4 Barb. (N. Y.) 127.*

83. Multifariousness as to parties.

—When the object of a bill is to reach equitable assets of a railroad corporation in

satisfaction of a judgment at law, and the assets are supposed to consist of the unpaid subscriptions to the capital stock as well as the proceeds which may be produced on setting aside an alleged fraudulent deed executed by the corporation, the bill is not multifarious because individual stockholders are joined as defendants with the trustees and purchasers under the alleged fraudulent deed. *Allen v. Montgomery R. Co., 11 Ala. 437.*

A demurrer for want of equity will not lie to a bill filed against a railway company by a creditor and shareholder, stating that under an act of parliament the company was to transfer its property to another railway company and to be dissolved, the purchasing company issuing to the selling company stock to a large amount; that the proceeds of the sale of the stock were to be applied by the selling company in discharge of certain liabilities, and the surplus was to be divided between the creditors and preferred stockholders; that the selling company had transferred its property, but had not paid its creditors or shareholders; and praying that the company might be wound up and the accounts taken. But such a bill is demurrable for multifariousness and misjoinder by reason of the adverse interests of the preferred and common stockholders. *Vard v. Sittingbourne & S. R. Co., L. R. 9 Ch. 488, 43 L. J. Ch. 533, 22 W. R. 565, 30 L. T. 550; affirming 22 W. R. 450, 30 L. T. 247.*

A company paid to tenants for life the full price of land conveyed for a right of way, and on the cesser of the life estate the remaindermen filed a bill stating that the company assumed to purchase the lands for a right of way; that the company alleged that it had paid the full consideration to the tenants for life, submitting that even if it did make such payment it did so in its own wrong, and asking for payment of plaintiffs' share of the purchase money. *Held*: (1) that the word "assumed" was a sufficient allegation of the fact of sale and conveyance, but that the statement that the company "alleged" that the purchase money was all paid to the vendors was not such a positive statement of the fact of payment to the tenants for life as to make them proper parties to the bill, and a demurrer was allowed on this ground. *Ouston v. Grand Trunk R. Co., 28 Grant's Ch. (U. C.) 428; former appeal 26 Grant's Ch. 93.*

84. — as to causes of action.—A bill which joins several causes of action which are without connection will be dismissed for multifariousness. *Whetham v. Pennsylvania & N. Y. C. & R. Co.*, 8 Phila. (Pa.) 92.

An individual obtained a judgment against a town for injuries received by reason of a defective bridge which a railroad company was bound to maintain, and afterwards the town filed a bill to have the judgment canceled on the ground that the company had settled with the injured party, and alleged that an assignee held the judgment for the benefit of the company, and prayed, if the judgment was not canceled, for a judgment against the company. *Held*, not demurrable on the ground that it united two causes of action, one legal, and the other equitable. *Strawberry Hill v. Chicago, M. & St. P. R. Co.*, 41 Fed. Rep. 568.

A party pledged certain negotiable bonds to plaintiff, and afterwards became insolvent. Defendants published a notice that the bonds had been wrongfully abstracted by the pledgor from an estate of which they were executors, and defendant company refused to register the bonds, whereupon plaintiff filed a bill to prevent such interference and required the company to register them, and to have plaintiff declared the real owner. *Held*, that the pledgor was a necessary party. *Newcombe v. Chicago & N. W. R. Co.*, 28 N. Y. S. R. 716, 55 Hun 607, 8 N. Y. Supp. 366.

85. The prayer for relief.—Where the special relief asked in the prayer of the bill is abandoned, and further or different relief is sought under the general prayer, it must be consistent with the case made in the bill, and not in conflict with what is specially prayed for. *St. Johns & H. R. Co. v. Bartola*, 28 Fla. 82, 9 So. Rep. 853.

86. The plea.—The receiver and manager of two roads after a foreclosure sale filed a bill to be admitted as a partner in the purchase, setting up an agreement with the purchasers by which he was to furnish certain information, and in consideration whereof was to share in the property. Defendants filed a plea or special answer charging that such contract was void, on account of the position of plaintiff at the time as receiver and manager, and issue was joined. *Held*, that the matters of the plea were a proper subject of demurrer, and could not be availed of by plea. *Louisville, E. & St.*

L. R. Co. v. Meyer, 30 Law. Ed. (U. S.) 689.

A plea which sets forth the character and terms of a statute granting a franchise to a railroad and material to defendants' case, which act is alluded to in the bill only as "a pretended legislative grant," performs the proper office of a plea by bringing forward matter not distinctly appearing in the bill, and which displaces the equity. *Union Branch R. Co. v. East Tenn. & G. R. Co.*, 14 Ga. 327.

87. The answer, and its effect.—A bill prayed for an injunction against a railroad corporation upon the ground that a certain bridge which respondents intended to build across a river would injure the orator's bridge, which had been erected under a charter from the legislature. The answer stated that the orator and wife owned certain land adjacent to the bridge, and held it and the franchise of the bridge by the same title. It was then stated that the assessment of damages to them was for injuries sustained by them as owners of the bridge and franchise, and also as owners of the land. *Held*, that the statement of the ownership of the land was not impertinent, because it explained the reason of the assessment. *Tucker v. Cheshire R. Co.*, 21 N. H. 29.

Where a bill in equity sets forth an "express agreement officially in writing" by the agent of a railroad company to redeed to the grantor certain lands, and the answer denies that the agent "entered into an express agreement officially in writing to redeed to the plaintiff" the lands, the denial is not so distinct and positive as to afford grounds for the application of the rule in equity that a denial in the answer must be met and overcome by more than one witness. *Erie & P. R. Co.'s Appeal*, 3 Pennyp. (Pa.) 164.

If a foreign corporation appears and answers, it thereby waives the right to object that it was not sued in the state or district of its creation; and where the suit is in equity to enforce a lien on property in the district where the suit is brought, the jurisdiction is not limited to property in the district, but gives the court jurisdiction for all other proper purposes. *Blackburn v. Selma, M. & M. R. Co.*, 2 Flipp. (U. S.) 525.

88. Demurrer.—A bill by a railroad company to set aside deeds for several tracts of land and to quiet the company's title is not demurrable on the ground that the

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character and franchise to a dants' case, bill only as," performs bringing for- aring in the ity. *Union G. R. Co., 14*

s effect.— n against a ground that ts intended ure the or- acted under a The answer owned cer- and held it by the same the assess- for injuries of the bridge of the land, e ownership t, because it assessment. *H. 29.*

orth an " ex- ting" by the o redeed to the answer into an ex- triting to re- s, the denial as to afford the rule in ver must be one witness. *ennyf. (Pa.)*

ears and an- nt to object or district is in equity the district risdiction is district, but or all other *Selma, M.*

5. a railroad several tracts ny's title is d that the

company is not in actual possession of a portion of the lands. A demurrer will not lie if the bill is maintainable as to a part of the lands. *Northern Pac. R. Co. v. Roberts, 42 Fed. Rep. 734.*

Where plaintiff alleges in its bill that, so far as it may be held that its rate on lumber discriminates against any shipper, it is a just, necessary, and wholesome discrimination, an issue of fact is presented which the court cannot determine without testimony, and it is therefore error to sustain a demurrer to the whole bill, dissolve the restraining order, and dismiss the bill. The demurrer should be sustained only so far as the bill sought to stay the prosecution of the suits begun in the state courts before the granting of a restraining order. *Texas & P. R. Co. v. Kuteman, 55 Am. & Eng. R. Cas. 507, 54 Fed. Rep. 547.*

A general demurrer to the whole bill must be overruled when there is any part as to which the defendant ought to answer. *Vail v. Central R. Co., 23 N. J. Eq. 466.*

A charter provided that the directors of a company should not exceed in their contracts the amount of its capital and funds which may have been borrowed and placed at their disposal, and provided for the joint and several liability of those of the board who might be present at the making of any contract exceeding such amount for the excess, and a bill seeking to enforce the liability of the directors for a violation of this provision alleged that the directors have exceeded in their contracts the amount of their unexpended capital. *Held*, that as the charter did not contain this limitation, and the charge was not made in language equivalent to that employed thereby, a demurrer to so much of the bill containing this allegation was properly sustained. *Shea v. Knoxville & K. R. Co., 6 Baxt. (Tenn.) 277.*

III. THE ISSUE; ITS SCOPE AND HOW JOINED.

80. Necessity of joinder of issue.—Plaintiff was a consignee of perishable freights and sued the carrier for a failure to deliver them. The company offered evidence that plaintiff agreed to dismiss the suit if it would furnish him evidence to defend an action against him for the price of the freights, which was done. *Held*, that such evidence would have been admissible if the facts had been set up by a proper plea, but not otherwise. *Central R. & B. Co. v.*

Avant, 32 Am. & Eng. R. Cas. 475, 80 Ga. 195, 5 S. E. Rep. 78.

It is error to submit to the jury an issue of fact concerning which no allegation is made in the pleading. *Melvin v. St. Louis & S. F. R. Co., 89 Mo. 106, 1 S. W. Rep. 286.*—FOLLOWING *Kenney v. Hannibal & St. J. R. Co., 70 Mo. 252.*

An objection to the admission in evidence of a rule for the government of the employes of a railroad company on the ground that such rule has been abandoned avails nothing if the fact of the abandonment of such rule is not pleaded. (Black, J. dissenting.) *Alcorn v. Chicago & A. R. Co., (Mo.) 48 Am. & Eng. R. Cas. 138, 14 S. W. Rep. 943.*

Where the issue of contributory negligence is not presented in the answer, defendant can introduce no evidence in relation to it. *St. Clair v. Missouri Pac. R. Co., 29 Mo. App. 76.*

A child was injured at a crossing, owing, as alleged, to the defective construction thereof. In the complaint it was alleged that the injury occurred at a crossing "belonging to such railroad." The complaint also charged defective construction by defendant. It appeared, however, that the railroad was constructed before the crossing was opened. *Held*, that the complaint fairly averred an ownership of the crossing by the railroad company, and as the answer did not deny ownership, no issue was raised as to such ownership. *Spooner v. Delaware, L. & W. R. Co., 39 Am. & Eng. R. Cas. 599, 115 N. Y. 22, 21 N. E. Rep. 696, 23 N. Y. S. R. 554; affirming 41 Hun 643, 1 N. Y. S. R. 558.*

90. What is a sufficient joinder.—Where defendant is cited personally and as president of a railroad company, and answers for himself alone, there is no issue joined, and the case will be remanded. *Jefferson v. Kaiser, 17 La. Ann. 176.*

Where plaintiff alleges in his complaint that the injury which is the subject of the action was not caused by any fault or negligence on his part, and defendant, instead of moving to strike out the allegation, specifically denies the same, an issue is formed on the question of contributory negligence, and no further pleading is necessary thereabout. *Watkins v. Southern Pac. Co., 14 Sawy (U. S.) 30.*

91. Scope and extent of the issue.—Where a company of a certain name is

sued, and after the period of limitation has expired an amendment is allowed substituting a different name, and in the latter name the statute of limitations is pleaded, and plaintiff replies that the suit was in fact originally brought against defendant by a wrong name, the issue thus presented is one of fact only. *Pennsylvania Co. v. Sloan*, 35 *Am. & Eng. R. Cas.* 440, 125 *Ill.* 72, 17 *N. E. Rep.* 37; *affirming* 24 *Ill. App.* 48.

Plaintiff, a civil engineer, sued for services rendered, and charged in his complaint that at the request of defendant he performed certain labor and services, between certain dates, of the value of \$2550, and charged a demand and a refusal to pay. The company answered admitting the performance of certain work during the time specified, but claimed that it had been fully paid for, and prayed that the suit be dismissed. *Held*, that no issue was presented except that of payment, the affirmative of which was upon defendant. *McElroy v. Brooklyn U. G. R. Co.*, 12 *N. Y. S. R.* 586, 46 *Hun* 681; *affirmed in* 120 *N. Y.* 640, *mem.*, 24 *N. E. Rep.* 1097, 30 *N. Y. S. R.* 1018.

In a suit for personal injuries caused by a car being thrown from the track by a rail broken several days before the injury, and a part of which was missing, it is not necessary that both defects should be proved to authorize a recovery. The substance of the issue being, "Was the track of appellant's road unsound and unsafe by reason of the defective rail?" it is sufficient to prove the substance of the issue. *Texas & P. R. Co. v. Kirk*, 62 *Tex.* 227.—REVIEWING Pittsburgh, Ft. W. & C. R. Co. *v.* Ruby, 38 *Ind.* 305.

In an action for work and labor, defendant pleaded a release under seal, making profert. Plaintiff replied that the agreement was delivered to a third party as an escrow, on condition that it should be void on default by defendant in payment of £200 by a certain day; that defendant did not pay, whereby the agreement became void, and so was not plaintiff's deed. *Held*, that defendant must prove the execution of the agreement, and that it was not necessary for plaintiff to show the conditional delivery as part of his case. *Light v. Woodstock & L. E. R. & H. Co.*, 13 *U. C. Q. B.* 216.

92. Effect of express admissions.—Plaintiff sued to recover for seven calves killed while running at large where defendant should have fenced. The company an-

swered admitting the killing of six calves, but denied all other averments of the complaint, and averred that the six calves, killed were not worth above a certain amount, which it had tendered to plaintiff. *Held*, that the admission of the killing of six calves was an admission that they were running at large where the company had a right to fence, and that the general denial put in issue only the killing of the seventh calf. *Taylor v. Chicago, St. P. & K. C. R. Co.*, 76 *Iowa* 753, 40 *N. W. Rep.* 84.

In an action against a company for a tort, the complaint stated that "defendant, a corporation duly organized, were the owners of a certain railroad." In its answer defendant "admits that at the time mentioned in said complaint they were owners of a certain railroad, as stated in said complaint." *Held*, that defendant thereby admitted that it was a corporation. *Woodson v. Milwaukee & St. P. R. Co.*, 21 *Minn.* 60, 19 *Am. Ky. Rep.* 293.

Where the general issue is pleaded to an action for the death of a conductor, with notice of special facts relied upon in defense, among which facts is an admission that deceased was in the employ of defendant company, this is evidence of that fact and it need not be proved. *Somerset & C. R. Co. v. Galbraith*, 23 *Am. & Eng. R. Cas.* 375, 109 *Pa. St.* 32, 1 *Atl. Rep.* 371.

IV. EVIDENCE UNDER THE PLEADINGS. VARIANCE.

1. What Evidence is Admissible or Sufficient.

93. In general.—Plaintiff sued for the killing of live stock and filed a complaint in two counts or paragraphs, the first alleging the breach of a statutory duty on the part of defendant to fence its track, the second charging negligence. The second count was dismissed. *Held*, that it was, nevertheless, competent evidence for defendant as tending in some degree to contradict plaintiff's theory as alleged in the first count. *Baltimore, O. & C. R. Co. v. Evarts*, 112 *Ind.* 533, 14 *N. E. Rep.* 369, 11 *West. Rep.* 875.

Where the consideration for a settlement and compromise, as pleaded, has been fully restored, defendant cannot complain that there is yet an additional consideration besides that relied on in the answer which has not been restored. A party is not bound to make proof of the avoidance of a defense

any broader than the defense pleaded. *Louisville, N. A. & C. R. Co. v. Faylor*, 126 Ind. 126, 25 N. E. Rep. 869.

An allegation that a signal was given to "stop the speed" of cars is supported by evidence of a signal which directed a total cessation of motion, that being what is meant by stopping the speed. *Beems v. Chicago, R. I. & P. R. Co.*, 67 Iowa 435, 25 N. W. Rep. 693.

Testimony as to the conduct of a brakeman is competent, although only the conduct of the conductor is specifically complained of. *Louisville & N. R. Co. v. Ballard*, 28 Am. & Eng. R. Cas. 135, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. Rep. 530.

94. Admissibility of evidence under the general issue.—Where a company is sued for labor done, and answers that the work was done, but for a contractor and not for the company, the contract between the company and the contractor is admissible evidence. *Downs v. Union Pac. R. Co.*, 4 Kan. 201.

In an action for damages for the destruction of plaintiff's carriage, caused by the neglect and imprudence of the driver of an omnibus alleged to belong to defendants, the latter may, under the general issue, offer proof that the omnibus had been leased by them to a third person at the time of the accident. The liability of defendants depending, not upon the ownership of the omnibus, but on the fact that the damage was done by their servant, it is no objection to such evidence that it is inconsistent with the denial of ownership of the omnibus in their plea of general denial. *Hart v. New Orleans & C. R. Co.*, 4 La. Ann. 261.

In a suit against a common carrier for failure to deliver a car-load of wheat to the consignee, if the defendant answers with a general denial only, the issue to be tried is that of delivery or non-delivery, and no defense can be set up on a theory that the defendant had become a warehouseman of the wheat at the time of its destruction by fire. *Pindell v. St. Louis & H. R. Co.*, 34 Mo. App. 675.

In an action against a railroad for injury to land, evidence that the acts complained of were done by the permission of plaintiff is admissible under the general issue; and, *a fortiori*, that they were done at the request and by the direction of plaintiff. *Hills v. Boston & M. R. Co.*, 18 N. H. 179.

Where a railroad is sued for a statutory penalty for withholding goods and for overcharges, the company cannot prove under a general denial a mistake in the weight and classification of the goods, even where the bill of lading provides that the weight and classification are subject to correction. *Ft. Worth & D. R. Co. v. Lillard*, 4 Tex. App. (Civ. Cas.) 123, 16 S. W. Rep. 654.

95. Plaintiff's capacity to sue.—Plaintiff sued as assignee to recover damages to certain premises. The company filed a general denial. *Held*, that it was competent to prove that before the assignment to plaintiff his assignor had made a general assignment for the benefit of creditors, and that, therefore, plaintiff took no title by the assignment to him, and for this purpose the general assignment was competent evidence. *Douai v. Metropolitan El. R. Co.*, 14 N. Y. S. R. 264; *affirmed* in 124 N. Y. 623, *mem.*, 35 N. Y. S. R. 996.

A. made a written, unsealed contract in his own name with a company for the delivery of wood for fuel, the contract stipulating that it or any rights thereunder should not be transferred or assigned by A. to any other party without the consent of the company indorsed thereon. B., for whom A. was acting, sued the company in his own name. Leave was granted B. to amend by alleging that the contract was made by A. for B.'s benefit; but B. declined to amend, whereupon the judge ordered a nonsuit. *Held*, that under the pleadings B. was not entitled to prove any interest under the contract. *Harris v. Richmond & D. R. Co.*, 31 So. Car. 87, 9 S. E. Rep. 690.

96. Breach of contracts, generally.—Under a declaration for a breach by a company of a contract to use and pay monthly for water, in consideration that plaintiff would build and keep a tank, alleging that all the materials were put up only for the advantages to accrue from said contract, and are a total loss, being of no value for any other purpose, plaintiff may show a partial loss, such as deterioration in value, owing to the market here not being good. *New Orleans, J. & G. N. R. Co. v. Echols*, 54 Miss. 264.

Plaintiff sued before a justice upon a claim made out in the form of an ordinary account for certain ties and lumber, where an action of assumpsit was the proper remedy; but the evidence showed that the ties and lumber were taken without plain-

tiff's consent and converted to defendant's use, which would have supported an action of trover. *Held*, that there was a fatal variance, and the action should be dismissed. *Sandeen v. Kansas City, St. J. & C. B. R. Co.*, 79 Mo. 278.

97. Breach of contract to build or restore depot.—In an action against a railroad for breach of contract in failing to erect a depot according to contract, a general allegation of damages caused thereby, with a prayer for a stated amount, is sufficient to allow the introduction of evidence of all damages naturally and necessarily resulting from a failure to erect the depot. *Louisville, St. L. & T. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. Rep. 1030.

Plaintiff alleged that he was the owner of lands adjoining the former site of defendant's depot at a certain place; that because of the vicinity of the depot said lands were valuable for business purposes, and plaintiff had erected thereon stores and buildings, having borrowed the money for that purpose, which was secured by mortgage on the property; that because of the refusal of plaintiff and others to surrender to defendant, without compensation, certain valuable riparian rights defendant removed its depot, whereby plaintiff's property was greatly depreciated in value, and could only be restored and saved from foreclosure by a restoration of the depot; that to secure this plaintiff entered into a contract with defendant by which he surrendered to it said riparian rights, in consideration of defendant's agreement to re-establish and forever to maintain its depot at the former site, and thereupon the mortgagee agreed to delay a foreclosure sale; that defendant built its depot on the old site, but because of plaintiff's refusal to consent to the closing of a street, which would seriously injure his property, without compensation, defendant, fully understanding plaintiff's position, wilfully and maliciously violated its contract, and delayed a restoration of the depot, for the express purpose of preventing plaintiff from being enabled to ward off a foreclosure, and instigated and induced the mortgagee to foreclose, and the property was sold at a great sacrifice. Upon the trial it was conceded that a good cause of action sounding in tort was stated in the complaint. Plaintiff offered to prove the agreement to restore the depot, and its breach that the restoration would have

greatly enhanced the value of his property; also to show what defendant did in procuring and instigating the foreclosure sale; also the declarations of defendant's officers as to the reasons for refusing to restore the depot. These were rejected as immaterial. *Held*, error. *Rich v. New York C. & H. R. R. Co.*, 11 Am. & Eng. R. Cas. 594, 87 N. Y. 382.

98. Breach of contracts with passengers.—Where plaintiff sued for a failure to supply six cars, according to contract, for an excursion, evidence that defendant refused to furnish four cars, on request, shows no breach of contract where there is nothing to show that the contract was not to be performed as an entirety. *Illinois C. R. Co. v. Demars*, 44 Ill. 292.

Where a company agrees to furnish certain cars to an individual, to be used in an excursion, each passenger paying a fixed sum for a ticket, the measure of damages for a failure to furnish the cars is the amount that would have been received for such tickets if the train had gone, less the amount to be paid for the cars. *Illinois C. R. Co. v. Demars*, 44 Ill. 292.

If the complaint in an action for failure to carry a passenger to her destination contains no averment relative to the declarations made to her by the ticket agent to the effect that the passenger might board the train without a ticket and pay her fare on the car, evidence of such declarations is inadmissible. *Wells v. Alabama G. S. R. Co.*, 40 Am. & Eng. R. Cas. 645, 67 Miss. 24, 6 So. Rep. 737.

99. Injuries to realty, generally.—In an action against a company for building a railroad embankment in front of real estate, an averment that plaintiff is the owner and possessor of the lot does not compel proof of a fee simple title. Proof of peaceable possession and damage is all that is required. *McCormick H. Mach. Co. v. Adele*, 47 Ill. App. 542.

Where a plaintiff alleges damages by a railroad company to 160 acres of land, he cannot prove damages to the entire 240 acres of his farm at so much per acre. *Waltemeyer v. Wisconsin, I. & N. R. Co.*, 30 Am. & Eng. R. Cas. 384, 71 Iowa 626, 33 N. W. Rep. 140.

An abutting owner sued to restrain defendant from constructing and operating a railway in the street upon the ground that defendant had not obtained the consent of

the owners of one half of the property on the street, nor of the court, as required by the constitution and the statute relating to street railroads. *Held*, that the only cause of action alleged was a failure to obtain the consents, as required by the constitution and statute, and therefore plaintiff could not recover on the ground that defendant was a trespasser upon the street, the fee of one half of which vested in plaintiff. *Benedict v. Seventh Ward R. Co.*, 24 N. Y. S. R. 169, 5 N. Y. Supp. 406.—FOLLOWING *Vail v. Long Island R. Co.*, 106 N. Y. 283.

100. Flooding lands.—Where a declaration alleges the construction of a dam by a company on its land adjoining that of plaintiff, and thereby overflowing the land of the latter, and the proof shows the closing of a culvert under its road by defendant through which the water was accustomed to flow, this will sustain the allegation in the pleading. *Illinois & St. L. R. & C. Co. v. Fehringer*, 82 Ill. 129.

In an action for overflowing plaintiff's land, witnesses were permitted to state how much more, if any, the land of plaintiff would have been worth between certain named dates if the water had not been made to run over it. The petition alleged that plaintiff sustained damages by reason of the overflow of his lands during the time named by the witnesses, and specified certain injuries, all in the nature of damage to real estate. *Held*, that the testimony was neither incompetent nor immaterial, and that its admission was not erroneous on the ground that it adopted a wrong measure of damages. *Peden v. Chicago, R. I. & P. R. Co.*, 78 Iowa 131, 4 L. R. A. 401, 42 N. W. Rep. 625.

101. Nuisances.—In an action by a church as a corporation against a railroad for damages for maintaining a nuisance near the church building, the defendant pleaded *nul tiel* corporation. *Held*, that such evidence as showed it a corporation *de facto* would enable it to maintain the action. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. Rep. 185.—FOLLOWING *Cincinnati, L. F. & C. R. Co. v. Danville & V. R. Co.*, 75 Ill. 113; *Stockton & L. G. R. Co. v. Stockton & C. R. Co.*, 45 Cal. 680.

102. Obstructing access to plaintiff's place of business.—Where the cause of action stated in a declaration is obstructing defendant's own track with cars

so as to prevent passengers from crossing over to plaintiff's eating house, and there is no averment of the obstruction of a crossing or public way over the track, evidence of such is inadmissible. *Disbrow v. Chicago & N. W. R. Co.*, 70 Ill. 246.

103. Other actions relating to realty.—A bill was filed to foreclose a deed of trust given on a tract of land upon which a company had by grant a right of way, but neither the original bill nor any of the subsequent pleadings in any way sought to defeat the right of the company to the right of way except that it was included in and subject to the original trust deed, and no issue was raised by the pleadings under which the validity of the company's deed could be attacked. *Held*, that evidence to show the breach of a condition subsequent in the company's deed was properly excluded. *Boone v. Clark*, 129 Ill. 466, 21 N. E. Rep. 850.

In an action for breach of a covenant of warranty, plaintiff alleged that he subsequently acquired title from the paramount owner, "the Des Moines Valley Railroad Company." *Held*, that he could not be permitted to prove that he acquired title from "the Des Moines & Fort Dodge Railroad Company." *Burns v. Iowa Homestead Co.*, 48 Iowa 279.

Defendant in an action of trespass to try title pleaded not guilty, and title under a foreclosure sale under a mortgage by a railway company of which one H. was president; that H. had bought the land for the company. Plaintiff exhibited a title under H. It was shown that he had paid for the land. *Held*, that under these defenses defendant could not establish a parol executed sale by H. to it. *Rio Grande & E. P. R. Co. v. Milmo*, 79 Tex. 628, 15 S. W. Rep. 475.

104. Action against lessee or consolidated road.—Where one count alleges that the railroad where the injury occurred was operated under a lease by the company against which suit was brought, and the other count alleges that defendant was using, controlling, and running the other road, without specifying the form of contract or the agreement under which it was so controlling and running it, evidence of the fact that defendant was using and controlling the other road sustains the latter count, and is sufficient without further proof as to that point to maintain the ac-

tion. *Central R. & B. Co. v. Gamble*, 77 Ga. 584, 3 S. E. Rep. 287.

A complaint charging that a railroad corporation known as the C., C. & I. C. railway company killed an animal belonging to plaintiff, and after the killing consolidated with another company, and is now run and known as the P., C. & St. L. railway company, is not supported by the evidence failing to show the consolidation charged. *Pittsburgh, C. & St. L. R. Co. v. Kain*, 35 Ind. 291, 5 Am. Ky. Rep. 574.

105. Creditors' actions.—Where officers of a corporation are sued to recover certain bonds which it is claimed belonged to the corporation but are wrongfully held by the officers, and an answer is filed alleging the absolute ownership by defendants, it is competent for them to prove that the bonds were given them as security for a debt. *Loeb v. Chur*, 6 N. Y. Supp. 296, 53 Hun 637, 25 N. Y. S. R. 996; affirmed in 125 N. Y. 726, 26 N. E. Rep. 756.

106. Actions against carriers of merchandise.—Plaintiff declared upon a contract to carry certain freights from Eufaula, Ala., to Albany, Ga., but proved a contract to carry from Louisville, Ky., via Atlanta to Quitman, Ga. Held, that the evidence did not support the declaration, and there could be no recovery on such proof. *Central R. & B. Co. v. Tucker*, 79 Ga. 128, 4 S. E. Rep. 5.

A declaration against a common carrier alleging an alternative contract to deliver to plaintiff, or to a third party for plaintiff, is not supported by proof of a contract to deliver to and for such third party. Nor does such proof support the more loose allegation of a contract to deliver generally for plaintiff, without specifying to whom. *Atlanta & W. P. R. Co. v. Texas Grate Co.*, 40 Am. & Eng. R. Cas. 130, 81 Ga. 602, 9 S. E. Rep. 600.

Where, in an action against a common carrier for a delay in the transportation and delivery of live stock, the complaint is based upon a special contract, plaintiff cannot sustain his action by proof of a breach of an implied contract, or of the legal duty of defendant as a common carrier to transport the stock in a reasonable time. In such case there is not a variance, but a failure of proof. *Jeffersonville, M. & I. R. Co. v. Worland*, 50 Ind. 339.—FOLLOWED IN *Jeffersonville, M. & I. R. Co. v. Ensley*, 50 Ind. 378.

Evidence that a company received and was paid for transporting property, and that after its transportation it was placed in a depot, and was not delivered upon a proper demand, will support a declaration alleging that the company received the property, agreed to deliver it, but neglected and refused to do so. *Lane v. Boston & A. R. Co.*, 112 Mass. 455.

Where the petition does not allege that the carrier knew of the necessity of the performance of the contract at once, and that any failure or delay on its part to perform the contract promptly would cause a suspension in business on the part of the consignor, evidence as to these facts is inadmissible. *Pacific Exp. Co. v. Darnell*, 62 Tex. 639.

Where a carrier is sued for goods described in the declaration as "one box of oil-well tools, one drill stem, and one sand pump," it is proper to put in evidence the carrier's receipt, which describes the articles as "one box boring tools, one boring stem, and one sand pump," and to give evidence that a drill stem and boring stem were the same thing, the two names being applied indifferently to the same article. *Williams v. Baltimore & O. R. Co.*, 9 W. Va. 33.

107. Actions for negligence, generally.—(1) *Evidence admissible.*—Under a general averment that "the injury complained of was the result of negligence or want of skill of defendant's employes in the management and running of a train," evidence is admissible that defendant did not have on the train a sufficient number of brakemen and servants to control it. *South & N. Ala. R. Co. v. Thompson*, 62 Ala. 494.—APPLIED IN *Stanton v. Louisville & N. R. Co.*, 91 Ala. 382.

The fact that evidence admitted in an action based on negligence may tend to support a charge of negligence not made by the declaration will not render it improper, if it has a material bearing upon one or more of the charges of negligence made. Defendant may, by instruction, limit such evidence to the charges made in the declaration. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; affirming 41 Ill. App. 311.

In actions based on negligence the allegations of the declaration and the proof must agree. *Chicago, B. & Q. R. Co. v. Dickson*, 143 Ill. 368, 32 N. E. Rep. 380.—APPLYING *Chicago, B. & Q. R. Co. v. Bell*,

112 Ill. 360. *REVIEWING Wabash, St. L. & P. R. Co. v. Coble*, 113 Ill. 115; *Indianapolis & St. L. R. Co. v. Estes*, 96 Ill. 470. —*Springfield City R. Co. v. De Camp*, 11 Ill. App. 475. *Chicago, B. & N. R. Co. v. Hawk*, 42 Ill. App. 322; *affirmed in 147 Ill. 399*, 35 N. E. Rep. 139. *Telle v. Leavenworth R. T. R. Co.*, 50 Kan. 455, 31 Pac. Rep. 1076. *Gurley v. Missouri Pac. R. Co.*, 93 Mo. 445, 12 West. Rep. 330, 6 S. W. Rep. 218.

Upon a general issue of negligence in the manner of running a street car, whereby plaintiff, a passenger, was injured, it is competent to prove the disposition of the horses hauling the car, whether they were vicious or not, and in the habit of starting the car with a jerk. *Dougherty v. Missouri Pac. R. Co.*, 34 Am. & Eng. R. Cas. 488; *see also 37 Am. & Eng. R. Cas.* 206, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251.

Under a common law count for negligence plaintiff may prove any negligence of the company that contributed to the injury complained of, including a failure to ring the bell or sound the whistle; and so of the proof of failure to fence. And the statement is susceptible of amendment under Mo. Rev. St. § 3060, but if made and based upon absence of a lawful fence the proof must be limited to that ground. *Boone v. Wabash, St. L. & P. R. Co.* 20 Mo. App. 232. —*FOLLOWING Minter v. Hannibal & St. J. R. Co.*, 82 Mo. 128. —*EXPLAINED IN Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520.

Where the drunkenness of a flagman at a certain crossing where plaintiff was injured is a mere incident or circumstance tending to show negligence, it may be proven under a general allegation of negligence. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

(2) *Evidence inadmissible.*—Where the action is for killing live stock, and the negligence charged is in the management of the train, it is not supported by evidence that the train was too heavy. *Central M. T. R. Co. v. Rockafellow*, 17 Ill. 541.

If the negligence of a defendant in a suit for an injury is established by the evidence, that evidence must necessarily have been confined to the averments of the declaration, as negligent acts not averred in the declaration cannot be proven. *Pennsylvania Co. v. Frana*, 112 Ill. 398.

Where an employé sues for an injury

caused by a collision, evidence tending to show negligence in failing to use air brakes, and failing to have a semaphore for signaling trains, is not admissible, when no negligence from these causes is alleged. *Chicago, B. & Q. R. Co. v. Young*, 26 Ill. App. 115.

A complaint charging a company only with negligence in the movement of a particular train without warning does not involve, as a cause of action, the neglect of the company to establish general regulations for the conduct of its servants in such cases. *Connelly v. Minneapolis Eastern R. Co.*, 38 Minn. 80, 35 N. W. Rep. 582.

Under a general allegation of negligence it is error to admit evidence or give an instruction as to the general condition of the track of defendant. Had the pleading been amended in this respect, evidence of the condition of the track at another time and place than that of the accident would still be incompetent. *Miller v. St. Louis R. Co.*, 5 Mo. App. 471.

108. Proof of higher degree of negligence than that alleged.—Under a count which avers simple negligence, in an action to recover damages for personal injuries, a recovery may be had on proof of wanton or reckless negligence. *Savannah & W. R. Co. v. Meadors*, 95 Ala. 137, 10 So. Rep. 141. *Richmond & D. R. Co. v. Farmer*, 97 Ala. 141, 12 So. Rep. 86.

Where the issue is one of ordinary negligence, a charge of wilful injury makes a different cause of action, and evidence of the latter is not admissible. *Pennsylvania Co. v. Smith*, 98 Ind. 42.

109. Proof of lower degree of negligence than that charged.—A plaintiff must recover, if at all, upon the case made by his declaration. So a plaintiff cannot charge one species of negligence in his declaration, and recover upon proof of negligence of a different character. *North Chicago St. R. Co. v. Cotton*, 52 Am. & Eng. R. Cas. 238, 140 Ill. 486, 29 N. E. Rep. 899; *affirming 41 Ill. App. 311*. *Chicago, B. & Q. R. Co. v. Dickson*, 88 Ill. 431, 21 Am. Ry. Rep. 328.

110. Personal injuries, generally.—(1) *Evidence admissible.*—Plaintiff alleged that he was a minister, but also engaged in other avocations at times, and that by the injury he was prevented from the proper prosecution of his avocations. *Held*, that evidence of the amount of salary that he had received as a minister was proper for

the jury to consider in estimating his damages. *Parshall v. Minneapolis & St. L. R. Co.*, 35 *Fed. Rep.* 649.

Where the complaint alleges that plaintiff "was violently and grievously bruised, mangled, and broken, to wit: in and upon his head, arms, legs, and body, and particularly as to serious injury and wounding of his internal vital organs," evidence is admissible to show injuries to his kidneys, urinary organs, and nervous system. *Central R. Co. v. Mitchell*, 1 *Am. & Eng. R. Cas.* 145, 63 *Gal.* 173.

An averment that plaintiff had "become wholly crippled and maimed, and prevented from actively pursuing his business for life," authorizes the admission of evidence that the injury would be deleterious to the plaintiff's nervous as well as to his general system, and that it would diminish his strength and power of physical endurance. *Wabash R. Co. v. Savage*, 28 *Am. & Eng. R. Cas.* 288, 110 *Ind.* 156, 9 *N. E. Rep.* 85.

A declaration alleged that plaintiff was knocked down and thereby bruised, hurt, and wounded, and that divers bones of her body were broken, and that she was grievously wounded internally. *Held*, broad enough to include injuries to the internal reproductive organs, and sufficient to admit evidence that the injuries had produced permanent sterility or incapacity to perform the sexual duties incident to the marriage state. *Lake Shore & M. S. R. Co. v. Ward*, 135 *Ill.* 511, 26 *N. E. Rep.* 520; *affirming* 35 *Ill. App.* 423.

Evidence that the company's servants in charge of the train discovered plaintiff's peril in time to have averted the injury is admissible under an averment that defendant's agents negligently moved and managed the train by which the injury was occasioned. *Dickson v. Missouri Pac. R. Co.*, 104 *Mo.* 491, 16 *S. W. Rep.* 381.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 71 *Mo.* 514. RECONCILING *Crane v. Missouri Pac. R. Co.*, 87 *Mo.* 588; *Gurley v. Missouri Pac. R. Co.*, 93 *Mo.* 445.

An allegation that plaintiff's injuries were sustained "through the negligence and carelessness of defendant's agents and servants while running, controlling, and managing this locomotive engine and train of cars" is sufficient to admit proof of negligence in running defendant's train. *Gratiot v. Missouri Pac. R. Co.*, (Mo.) 49 *Am. & Eng. R. Cas.* 398, 16 *S. W. Rep.* 384.

Where plaintiff sues for an injury to his hand and charges that it "was serious, permanent, and painful," this is sufficient to support evidence that the injury to the hand occasioned an injury to his general health. *Hanse v. Brooklyn El. R. Co.*, 66 *Hun* 384, 50 *N. Y. S. R.* 255, 21 *N. Y. Supp.* 230.

Under a general allegation of damage plaintiff is entitled to recover not only for pain and suffering endured up to the time of the trial, but for such as probably remains to be endured. Accordingly *held*, that the testimony of a physician as to the condition of plaintiff's eye at the time of the trial, and that of plaintiff to the effect that the pain and suffering attending his injuries had continued, was proper. *Schuler v. Third Ave. R. Co.*, 48 *N. Y. S. R.* 663, 1 *Misc.* 351, 20 *N. Y. Supp.* 683; *affirming* 44 *N. Y. S. R.* 774.

An allegation that plaintiff has received personal "injuries in his spine, chest, head, and limbs" will authorize evidence that heart disease has resulted from the injury inflicted. *Gulf, C. & S. F. R. Co. v. McManneville*, 34 *Am. & Eng. R. Cas.* 428, 70 *Tex.* 73, 8 *S. W. Rep.* 66.

Under an allegation that on account of injuries sustained plaintiff was confined to his bed for about three months, and that by reason thereof he has been disabled and prevented from pursuing his occupation, evidence is admissible showing the length of time he was out of employment. *Fl. Worth & D. C. R. Co. v. Thompson*, 2 *Tex. Civ. App.* 170, 21 *S. W. Rep.* 137.

Under allegations that plaintiff was permanently disabled to follow his occupation and rendered unable to earn a livelihood, evidence of his prior occupation and wages is admissible, and, though such allegations are not broad enough, the admission of the evidence is not ground of exception under Wash. Code, § 105. *Northern Pac. R. Co. v. O'Brien*, 1 *Wash.* 599, 21 *Pac. Rep.* 32.

Under an allegation that defendant so negligently and unskillfully conducted itself in the management of its car that through the negligence of defendant and its servants in guiding the car plaintiff was injured, it is admissible to prove defects in the brake-rod of the car. *Cogswell v. West St. & N. E. Elec. R. Co.*, 52 *Am. & Eng. R. Cas.* 500, 5 *Wash.* 46, 31 *Pac. Rep.* 411.—QUOTING *Northern Pac. R. Co. v. O'Brien*, 1 *Wash.* 599, 21 *Pac. Rep.* 32.

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Where plaintiff sues for an injury charged to have resulted from defendant's negligence, and defendant answers charging contributory negligence, it is competent for plaintiff to prove negligence in other respects than that charged where it tends to disprove the charge of contributory negligence. *Curtis v. Detroit & M. R. Co.*, 27 Wis. 158, 5 Am. Ry. Rep. 368.

(2) *Evidence inadmissible.*—Where an employe sues for a personal injury, and charges that it was caused by other employes "in carelessly and negligently running and pushing a certain hand-car upon the railroad track of the defendant," evidence is inadmissible for plaintiff to prove that the injury was caused by reason of a certain defective instrument, called a "jigger." *Thomas v. Georgia R. & B. Co.*, 40 Ga. 231.—REVIEWED IN *Woodward v. Oregon R. & N. Co.*, 18 Oreg. 289.

An allegation that a company was negligent in not having a key placed in the bolt which fastened the tender to the engine, in consequence of which the bolt came out, the engine and tender separated, and the fireman was thrown between them and injured, is not supported by proof that the bolt was not long enough to go through so as to be keyed and thereby prevented from coming out, and that the train was stopped and the engineer and fireman attempted to fasten the bolt, but it was so short that this could not be done. *Port Royal & A. R. Co. v. Tompkins*, 83 Ga. 759, 10 S. E. Rep. 356.—CRITICISED IN *Central R. Co. v. Hubbard*, 86 Ga. 623.

In case to recover for a personal injury alleged to have been produced by a defective wheel, defective ties, and the unskillfulness of the company's servants, it is error to permit plaintiff to introduce evidence that the accident was caused by the high rate of speed of the train. *Toledo, W. & W. R. Co. v. Boggs*, 85 Ill. 80.—REVIEWED IN *Chicago, B. & Q. R. Co. v. Wilcox*, 12 Ill. App. 42.

In a suit for damages on account of a personal injury alleged to have been caused by defendant carelessly running its train against a horse, it is not competent for plaintiff to prove that the track was not properly fenced, or that the cars were not provided with steam brakes, or any other negligence than that averred. *Toledo, W. & W. R. Co. v. Foss*, 88 Ill. 551, 21 Am. Ry. Rep. 368.—DISTINGUISHED IN *Kansas Pac. R. Co. v.*

Richardson, 6 Am. & Eng. R. Cas. 96, 25 Kan. 391.

Where the declaration alleges that plaintiff was injured by a car being carelessly driven over him, it is not supported by evidence that the injury was caused by a car not carelessly driven while plaintiff was attempting to escape from another car which was carelessly driven. *Hanlon v. South Boston Horse R. Co.*, 2 Am. & Eng. R. Cas. 18, 129 Mass. 310.

In an action to recover for personal injuries a general allegation is not sufficient to authorize a recovery for "loss of time," and there can be no recovery without proof of the value of such time. *Slaughter v. Metropolitan St. R. Co.*, 58 Am. & Eng. R. Cas. 604, 116 Mo. 269, 23 S. W. Rep. 760.

Where the allegation is that defendant "by its servants so carelessly and improperly drove and managed its locomotive engine and train that by and through the negligence and improper conduct of defendant by its servants in that behalf said locomotive engine and train" ran over and injured plaintiff's minor son, evidence that the injury occurred in consequence of the defective construction of defendant's station platform, which was built so near the track that the coaches projected over it a foot, is inadmissible. *Murray v. Silver City, D. & P. R. Co.*, 26 Am. & Eng. R. Cas. 154, 3 N. Mex. 337, 9 Pac. Rep. 369.

Under a complaint which charges the injury complained of to have been caused by the negligence of a company in permitting a bridge on its road to remain out of repair, and failing to keep proper watch and oversight of the same, plaintiff will not be allowed to show that the bridge was constructed originally in an improper and negligent manner. *Knahtla v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 136, 27 Pac. Rep. 91.

111. Place of injury.—Where a declaration alleges that the injury complained of was done in the county of Talbot, and the proof shows that it occurred between two points both located on the line of the railroad in that county, this is sufficient proof of the venue. *Central R. & B. Co. v. Gamble*, 77 Ga. 584, 3 S. E. Rep. 287.

In an action for injuries received while crossing a railroad track the petition alleged that the place where the accident occurred was a "public crossing or footway for footmen." Held, that such allegations would not restrict plaintiff to proof that the place

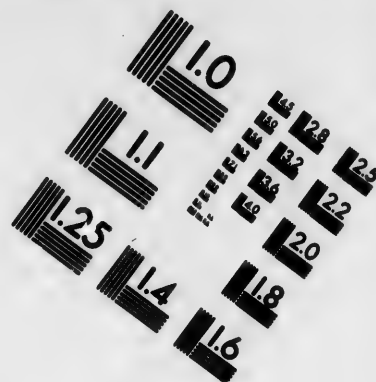
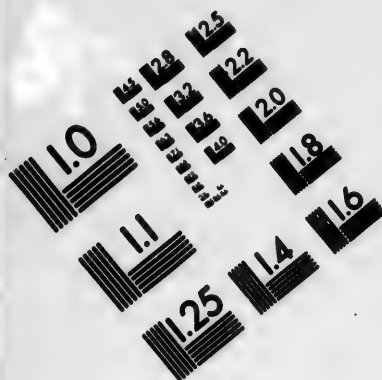
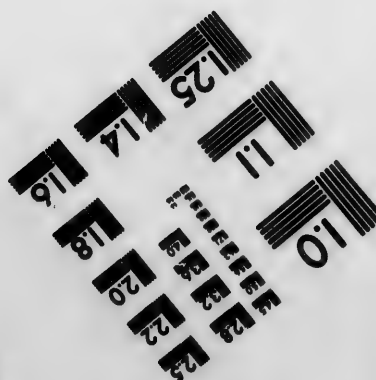
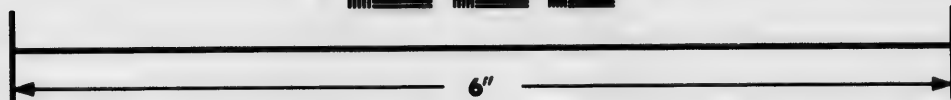
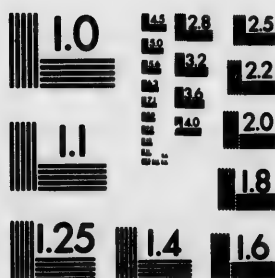


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was a public highway, and evidence that it was used by footmen was properly admitted. *Clampit v. Chicago, St. P. & K. C. R. Co.*, 49 Am. & Eng. R. Cas. 468, 84 Iowa 71, 50 N. W. Rep. 673.

No proof of negligence can be received beyond what is alleged. So where a declaration alleges that an injury was received at a public road-crossing, evidence is not admissible to show that it was at a place where the public had made a short cut across the track, but had no rights. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 42 Am. & Eng. R. Cas. 192, 7 Mich. 136, 43 N. W. Rep. 911.

112. Proof of ordinance, speed, etc.—In a suit for injuries by being struck by a passing train, where the declaration contains no averment that there was a city ordinance regulating the rate of speed of trains at the place, it is improper to admit evidence as to the rate of speed being greater than that prescribed by ordinance. *Illinois C. R. Co. v. Godfrey*, 71 Ill. 500.—DISTINGUISHED IN *Solen v. Virginia & T. R. Co.*, 13 Nev. 106.

Where the negligence charged is in the manner of running a car on a street, evidence of an ordinance fixing a lower rate of speed is not admissible unless the ordinance be specially pleaded; and an allegation that the car was run contrary to the provisions of the ordinance is not a sufficient allegation to admit such evidence. *Chicago W. D. R. Co. v. Klauber*, 9 Ill. App. 613.

When the petition charges that defendant is running trains through certain streets of a city without warrant of law or sanction of authority, defendant, under a plea of general denial, will be allowed to introduce in evidence private acts of the legislature and city ordinances purporting to authorize the acts complained of. As such acts are introduced for the purpose of rebutting the assertion of illegality, they need not be specially pleaded. *Werges v. St. Louis, C. & N. O. R. Co.*, 35 La. Ann. 641.—QUOTING *Story v. New York El. R. Co.*, 90 N. Y. 122.

The fact that the rate of speed was prohibited by an ordinance of the city is competent evidence of negligence, although the existence of the ordinance has not been pleaded. *Faber v. St. Paul, M. & M. R. Co.*, 8 Am. & Eng. R. Cas. 277, 29 Minn. 465.

In a suit for personal injuries by reason of the negligence of defendant in not signaling by bell or whistle the approach of the cars,

and by running too fast, the proof was that the negligent act was in the failure to have the place properly lighted. *Held*, that the testimony should have been confined to the allegations. *Missouri Pac. R. Co. v. Hennessey*, 42 Am. & Eng. R. Cas. 225, 75 Tex. 155, 12 S. W. Rep. 608.

113. Proof of medical expenses, nursing, etc.—Claim for "medical attendance" covers expenditures for medicine used by the physician in giving such medical attendance. *Knapp v. Sioux City & P. R. Co.*, 71 Iowa 41, 32 N. W. Rep. 18.—DISTINGUISHING *Gardner v. Burlington, C. R. & N. R. Co.*, 68 Iowa 588; *Stafford v. Oskaloosa*, 57 Iowa 748; *Reed v. Chicago, R. I. & P. R. Co.*, 57 Iowa 23.

Where a passenger sues for a personal injury and only sets out the payment of \$500 to a physician, without stating any other expenses caused by the injury, it is error to allow him to state that his whole expense was \$700. *Galveston, H. & S. A. R. Co. v. Wesch*, (Tex. Civ. App.) 21 S. W. Rep. 62.

Where the complaint contains an allegation that plaintiff has been compelled to pay a certain sum for medical treatment and nursing, evidence thereof is admissible without being pleaded as a distinct cause of action. *Northern Pac. R. Co. v. Hess*, 48 Am. & Eng. R. Cas. 91, 2 Wash. 383, 26 Pac. Rep. 866.

114. Evidence of permanency of injury.—Where the action is for personal injuries, an allegation that the injuries are permanent is not necessary to authorize the admission of evidence as to their permanency. *Rosevelt v. Manhattan R. Co.*, 27 J. & S. 197, 37 N. Y. S. R. 894, 13 N. Y. Supp. 598; *affirmed* in 133 N. Y. 537, *mem.*, 30 N. E. Rep. 1148, 44 N. Y. S. R. 929, *mem.*

Allegations of injury and damage "that by reason of the carelessness of the defendant, its agents, servants and employes, this plaintiff sustained serious damage both to her person and to her property, and was obliged to and actually did incur liability for surgical and other treatment and attendance in seeking to restore herself of her injury, to her damage five thousand dollars," are sufficient to let in expert testimony as to the probable permanency of the injury sustained. *Lynch v. Third Ave. R. Co.*, 27 J. & S. 71, 13 N. Y. Supp. 236, 36 N. Y. S. R. 431; *affirmed* in 128 N. Y. 681, *mem.*, 29 N. E. Rep. 149.

115. Accidents at crossings.—(1)

Evidence admissible.—In an action for a personal injury at a street crossing, the declaration contained five counts, the fourth of which charged that the speed of the train was in excess of that fixed by an ordinance of the city. A demurrer was sustained to each count, and under leave to amend only the third and fifth counts were amended. Afterwards defendant filed another demurrer, purporting to be to "the amended declaration, and to each and every count thereof," which was overruled, and then defendant filed the general issue, not limited to any particular counts, but going to the whole declaration, upon which issue was taken. *Held*, that the ordinance of the city was properly admitted in evidence, and that an instruction based upon the fourth count was properly given. *Chicago & I. R. Co. v. Lane*, 130 Ill. 116, 22 N. E. Rep. 513; *affirming* 30 Ill. App. 437.

In an action for personal injuries, it was averred that the injuries were caused by the neglect of the company in crossing a public street with a locomotive and train of cars at a very swift, rapid, dangerous, and reckless rate of speed, and without giving any warning by sounding a whistle or ringing a bell, and that the view was obstructed by cars and by lumber piled in close proximity to the road. *Held*, not error for the trial court to permit plaintiff to prove that the company had no flagman at the crossing as one of the circumstances existing at the time and place of the accident. *Kansas Pac. R. Co. v. Richardson*, 6 Am. & Eng. R. Cas. 96, 25 Kan. 391.

A declaration alleged that the deceased was thrown from his loaded wagon through defects in a crossing, and from the fright of his team at cross-ties and a hand-car at the side of the railroad. The evidence failed to show that the crossing was out of repair, but did show that the deceased fell from a loaded wagon some 75 to 150 yards from the crossing while his horses were yet in a gallop. *Held*, that there was no material variance between the allegation and the proof. The evidence only failed as to the allegation regarding the condition of the crossing. *Texas & P. R. Co. v. Hill*, 71 Tex. 451, 9 S. W. Rep. 351.—FOLLOWING *Missouri Pac. R. Co. v. Scott*, Tyler Term 1886.

It is competent to show that a flagman on duty was drunk without alleging the

fact, unless the drunkenness be relied upon as evidencing negligence of the employer in selecting its employés, in which case the matter should be pleaded. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

(2) *Evidence inadmissible.*—A declaration which alleges that the train was proceeding in its ordinary course when plaintiff was injured is not supported by evidence that the injury was caused by backing on a side track cars shoved by an engine to which they were not attached. *Schindler v. Milwaukee, L. S. & W. R. Co.*, 42 Am. & Eng. R. Cas. 192, 77 Mich. 136, 43 N. W. Rep. 911; *further appeal* 87 Mich. 400, 49 N. W. Rep. 670.

Where the petition charges that plaintiff, who was attempting to make a crossing, was caught between two cars standing on defendant's side track by reason of its carelessness and negligence in driving and forcing its cars together, a recovery cannot be had for negligence in leaving cars standing on the track without securing them. *Gurley v. Missouri Pac. R. Co.*, 93 Mo. 445, 12 West. Rep. 330, 6 S. W. Rep. 218.—RECORDED IN *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491.

The general reputation of a flagman at a crossing for carelessness is inadmissible in an action against a railroad company where it is alleged that the accident was caused by a single act of carelessness of the flagman. *Baltimore & O. R. Co. v. Colvin*, 32 Am. & Eng. R. Cas. 160, 118 Pa. St. 230, 10 Cent. Rep. 583, 12 Atl. Rep. 337, 20 W. N. C. 531.

116. Injuries to passengers.—(1)

Evidence admissible.—Under a complaint that the conductor wrongfully compelled plaintiff to leave the train, plaintiff may prove the conduct of the flagman in compelling him to leave the car, when the flagman himself testifies that he was authorized by the conductor to put plaintiff off, it being also matter of common knowledge that it is one of the ordinary duties of flagmen and brakemen to assist in carrying out the orders of the conductor. *Alabama G. S. R. Co. v. Tapia*, 94 Ala. 226, 10 So. Rep. 236.

Evidence of what a flagman said and did at the time and just before a person about to take passage on a train was struck by another train passing on another track at a rapid speed is pertinent, in an action to

recover for the injury, under an allegation that the company failed to keep a flagman at the spot to signal and warn of the approach of impending danger. Such allegation means more than that there was no flagman employed there. *Pennsylvania Co. v. Rudel*, 6 Am. & Eng. R. Cas. 30, 100 Ill. 603.

Where a complaint alleges that plaintiff stepped in a hole in a station platform, whereby his foot and ankle were sprained and permanently injured, causing great pain, evidence is admissible to show the full nature and consequences of the injury. *Ohio & M. R. Co. v. Hecht*, 34 Am. & Eng. R. Cas. 447, 115 Ind. 443, 15 West. R. p. 122, 17 N. E. Rep. 297.—DISTINGUISHING *Brown v. Byroads*, 47 Ind. 435; *Teagarden v. Hetfield*, 11 Ind. 522.

Where a husband sues to recover for personal injuries to his wife, who was a passenger, and avers in his complaint that she received heavy and serious blows, that her lower limbs were bruised and injured, and her nervous system permanently impaired, and that she suffered great mental and physical pain, evidence of a threatened miscarriage is admissible. *Missouri Pac. R. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. Rep. 411.

A charge that the "depot" was not sufficiently lighted at night when plaintiff got off the train to enable him to do so with safety is sufficiently broad to admit proof that a passage between cars where plaintiff had to go was not sufficiently lighted. In such case the term "depot" is held to include the platform around it and the grounds and approaches thereto. *Galveston, H. & S. A. R. Co. v. Thornsberry*, (Tex.) 17 S. W. Rep. 521.

(2) *Evidence inadmissible*.—A declaration alleged that plaintiff became and was a passenger, to be carried from A. to B., two stations on the road. There was no evidence that plaintiff became a passenger at A. for B., but the court allowed plaintiff to prove that he took passage at M. to go to O., the stations A. and B. being intermediate stations between M. and O. Defendant made objection to the evidence on the ground of a variance, which the court overruled. *Held*, that the court erred in admitting the evidence. *Wabash Western R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. Rep. 353, 34 N. E. Rep. 1111.

A sleeping passenger was awakened on

approaching his station, but, seeming intoxicated, the conductor deemed it best not to put him off, and carried him to another station. The following day he was ejected from a train on returning to his station for refusal to pay fare. In suing the company he made no claim for damages for being carried beyond his destination. *Held*, error to instruct the jury that the company was liable if it negligently carried him beyond his station and did not give him timely warning of the train's arrival. *Louisville & N. R. Co. v. Lewis*, (Ky.) 21 S. W. Rep. 341.

Where the petition alleges a specific act of negligence, there can be no recovery for any other act. Thus where the specific negligence alleged is the failure of a company to stop its train at plaintiff's station long enough for him to alight, he cannot recover upon proof that the injuries for which he sued were sustained by reason of the company's failure to keep the platform lighted. (Norton, J., dissenting.) *Price v. St. Louis, K. C. & N. R. Co.*, 3 Am. & Eng. R. Cas. 365, 72 Mo. 414.—FOLLOWING *Waldhier v. Hannibal & St. J. R. Co.*, 71 Mo. 514. REVIEWING *Mayor v. Humphries*, 1 C. & P. 251.—DISTINGUISHED IN *Werner v. Citizens' R. Co.*, 81 Mo. 368; *Otto v. St. Louis, I. M. & S. R. Co.*, 12 Mo. App. 168. FOLLOWED IN *Ellis v. Wabash, St. L. & P. R. Co.*, 17 Mo. App. 126. RECONCILED IN *Hall v. Missouri Pac. R. Co.*, 8 Am. & Eng. R. Cas. 106, 74 Mo. 298.—*Lakin v. Oregon Pac. R. Co.*, 34 Am. & Eng. R. Cas. 500, 15 Oreg. 220, 15 Pac. Rep. 641. *Texas Pac. R. Co. v. Buckelew*, 3 Tex. Civ. App. 272, 22 S. W. Rep. 994. *Gulf, C. & S. F. R. Co. v. Adams*, 3 Tex. App. (Civ. Cas.) 493.

117. Injuries to employees.—(1) *Evidence admissible*.—When the complaint alleges that plaintiff, while at work under a car, was injured by another car being negligently run down upon it by some person in defendant's service who had the control and superintendence of said moving car, a recovery may be had on evidence showing that the accident was caused by the negligence of the engineer, who, in detaching and switching off the car, propelled it with too great force. *Louisville & N. R. Co. v. Davis*, 91 Ala. 487, 8 So. Rep. 552.

Under a count which avers that the engine used in the yard at the time plaintiff was injured, while engaged in uncoupling cars, was not provided with a platform or

other device on which brakemen could stand while engaged in the service, it is competent to show that the switch engine ordinarily used in the yard was provided with such platform, but was temporarily at the shop for repairs; that a road engine, with pilot attached, and a flat car in front of it, which obviated the necessity of standing on the ground while coupling or uncoupling, was at first substituted, and that this was withdrawn a day or two before the accident. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

Under a count that the injury was caused by the negligence of the engineer in charge of the engine and cars, plaintiff may prove that the fireman was handling the engine at the time. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

Evidence that no signal was given of a delayed freight train, or that none was seen by a fireman injured by his train rushing into the rear end thereof while rounding a sharp curve, is admissible under an allegation of negligence in ordering the fireman's train to proceed without notice of any danger ahead, or any effort being made to remove the same or to give notice thereof after the fireman's train had started. *Chattanooga, R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. Rep. 853.

In an action by an employé for personal injuries, the negligence charged was the moving of a car, under which plaintiff was working, without notice or warning. The proof showed that the negligence in not giving notice was attributable to the foreman under whose control plaintiff was working, and not to those engaged in moving the car. *Held*, not a case of a failure of proof under Ohio Code, § 133, but, at most, of variance under sections 131, 132. *Lake Shore & M. S. R. Co. v. Lavalley*, 5 Am. & Eng. R. Cas. 549, 36 Ohio St. 221.

Where carelessness and negligence in causing a locomotive to run against the place at which plaintiff was at work are directly imputed to defendant, such allegation is broad enough to admit evidence of all kinds and grades of negligence on the part of defendant which resulted from causing and permitting the locomotive to run down on the place where plaintiff was at work, thereby rendering it unsafe and causing the injury. *Wild v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 159, 27 Pac. Rep. 954.

Where a locomotive engineer sues for an

injury caused by an explosion of gas from a fire box, and alleges that it resulted from defendant's failure to supply him with proper appliances, evidence is admissible that the coal furnished was inferior and clogged the spark arrester so as to cause an accumulation of gas in the fire box. Coal might be included under the term "appliances" as used in the complaint. *Davis v. New York, L. E. & W. R. Co.*, 14 N. Y. S. R. 1; affirmed in 110 N. Y. 646, 17 N. E. Rep. 733, 17 N. Y. S. R. 172, 2 Silv. App. 94.

Evidence of defects of an engine is admissible under a complaint which alleged generally that the collision between the train on which plaintiff was working and another train was caused by defendant's gross negligence, and though the allegations are not broad enough to cover it, its admission is not ground of exception under Wash. T. Code, § 105. *Northern Pac. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. Rep. 32.—QUOTED IN *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46.

The complaint shows that an engine on which plaintiff was fireman was derailed and overturned, and that large quantities of steam and water escaped therefrom and fell upon him, and he was "severely burned, maimed, and permanently injured, and has suffered and continues to suffer great pain in body and mind, and that by reason thereof he became, and for a long time remained, ill, and is still suffering from said injuries." There was no motion to make the complaint more definite and certain. *Held*, that there was no error in admitting evidence for plaintiff that the covering of his spinal cord was injured by the accident, and that urinary difficulties resulted from his injuries; nor in admitting evidence that an inguinal hernia made its appearance about nine months after the injury, and was the result thereof. *Delie v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 464, 51 Wis. 400, 8 N. W. Rep. 265.

The fact that plaintiff failed to make adequate proof of the last averment, so that the court withdrew that subject from the jury, had no bearing on the question of the admissibility of the evidence in the first instance. *Delie v. Chicago & N. W. R. Co.*, 5 Am. & Eng. R. Cas. 464, 51 Wis. 400, 8 N. W. Rep. 265.

(2) *Evidence inadmissible*.—Under a count which alleges a common law liability on the ground that plaintiff was on defendant's

railroad track by invitation, and was injured by the negligence of defendant's servants, a recovery cannot be had on proof of a statutory liability of employer to employé. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

Where a brakeman sues to recover for a personal injury and charges no negligence except in the movement of the train, it is error to admit evidence as to defects in rails and coupling-pins, or as to the extent of the injuries, except as mere incidents to the accident. *Greer v. Louisville & N. R. Co.*, (Ky.) 21 S. W. Rep. 649.

Where a conductor sues for an injury and alleges that it was due to a failure of the company to employ a suitable engineer, proof is not admissible that a fireman had charge of the locomotive in the absence of the engineer. To make such evidence admissible the complaint should allege that the company authorized or allowed the fireman so to act. *Harper v. Indianapolis & St. L. R. Co.*, 44 Mo. 488.

In an action for an injury to a servant resulting from the negligence of the master in furnishing him with defective machinery, the servant cannot recover on the ground that the master failed to keep his machinery in repair. *Current v. Missouri Pac. R. Co.*, 86 Mo. 62.—FOLLOWED IN *Warmington v. Atchison, T. & S. F. R. Co.*, 46 Mo. App. 159.

Where an employé is injured and sues the company for damage and sets out a contract by which, among other things, the company agreed to pay \$1.75 per day, but alleges no breach of this part of the contract, but charges a breach of other conditions, it is error to admit evidence tending to show a failure to pay the \$1.75 per day. *Texas Pac. R. Co. v. Grimes*, (Tex. Civ. App.) 21 S. W. Rep. 402.

2. Burden of Proof.

118. In general.—Where the action is based upon negligence, and the company interposes the double defense of "not guilty" and contributory negligence, the burden of proof is upon the plaintiff as to the charge of negligence, but on the defendant as to the charge of contributory negligence. *Louisville & N. R. Co. v. Hall*, 39 Am. & Eng. R. Cas. 298, 87 Ala. 708, 4 L. R. A. 710, 6 So. Rep. 277.

In a suit against a railway for a breach of contract to make culverts and fences along

its right of way, the declaration alleged two considerations: a waiver by plaintiff of a right of appeal from the assessment of damages for right of way, and plaintiff's agreement to convey the right of way. Plaintiff testified that he did not agree to give a deed and that nothing was said about one, and the proof failed to show that anything was said about waiving any right of appeal, and no proceedings were shown to condemn the land so as to show there was any right of appeal. *Held*, that no recovery could be had upon the contract for the want of proof of a sufficient consideration. *Indianapolis, B. & W. R. Co. v. Rhodes*, 76 Ill. 285.

Where several differer grounds of action as acts of negligence are alleged in several counts, plaintiff is entitled to recover if he proves, by a preponderance of the evidence, either ground of action. The burden is not on him to prove, by a preponderance of evidence, as a condition precedent to the right of recovery, each and all of the material acts of negligence in each and all of the counts. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; *affirming* 33 Ill. App. 129.

Where a release is pleaded in defense and not denied, but matter is pleaded by plaintiff in avoidance of the release, the burden to establish the release is removed from defendant, and the burden to establish the matter in avoidance devolves upon plaintiff; and it is error to charge the jury that "as to material affirmative allegations and defenses of the answer the burden of proof devolves upon defendant"; and the error is not cured by another instruction which correctly places the burden of proof. *Hawes v. Burlington, C. R. & N. R. Co.*, 19 Am. & Eng. R. Cas. 220, 64 Iowa 315, 20 N. W. Rep. 717.

Under a general denial of the complaint, which set forth a parol agreement and part acceptance thereunder, plaintiff must prove both contract and acceptance to make out a case. *Russell v. Wisconsin, M. & P. R. Co.*, 39 Minn. 145, 39 N. W. Rep. 302.

Plaintiff sued to enforce certain rights under a lease which he alleged was executed by the officers of defendant corporation under a resolution by the board of directors. The company answered admitting the execution of the lease, but alleged that there was not a quorum at the meeting of the directors authorizing the lease. *Held*, that the burden of proof as to the execution

of the lease was on defendant. *Oregon R. Co. v. Oregon R. & N. Co.*, 28 Fed. Rep. 505.

119. Breach of contract by carrier of goods.—In a suit against a company where its liability for the transportation of specific articles is alleged in the petition to result from its partnership with connecting lines over which the articles were to be carried, no evidence of partnership is required to be shown by plaintiff, in the absence of the statutory plea of *non est factum*, denying the partnership. *International & G. N. R. Co. v. Tisdale*, 74 Tex. 8, 11 S. W. Rep. 900.

120. — by carrier of passengers.

—Under a count that plaintiff was "put off" by the conductor, or "compelled to get off," it is not necessary to prove that she was ejected by force. A recovery may be had on evidence showing that, having been carried several hundred yards beyond the station, the conductor refused to move the train back and ordered her to get off, and that she then alighted to avoid being carried further. *Alabama G. S. R. Co. v. Sellers*, 93 Ala. 9, 9 So. Rep. 375.

Where the only count of the complaint alleges that defendant failed and refused to stop the train at plaintiff's destination, whereby she, a passenger, was unable to get off, and further alleges that she was carried past said station and put off with her baggage against her protest and objection, it is a joinder of case and trespass, and being alleged conjunctively a general denial imposes on plaintiff the burden of proving both phases of the case made by the complaint. *Louisville & N. R. Co. v. Dancy*, 97 Ala. 338, 11 So. Rep. 796.—FOLLOWING *Louisville & N. R. Co. v. Johnston*, 79 Ala. 436.

While it may be true that a plaintiff in an action against a railway company need not state the *termini* of his contract for carriage, and it may be sufficient for him to state generally that he became a passenger on defendant's road for being carried, yet if he goes into detail and states the points from and to which he took passage he must prove the express or implied contract as alleged. *Wabash Western R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. Rep. 353, 34 N. E. Rep. 1111.

121. Personal injuries, generally.

—Where the complaint avers in general terms that plaintiff was bruised and injured internally and externally, specifying several

particular injuries, defendant cannot claim a verdict because of a failure to prove one or more of the particular injuries alleged. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. Rep. 722.

If the complaint, or a count therein, alleges that plaintiff's injuries were caused by a defect in the engine, and that it was so out of order that it could not be stopped promptly, this is a matter of description and must be proved as alleged. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. Rep. 145.

An act giving a remedy for an injury to a person by a railroad will not be so strictly construed as to compel plaintiff to prove the exact date of the injury set forth in his complaint, especially when the act itself does not contemplate such exactitude. *Augusta & S. R. Co. v. McElmurry*, 24 Ga. 75.

Where the action is to recover damages for injuries to the person, plaintiff is not bound to prove every specific injury alleged in the complaint. *Hammond v. North Eastern R. Co.*, 6 So. Car. 130.

122. Injuries at crossings.—Where the gist of the complaint is that defendant without proper care propelled unguarded cars along its track which forced other detached cars onto a street crossing, thereby causing the injury sued for, an allegation that it was done in making a flying switch is not essential, and it is immaterial that the evidence does not show that the injury was caused while making a flying switch. *International & G. N. R. Co. v. Dyer*, 76 Tex. 156, 13 S. W. Rep. 377.

123. Injury to employe.—A brakeman sued to recover for a personal injury, and charged generally that the injury resulted from the negligence of the conductor in signaling the engineer to back, and from negligence in backing the train, and from defects in car couplings. *Held*, that it was not necessary in order to recover to show negligence in all of the matters charged; that it was competent to show that the injury resulted from the negligence of the engineer or other employes in backing the train, or that the injury resulted from defective couplings, and if the proof showed that the injury resulted from either or both of these causes he was entitled to recover. *Louisville & N. R. Co. v. Foley*, (Ky.) 21 S. W. Rep. 866.

124. Injury to adjacent property.

—Where plaintiff sues for maintaining a track so near his dwelling house as to cause

a nuisance, but only counts upon his possession of the premises, he cannot recover where the proof totally fails to show that he ever had possession, but tends strongly to show a mere reversionary interest. In order to recover plaintiff must prove (1) his possession of the house and land; (2) the injurious act alleged to have been done by defendant; and (3) the damages resulting therefrom. *Chicago & E. I. R. Co. v. Loeb*, 8 Ill. App. 627.

3. Variance.

125. In general.—The fact that defendant company is named a "railroad" company in the complaint, and a "railway" company in the summons and judgment, is not a material variance. *St. Louis, I. M. & S. R. Co. v. State*, 55 Ark. 200, 17 S. W. Rep. 805.

If plaintiff, though needlessly, describe the tort and the means adopted in effecting it with minuteness and particularity, and the proof substantially varies from the statement, there will be a fatal variance. *Lake Shore & M. S. R. Co. v. Beam*, 11 Ill. App. 215. *Chicago, B. & Q. R. Co. v. Morkenstein*, 24 Ill. App. 128.

A general allegation that the master by his servant made the assault is overborne by a statement of the actual facts which shows a mere volunteer assault by the servant, and one outside the scope of his employment. *Hudson v. Missouri, K. & T. R. Co.*, 16 Kan. 470.

Where a defendant is sued as the sole owner of a railroad, and the proof is that he is jointly concerned with others as a stockholder, the allegation of ownership is material, and unless the bill is amended no decree can be entered against defendant. *Beard v. Bowler*, 2 Bond (U. S.) 13.

Where the evidence admitted without objection shows a case different from that alleged in the complaint, and the questions arising upon that state of the case are fully litigated on the trial, the pleadings may be amended at any time or the variance disregarded. *Stetler v. Chicago & N. W. R. Co.*, 49 Wis. 609, 6 N. W. Rep. 303, 21 Am. Ry. Rep. 89.

126. Plaintiff's capacity to sue.—A petition against "The St. Louis, Arkansas & Texas Railway Company in Texas" alleged the transfer to plaintiff of certain claims for damages against it. The proof offered was of certain written transfers of

claims against "The St. Louis, Arkansas & Texas Railway Company." Held, that the variance could not have misled, and also that, as the transfers were not declared on in the petition, the variance could be supplied by parol evidence. *St. Louis, A. & T. R. Co. v. Turner*, 1 Tex. Civ. App. 625, 20 S. W. Rep. 1008.

127. Actions against carriers of goods.—Where a declaration is founded upon the common law liability of a carrier, and there is proof of a special contract whereby the carrier is not answerable for certain risks, there is a variance. *Austin v. Manchester, S. & L. R. Co.*, 16 Q. B. 600, 15 Jur. 670, 20 L. J. Q. B. 440.

In an action for not complying with a contract to carry and deliver a draft, the complaint alleged that it was signed "John Q. Jackson"; the proof showed that it was signed "John Q. Jackson, Agent." Held, that the variance was immaterial. *Zeigler v. Wells*, 28 Cal. 263.

The receipt given for goods is the evidence of the contract for their transportation, and where plaintiff has declared upon a failure to transport goods to a point other than that thus contracted for plaintiff will be nonsuited. *Rome R. Co. v. Sullivan*, 25 Ga. 228.

Where an action is brought against a common carrier to recover damages for an alleged delay in the transportation and delivery of live stock, and the complaint counts upon a breach of the common law duty of such carrier, if the evidence shows a special contract which was not declared upon, the variance is fatal, and plaintiff cannot recover. *Lake Shore & M. S. R. Co. v. Bennett*, 6 Am. & Eng. R. Cas. 391, 89 Ind. 457. *Hall v. Pennsylvania Co.*, 16 Am. & Eng. R. Cas. 165, 90 Ind. 459.—QUOTED IN *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 326.—*Bartlett v. Pittsburgh, C. & St. L. R. Co.*, 18 Am. & Eng. R. Cas. 549, 94 Ind. 281. *Baltimore & O. R. Co. v. Rathbone*, 1 W. Va. 87.

Where the allegation is that plaintiffs delivered to defendant a large quantity of wool, to wit, 7837 pounds, which it promised to transport, and the proof is of a smaller quantity, there is no variance. *Deming v. Grand Trunk R. Co.*, 48 N. H. 455.

In an action against a carrier for failure to comply with a contract of shipment by unreasonable delay, proof of unreasonable delay after Jan. 6 is not a fatal variance

from allegations alleging a contract on Dec. 11 to commence the transportation at once, and failure to do so for four weeks there after. *Lawrence v. Milwaukee, L. S. & W. R. Co.*, 84 Wis. 427, 54 N. W. Rep. 797.

Where the declaration alleges a contract to transport goods within a reasonable time subject to certain limitations of liability, and the proof shows an additional condition that all liability on defendant's part should cease on delivery of the goods to the succeeding carrier, the variance is fatal. *Fraser v. Grand Trunk R. Co.*, 26 U. C. Q. B. 488.

128. Actions against carriers of live stock.—A complaint alleged that defendant undertook as a common carrier for a valuable consideration to transport a mare and colt for plaintiff over its road, and that the animals were injured through defendant's negligence in the transportation. Defendant's contract was expressed in a bill of lading which exempted it from liability for damage from certain specified causes, none of which covered the negligence charged. *Held*, that there was no variance. *Conpland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. Rep. 870.

Where several parties join in a suit against a railroad company for failing to furnish cars, and transport live stock according to contract, and a complaint avers a joint contract between all of the plaintiffs and the company, it is a fatal variance to introduce two contracts between different plaintiffs agreeing to carry the stock to a different point from that named in the complaint. *Texas & P. R. Co. v. Hamm*, 2 Tex. App. (Civ. Cas.) 436.

Where a party declares upon a special contract, and the contract proved is essentially variant from the one declared on, he cannot recover, as the allegations and proofs must correspond. So where the action is against a carrier, and the declaration alleges a special contract to carry safely, but the evidence shows a contract which limits the carrier's liability to injuries resulting from gross negligence, there can be no recovery. *Baltimore & O. R. Co. v. Skeels*, 3 W. Va. 556.

129. Action against consolidated company.—In a suit against a consolidated company where the tort sued for was committed by one of the old corporations, the fact should be so averred to avoid a variance in the proof, but on appeal such a

variance will not be available. *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465.

130. Suits against receivers.—Suit was brought against a receiver on a shipping contract, and subsequently the company was made co-defendant. It was alleged that the contract sued on was made by the receiver, but the one offered in evidence was signed by the agent of the receiver, but purported to be signed as the agent of the company. There was no question but that the road was in the hands of the receiver when the contract was made. *Held*, not such a variance as to have taken the company by surprise. *Texas & P. R. Co. v. Wilson*, (Tex. Civ. App.) 21 S. W. Rep. 373.

131. Actions relative to realty.—Under an allegation stating the consideration of the promise sued upon to be an agreement of plaintiff's to convey a right of way for defendant's road, proof of a conveyance of the fee of the land as performance of this agreement is not objectionable as a variance; proof of performance of more than the consideration, so long as it includes the agreed consideration, is not open to complaint on the part of defendant. *Detroit, H. & I. R. Co. v. Forbes*, 30 Mich. 165.

Where the action is trespass to try title, and plaintiff avers as part of his chain of title a certain deed made at a certain date which was lost, a variance of some three years as to the date fixed in parol evidence offered to establish the deed does not render it inadmissible, where it is immaterial which was the correct date. *Houston, E. & W. T. R. Co. v. Blagge*, 73 Tex. 24, 12 S. W. Rep. 616.

132. Injury to realty, generally.—Plaintiff sued to recover for damages caused by an embankment throwing water on his lands, and charged that defendant company had constructed the embankment. The evidence showed that it had been constructed by a former company, and that defendant was only liable, if at all, for continuing it. *Held*, that the variance was immaterial and properly disregarded. *Conhocton Stone Road Co. v. Buffalo, N. Y. & E. R. Co.*, 3 Hun (N. Y.) 523, 5 T. & C. 651.

133. Obstruction of ways and watercourses.—Where a company is sued for obstructing a watercourse, a failure to show the existence of such watercourse by the evidence is such a variance as will justify a reversal. *Chicago & A. R. Co. v. Henneberry*, 28 Ill. App. 110.

Where in a suit for obstructing a private way there is a variance between the allegations in the declaration descriptive of the way alleged to have been obstructed, and the evidence of the plaintiff as to the way actually used by him, a verdict should be directed for defendant. *Bolton v. Manistee & G. R. R. Co.*, 95 *Mich.* 202, 54 *N. W. Rep.* 875.

In an action to recover damages for the obstruction of a private way, the complaint alleged that the way was so entirely obstructed that plaintiff was utterly unable to pass. The proof showed that the way was only partially obstructed, leaving ample room for egress. *Held*, that the variance was fatal, and that a motion for a nonsuit should have been granted. *Ross v. Georgia, C. & N. R. Co.*, 46 *Am. & Eng. R. Cas.* 34, 33 *So. Car.* 477, 12 *S. E. Rep.* 101.

134. Destruction of property.—A declaration alleged that plaintiffs, father and son, were possessed as partners of the property which was destroyed by defendant. The proof showed that the property belonged to the son and his mother as partners. The court gave leave to substitute the mother as co-plaintiff, when defendant asked for a continuance, and thereupon the suit was discontinued as to the father, and a trial at the suit of the son alone. *Held*, error, as denying defendant the right of pleading the non-joinder in abatement, and that there was a fatal variance between the allegation and proofs. *Chicago, R. I. & P. R. Co. v. Todd*, 91 *Ill.* 70. *Gulf, C. & S. F. R. Co. v. Witt*, 2 *Tex. App. (Civ. Cas.)* 677.

Where plaintiff sues to recover for injuries caused by an explosion, and alleges that it was caused by certain oils stored in a warehouse east of plaintiff's building, and the evidence shows that it was south of the building, there is a fatal variance. *Wright v. Chicago & N. W. R. Co.*, 27 *Ill. App.* 200.

Where plaintiff charges that his property was destroyed by sparks from a certain "steam shovel plow" or "steam engine" operated by defendants, and the proof shows that the fire was caused by sparks from a steam engine used by defendants in working a shovel plow, there is no substantial variance. It is enough if the substance of the issue is proved, and variance in form merely, or in matter immaterial, will not be regarded. *Ryan v. Gross*, 68

Md. 377, 11 *Cent. Rep.* 502, 12 *Atl. Rep.* 115, 16 *Atl. Rep.* 302.

135. Actions for negligence, generally.—Where a complaint alleges that plaintiff was injured by the conductor refusing to stop his train and put plaintiff off at the proper station, and that he willfully refused to stop and carried her several hundred yards beyond the station, without her consent and against her protest, there is a fatal variance where the evidence shows that the conductor merely neglected to stop, and that plaintiff not only submitted but consented to be put off at the point beyond the station. *Louisville & N. R. Co. v. Johnston*, 79 *Ala.* 436.—ADHERED TO IN *Birmingham Mineral R. Co. v. Jacobs*, 92 *Ala.* 187; *Highland Ave. & B. R. Co. v. Winn*, 93 *Ala.* 306.

Plaintiff may not state one act of negligence in his declaration and recover on proof of another act. *Chicago, B. & Q. R. Co. v. Bell*, 112 *Ill.* 360.—APPLIED IN *Chicago, B. & Q. R. Co. v. Dickson*, 143 *Ill.* 368.

Where the declaration alleges that certain wrongs, causing injury to plaintiff, were willfully and negligently done, and plaintiff's evidence shows that they were negligently done merely, a motion to exclude the evidence for variance is rightly overruled. *Alabama & V. R. Co. v. Hanes*, 69 *Miss.* 160, 13 *So. Rep.* 246.

Where the negligence proved is sufficient to support an action, and is of the same character as that alleged, although not proved to the extent alleged, there is no variance. *Werner v. Citizens' R. Co.*, 81 *Mo.* 368; *affirming* 11 *Mo. App.* 601.—DISTINGUISHING *Waldhier v. Hannibal & St. J. R. Co.*, 71 *Mo.* 514; *Price v. St. Louis, K. C. & N. R. Co.*, 72 *Mo.* 414; *Buffington v. Atlantic & P. R. Co.*, 64 *Mo.* 246.

136. Killing stock.—Where a complaint avers that plaintiff's cattle were killed on the 17th day of a month, it is immaterial that the evidence shows that they were killed on the 15th day of the month. In such case plaintiff is not confined to the date laid in his declaration, but may prove any date before the commencement of the suit within the statute of limitations. *Toledo, P. & W. R. Co. v. McClannan*, 41 *Ill.* 238. *Texas & P. R. Co. v. Virginia R. L. & C. Co.*, (*Tex.*) 35 *Am. & Eng. R. Cas.* 201, 7 *S. W. Rep.* 341.

Complaint against a railroad company to

recover the value of a mare of the plaintiff alleged to have been killed by the defendant by running its locomotive and cars upon the mare. The evidence disclosed that another railroad company, exclusively operating the road as lessee of the defendant, with its own locomotive and cars, committed the injury. *Held*, that the variance was fatal. *Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593.

A complaint against a railroad company alleged that the two colts killed were each of the value of \$100. The evidence showed that one was worth \$150 and the other \$50. *Held*, that the variance was not material. *Louisville, N. A. & C. R. Co. v. Overman*, 88 Ind. 115.

Proof that, by reason of neglect to fence a railroad, the plaintiff's horse went upon the track, fell into a railroad bridge, and in some way was killed—*held*, not a case of material variance or of defect of proof, although the complaint alleged that the horse was killed in being taken out of the bridge. *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480, 44 N. W. Rep. 530.

Plaintiff alleged that his horses escaped from his field through the inclosed lands of divers other persons before reaching defendant's road, where they were killed. The evidence showed that there was but one intermediate close. *Held*, that there was no essential variance. *Underhill v. New York & H. R. Co.*, 21 Barb. (N. Y.) 489.

137. Personal injuries, generally.

—When the injury is alleged to have occurred on the twenty-first day of a month, and the evidence shows that it occurred on the first day, the variance is fatal and the evidence should be excluded. *East Tenn., V. & G. R. Co. v. Carliss*, 77 Ala. 443.

If two counts in a complaint aver that the injuries were caused by the concurring acts of the engineer of a train in regulating its speed, and the act of a yard master in placing a car dangerously near a switch, and there is no evidence of any negligence on the part of the engineer, the general affirmative charge should be given as to those counts, if requested by defendant. *Kansas City, M. & B. R. Co. v. Burton*, 97 Ala. 240, 12 So. Rep. 88.—*DISTINGUISHING Georgia Pac. R. Co. v. Davis*, 92 Ala. 300.

Where several acts and omissions of duty are charged as negligence and the cause of the injury, a failure to prove each and all of the alleged acts and omissions does not

constitute a variance. *Chicago, B. & Q. R. Co. v. Warner*, 18 Am. & Eng. R. Cas. 100, 108 Ill. 538.

Plaintiff sued for an injury and alleged that it was caused by defendant's negligence in moving, propelling, and operating a train. The evidence showed that the injury resulted from the wrongful act of the conductor in shutting a car door on his hand and in pushing him off the car. *Held*, that there was a fatal variance. *Chicago, B. & Q. R. Co. v. Wilcox*, 12 Ill. App. 42.—*QUOTING Bloomington v. Goodrich*, 88 Ill. 558. *REVIEWING Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80.

Where a complaint alleges that plaintiff was injured by reason of a defect in defendant's cars, there can be no recovery where the evidence shows that a defect in the track was the main cause of the injury. *Buffington v. Atlantic & P. R. Co.*, 64 Mo. 246.—*DISTINGUISHED IN Werner v. Citizens' R. Co.*, 81 Mo. 368. *FOLLOWED IN Edens v. Hannibal & St. J. R. Co.*, 5 Am. & Eng. R. Cas. 459, 72 Mo. 212; *Wills v. Cape Girardeau S. W. R. Co.*, 44 Mo. App. 51; *Waldhier v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 146, 71 Mo. 514.

The evidence showed that the injury was caused by a broken rail, while the petition charged negligence in "using defective machinery" and in "running its cars." *Held*, that there was a fatal variance. (Morton and Napton, [J.], dissenting.) *Waldhier v. Hannibal & St. J. R. Co.*, 2 Am. & Eng. R. Cas. 146, 71 Mo. 514.—*FOLLOWING Buffington v. Atlantic & P. R. Co.*, 64 Mo. 246.—*DISTINGUISHED IN Werner v. Citizens' R. Co.*, 81 Mo. 368.

138. Place of injury.—Where the substance of an action is whether plaintiff was injured by defendant, as alleged, by being knocked down by defendant's car, and not where plaintiff was, to a mathematical precision, a recovery should not be denied because the place of the injury as averred and the place as proved do not precisely agree. *Johnson v. Canal & C. R. Co.*, 27 La. Ann. 53.

A railroad company occupied a part of a highway and built a new road, upon which the travel was turned, but there was nothing to show that the company had proceeded according to law in changing the road, or that the proper authorities had abandoned the old road. Plaintiff sued for an injury by reason of the insufficiency of the new

road, and his declaration described the highway by its *termini* beyond the points of connection of the old and new roads, so that the description would apply to either. His evidence showed that the injury was sustained on the old road. *Held*, that there was no variance between the allegations and the proofs. *Barber v. Essex*, 27 Vt. 62.

139. Accidents at crossings.—Plaintiff alleged that the injury sued for occurred where defendant's track crossed a certain street at its intersection with a sea wall. The evidence showed that it occurred where defendant's track crossed the sea wall, but a little beyond the end of the street that was used as a public thoroughfare, but at a crossing that was used as a public way for numerous teams. *Held*, that there was no variance between the allegations and the proofs. *Carraher v. San Francisco Bridge Co.*, 81 Cal. 98, 22 Pac. Rep. 480.

A declaration averred that plaintiff, at the time of the injury, was at a point where a certain street crossed the main track of defendant's road, while the evidence showed that plaintiff was injured while standing at a point twenty-five or thirty feet away from such street. *Held*, that the variance was material. *Lake Shore & M. S. R. Co. v. Ward*, 135 Ill. 511, 26 N. E. Rep. 520; *affirming* 35 Ill. App. 423.

In an action for injuries caused by being thrown from a carriage by a locomotive at a railroad crossing, a variance will, after verdict, be overlooked as immaterial, when there is no dispute or misunderstanding as to the precise spot where the accident occurred, and when the case declared upon and that proved do not require or admit different kinds or degrees of proof, or the application of different rules of law. *Webb v. Portland & K. R. Co.*, 57 Me. 117.—**DISTINGUISHING** *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.

An averment in the declaration that plaintiff was struck by defendant's locomotive while traveling in the highway is not sustained by proof that by means of defendant's negligence plaintiff's horse was frightened and ran out of the highway five or six rods before reaching the railroad, upon land owned by defendant, and plaintiff was there struck while attempting to cross the railroad; and the declaration cannot be amended after verdict so as to cure the variance. *Shaw v. Boston & W. R. Corp.*, 8 Gray (Mass.) 45.—**DISTINGUISHED IN** *Webb*

v. Portland & K. R. Co., 57 Me. 117. **REVIEWED IN** *Shepard v. New Haven & N. Co.*, 45 Conn. 54.

A declaration laid the injury as done at a certain street crossing, and averred defendant's duties accordingly, but the proof showed that the collision occurred at another crossing, several rods distant. *Held*, that a verdict for plaintiff could not be maintained. *Klanowski v. Grand Trunk R. Co.*, 64 Mich. 279, 31 N. W. Rep. 275.

140. Injuries to passengers.—(1) *Fatal variances.*—An averment in a declaration that plaintiff "became and was a passenger at A," to be carried to B, for reward, is in effect a statement that he took the train at A. for B, and paid, or was ready to pay, his fare from the one point to the other, and will not be sustained by proof of the purchase of a ticket from C., a point on the road before reaching A., to D., a point several stations beyond B. *Wabash Western R. Co. v. Friedman*, 146 Ill. 583, 30 N. E. Rep. 353, 34 N. E. Rep. 1111.

A recovery cannot be had upon a complaint that the plaintiff was thrown from a street-car, when the evidence shows that she must have stepped or jumped off voluntarily. *Dickson v. Broadway & S. A. R. Co.*, 41 How. Pr. (N. Y.) 151, 1 J. & S. 330, *appeal dismissed in* 47 N. Y. 507.

(2) *Immaterial variances.*—An objection that there is a variance between a declaration and the proofs, in that the declaration avers that plaintiff stood on the lower step of a car and was in the act of stepping therefrom when the car started, while the proof is that plaintiff stood near the door of the car, is without merit, it being unnecessary to aver the exact place, the gist of the action being that the train started while plaintiff was proceeding to alight. *McCaslin v. Lake Shore & M. S. R. Co.*, 52 Am. & Eng. R. Cas. 290, 93 Mich. 553, 53 N. W. Rep. 724.

Where the substance of a complaint is that a train did not stop a sufficient time to allow plaintiff to get off on the passenger platform, it is not a fatal variance where the evidence shows that the train stopped opposite the platform, not the usual stopping place, but which plaintiff had reason to believe was the usual place, and again started before he could get off. (Henry, C.J., and Sherwood, J., dissenting.) *Lestie v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 229, 88 Mo. 50.

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Where the actual negligence charged against a carrier is permitting a car to be put in motion while plaintiff was in the act of leaving it, without giving him a reasonable time to alight safely therefrom, whereby he was thrown from the car, and the proof is that it slackened up so as to induce plaintiff to get into a position to alight, and then started with such violence as to throw him off—*held*, no variance. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270, 13 S. W. Rep. 889, 14 S. W. Rep. 760.

Where a petition charges negligence in prematurely starting a street-car while plaintiff was alighting, and the evidence supports the charge, the fact that a defective brake contributed to the injury will not defeat a recovery, and constitutes no variance. *Buck v. People's St. R., E. L. & P. Co.*, 52 Am. & Eng. R. Cas. 512, 108 Mo. 179, 18 S. W. Rep. 1090.

141. Expulsion of passengers.—A declaration as for injury to plaintiff in being wrongfully put off the train at a place remote from the railway station will not support a recovery where the proof shows that the injuries suffered, which were very great, were mainly due to the passenger's being carried past, but finally landed near the station so late that the carriage which had called for him had gone. the driver supposing that he had not come, and when all places of shelter were closed, and all conveyances gone, it being after midnight, so that he was obliged, while suffering from fever, to walk home three quarters of a mile in a freezing rain. *Harding v. Chicago & G. T. R. Co.*, 21 Am. & Eng. R. Cas. 410, 56 Mich. 628, 23 N. W. Rep. 445.

Where the cause of action stated in the complaint is that the conductor of a freight train wrongfully expelled plaintiff therefrom, and the evidence shows that plaintiff had no right to travel upon the train without a permit from the superintendent, and that the ticket agent who sold plaintiff his ticket promised to obtain such permit, but failed to do so, the variance is fatal to plaintiff's right to recover. *Thomas v. Chicago & G. T. R. Co.*, 37 Am. & Eng. R. Cas. 108, 72 Mich. 355, 40 N. W. Rep. 463.

142. Injuries to employees.—(1) *Fatal variances.*—Where the complaint alleges that plaintiff was injured while in the discharge of his duties as a brakeman by stepping into a hole on the railroad track, which caused him to stumble and fall in

front of a moving car, and the evidence shows that the accident was caused by his stepping into a depression between the ends of two cross-ties, outside of the rails, there is, it seems, a fatal variance. *Pryor v. Louisville & N. R. Co.*, 90 Ala. 32, 8 So. Rep. 55.

In an action for being thrown from a hand-car, the declaration alleged that a pin or bolt became detached from the handle and then became entangled in plaintiff's clothing, and that it became detached because it and other parts and attachments of the handle were insufficient and unfit for the use to which they had been applied. The evidence was that while plaintiff was turning the crank a bolt at the end of the crank took hold of his coat and threw him over and the car ran over him. *Held*, that there was a variance between the allegations and the proof. *Carey v. Boston & M. R. Co.*, 158 Mass. 228, 33 N. E. Rep. 512.

A declaration for injury to a brakeman while coupling cars set forth that it was occasioned by a deep hole between the rails. The evidence was that it was between the rails of a side track. *Held*, that the declaration would naturally be construed to refer to the main track, and that the variance was material, especially when taken in connection with other variances as to the nature of the hole and the extent of the injury. *Batterson v. Chicago & G. T. R. Co.*, 8 Am. & Eng. R. Cas. 123, 49 Mich. 184, 13 N. W. Rep. 508.

There is a fatal variance between a declaration framed upon the theory that a freight train, which plaintiff's decedent, a switchman, mounted for the purpose of uncoupling a car, was moving backward, uncontrolled by either brakeman or engineer, and without orders, at the time of the accident, and proof that the train was moving forward under the order of the conductor. *Pennington v. Detroit, G. H. & M. R. Co.*, 90 Mich. 505, 51 N. W. Rep. 634.

Plaintiff sued for an injury received while engaged in unloading iron pipes from cars. He charged that defendant's foreman was incompetent, reckless, careless, and brutal, and that by reason thereof plaintiff was compelled to take a position of unnecessary danger in doing the work, and that his injury was the direct result of the foreman's cursing, threatening, and driving the men under him. The evidence showed that the foreman was a profane man, but failed to show any threat to punish or discharge the men, or that the

place at which plaintiff was ordered to work was an improper one, or more dangerous than any other place necessary to do the work; and tended to show that the injury was the result of a defective iron bar used in raising the pipes. *Held*, that there was a fatal variance between the allegations and the proofs. *Ischer v. St. Louis Bridge Co.*, 95 Mo. 261, 14 West. Rep. 726, 8 S. W. Rep. 367.—APPLIED IN *Ballard v. Chicago, R. I. & P. R. Co.*, 51 Mo. App. 453.

Where the gist of the complaint is that the master has injured the servant, and the proof shows that plaintiff's injury was caused by the negligence of a fellow-servant, defendant may move for nonsuit without having pleaded any other defense than the general denial. *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. Rep. 830.

(2) *Immaterial variances*.—A brakeman sued for a personal injury, and alleged that he was an employé of one railroad, and as such was riding on a train which was passing over the track of defendant company when he was injured. The evidence showed that the train had a right to pass over defendant's road under some contract between the two companies, and that plaintiff and the other employés were in fact the employés of defendant. *Held*, that he was not supposed to know the exact relations existing between the two companies, or the legal effect of such contract, and the variance was not so material as to exclude plaintiff's evidence. *Zeigler v. Danbury & N. R. Co.*, 23 Am. & Eng. R. Cas. 400, 52 Conn. 543.

A declaration alleged that plaintiff's hand was crushed by the falling of an eccentric upon it. The proof was that the eccentric in falling knocked his hand upward and crushed it against other machinery. *Held*, not so far inconsistent with the declaration as to constitute a substantial variance, but it would have been better to amend the declaration so as to make it conform accurately to the evidence. *Georgia R. & B. Co. v. Miller*, 90 Ga. 571, 16 S. E. Rep. 939.

It was averred that the accident happened while plaintiff was acting as a brakeman on a freight train, while the proof showed he was acting as a brakeman in switching cars at a station in making up a freight train. *Held*, that there was no variance in respect to the character of the train. *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 1 Am. Ry. Rep. 569.

A declaration alleged that the deceased, at the time he was struck by a train, was engaged in his duty in passing over and upon a certain track "to give directions to others of his co-servants, and to aid in the switching, movement, and operation of certain cars being switched upon" such track. There was evidence tending to prove this allegation. *Held*, that proof that deceased had another duty to perform, as taking the number of the cars in a memorandum book, constituted no variance. *Pennsylvania Co. v. Conlan*, 6 Am. & Eng. R. Cas. 243, 101 Ill. 93.

In an action by a brakeman for injuries received while attempting to uncouple cars, he alleged that he was pushed, carried, and crowded along the track to a cattle-guard, into which he fell, by the moving engine and cars. *Held*, that it was not necessary that this allegation should be literally established, but that the ultimate inquiry was whether the falling into the cattle-guard, which was the cause of the injury, was caused by the engine and cars, and that, if the evidence tended to prove that fact, there was no material variance, even though it showed that he voluntarily walked between the engine and the car to the cattle-guard. *Sedgwick v. Illinois C. R. Co.*, 31 Am. & Eng. R. Cas. 207, 73 Iowa 158, 34 N. W. Rep. 790.

In an action for a personal injury alleged to have been caused by the negligence of a section boss in causing the speed of the train to be increased, the evidence showed that it was the conductor who ordered the increase of speed. *Held*, to be an immaterial variance, under Iowa Code, § 2686. *Rayburn v. Central Iowa R. Co.*, 74 Iowa 637, 35 N. W. Rep. 606, 38 N. W. Rep. 520.

The variance between an allegation in a declaration that plaintiff was employed as a switchman, and was discharging his duties as such when injured, and proof that he was the conductor of a switch engine, or foreman of a switching crew, is immaterial. *Ashman v. Flint & P. M. R. Co.*, 53 Am. & Eng. R. Cas. 80, 90 Mich. 567, 51 N. W. Rep. 645.

A petition alleged that plaintiff was injured by being thrown from a hand-car. The testimony showed that the car was suddenly stopped, and plaintiff, to save himself from apparent danger, "jumped from the car." *Held*, no material variance. *Gulf*,

C. & S. F. R. Co. v. Johnson, 83 *Tex.* 628, 19 *S. W. Rep.* 151.

A petition alleged that while ascending a ladder on the side of a car of a moving train a brakeman was struck by a timber connected with a tank, which projected too near the road for the safety of employes. The proof showed that the beam which struck him projected from a temporary staging erected around the tank, which was being repaired, and that the scaffold was nearer to the track than the tank. *Held*, not a material variance. *Texas & P. R. Co. v. Hohn*, 1 *Tex. Civ. App.* 36, 21 *S. W. Rep.* 942.

V. AMENDED AND SUPPLEMENTAL PLEADINGS.

143. Amendments, generally.—

An amendment to a declaration which does not propose to correct a defect of form or supply some matter of necessary substance should not be allowed. *Wigton v. Pennsylvania R. Co.*, 20 *Phila. (Pa.)* 182.

Where the contention is over the rentals due from one company to another for the use of certain rolling stock, defendant company should not be permitted to amend its answer so as to impose a new and additional set-off which was not presented at a hearing before the master, and where it appears that such claim is pending in a proceeding in another court where the merits of the claim can be adjudicated. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 50 *Fed. Rep.* 857.

Where the original declaration fails to show jurisdiction, in a suit against a railroad company for refusal to issue a through bill of lading, because the action was not brought in the county where the refusal was made or defendant resided, an amendment stating a notification to the agent in the county where the action was brought, and a request for the transfer of the goods to another line in the same cars, does not show any contract in that county so as to give jurisdiction. *Coles v. Central R. & B. Co.*, 82 *Ga.* 149, 9 *S. E. Rep.* 127.

If one cause of action at common law be well set forth, and another arising under a statute be imperfectly pleaded, this affords no reason why an amendment of the latter should not be made. *Daley v. Boston & A. R. Co.*, 33 *Am. & Eng. R. Cas.* 298, 147 *Mass.* 101, 6 *N. Eng. Rep.* 349, 16 *N. E. Rep.* 690.

144. Discretionary power of the courts.—The permitting or refusing amendments to pleadings is a matter within the sound discretion of the trial judge; and unless it is made clearly to appear that he has abused this discretion, and a party has thereby been deprived of the opportunity to make his case or defense, the supreme court will not interfere. It is not necessarily a fatal objection to a proposed amendment that it is in fact an additional defense or an additional cause of action. *Omaha & R. V. R. Co. v. Moschel*, 56 *Am. & Eng. R. Cas.* 674, 38 *Neb.* 281, 56 *N. W. Rep.* 875.

An express company brought suit as a corporation, and afterwards, by leave of court, filed an amended declaration in the name of its president for the use of the company. *Held*, that the amendment was within the discretion of the trial court, and not reviewable. *Chapman v. Barney*, 129 *U. S.* 677, 9 *Sup. Ct. Rep.* 426.

When the chancellor, on sustaining a demurrer to a bill, dismisses it because "no amendment can be made" which will give it equity, this relieves the complainant of the duty of asking leave to amend; and this court, while affirming the ruling on the demurrer, will reverse and remand, in order that the complainant may have an opportunity to amend, unless the record affirmatively shows that no amendment can give equity to the bill. *Georgia Pac. R. Co. v. Wilks*, 38 *Am. & Eng. R. Cas.* 665, 86 *Ala.* 478, 6 *So. Rep.* 34.

Granting leave to change the date at which a matter is alleged to have taken place shows no abuse of discretion, although by the former date the action was barred, and by the latter not, unless where it appears that, under pretense of amendment, a cause of action not barred was substituted for one barred; and the court may look at the whole record to determine that question. *Kansas Pac. R. Co. v. Kunkel*, 17 *Kan.* 145.

145. There must be something to amend by.—Where the original declaration sets forth no cause of action, it is error to allow an amendment thereto. *Martin v. Gainesville, J. & S. R. Co.*, 78 *Ga.* 307.—**OVERRULED IN** *Ellison v. Georgia R. Co.*, 87 *Ga.* 691.

When the amendment needed is one of substance itself, "enough to amend by" does not mean the same as "enough to be good in substance without amendment."

On the contrary, failing to be good in substance is generally the reason why amendment of substance is needed. "Enough to amend by" is to be determined by what is enough relatively to the particular amendment needed and offered. There may be enough to amend by in one respect, though not in another. The Code does not make the standard for form and substance the same. *Ellison v. Georgia R. Co.*, 87 Ga. 691, 13 S. E. Rep. 809.—OVERRULING *Martin v. Gainesville, J. & S. R. Co.*, 78 Ga. 307.—APPLIED IN *Bright v. Central City St. R. Co.*, 88 Ga. 535. FOLLOWED IN *Smith v. Georgia R. & B. Co.*, 87 Ga. 764.

146. Amendments in respect to parties.—In an action against a railroad company, the summons and complaint may be amended under Ala. Code, § 3156, by adding an averment that defendant is a body corporate, and is sued in its corporate capacity, such amendment neither introducing a new party nor working a departure or variance. *Western R. Co. v. Sistrunk*, 85 Ala. 352, 5 So. Rep. 79.

A declaration by a consignee against a carrier for damages which have never been sustained by plaintiff is not amendable by introducing as a user of the action a purchaser from him who, by reason of paying for the goods more than they were worth, has sustained damage. *Henry v. Central R. & B. Co.*, 89 Ga. 815, 15 S. E. Rep. 757.

Where one railroad corporation is sued for a tort, the declaration cannot be amended by substituting another as defendant, under the guise of correcting a misnomer. *Nashville, C. & St. L. R. Co. v. Edwards*, 52 Am. & Eng. R. Cas. 62, 91 Ga. 24, 16 S. E. Rep. 347.

Where the action is against the Nashville, Chattanooga & St. Louis railroad company, and the declaration alleges that "defendant operates as lessee the Western & Atlantic Railroad," an amendment stating that "the lessee of the Western & Atlantic Railroad sued in this case, and operating said road at the time of the injuries to plaintiff, was known and styled as the Western & Atlantic Railroad Company, by virtue of a public act of this state," did not make the latter company a party to the action. *Nashville, C. & St. L. R. Co. v. Edwards*, 52 Am. & Eng. R. Cas. 62, 91 Ga. 24, 16 S. E. Rep. 347.

A misnomer of the real party intended to be sued, upon whom process has been

served, may be corrected by amendment. Such an amendment does not amount to a substitution of a defendant. *New Albany & S. R. Co. v. Laiman*, 8 Ind. 212.—FOLLOWED IN *New Albany & S. R. Co. v. Chamberlain*, 8 Ind. 278.

In an action by the state to the use of another against a railroad company for causing the death of a certain party, the narr subsequently filed, by mistake, omitted the name of the state. *Held*, that the narr might be amended so as to conform to the original titling of the action. *Baltimore & O. R. Co. v. State*, 19 Am. & Eng. R. Cas. 83, 62 Md. 479, 50 Am. Rep. 233.

A bill by a mere naked trustee of an equitable interest in lands was permitted to be amended so as to make the *cestui que trust* a complainant, and the real trustee a party defendant, so as to secure the rights of the *cestui que trust* in an award made to the real trustee under proceedings to condemn the lands by a railroad company. *McIntyre v. Easton & A. R. Co.*, 26 N. J. Eq. 425.

More than sixty days after the property of a railroad company had been sold, and the purchasers had formed a new corporation, and the receiver had been discharged, plaintiff brought an action against the receiver for services rendered. *Held*, that the action could not be maintained against the receiver under N. Y. Act of 1876, ch. 446, § 3, but the new company was subject to the same liability that had existed against the receiver; therefore it was proper to allow plaintiff to amend by striking out the name of the receiver and inserting that of the new company. *Abbott v. Jewett*, 25 Hun (N. Y.) 603.

It was obviously the intention of plaintiff to sue the receivers of a road in their official capacity, but the trial court held that the complaint stated a case against the receivers in their individual capacity, because it was not explicitly stated that the suit was against them as receivers; whereupon plaintiff asked and obtained leave to file an amended complaint, both the original and amended complaints counting upon the same transaction. *Held*, that the amendment was properly allowed. *Eddy v. Powell*, 49 Fed. Rep. 814, 4 U. S. App. 259, 1 C. C. A. 448.

Where an information against a street railway had been amended by merely adding a party by the direction of the court, a motion to take the amended information

off the files because not signed by the attorney-general was refused. *Attorney-General v. Toronto St. R. Co.*, 2 *Chan. Chamb. (U. C.)* 321.

147. Amendments changing the form of action.—Under Arkansas Code, that there shall be but one form of civil action, and that the court shall not, in case of error of plaintiff as to the kind of proceedings adopted, dismiss the action, but shall allow plaintiff to amend, and transfer the action to the proper docket, it is error to dismiss an action to enjoin a railroad company from continuing to occupy plaintiff's lands without compensation on the ground that plaintiff has an adequate remedy at law, the proper course being to allow plaintiff to amend, and order the action to be transferred to the proper docket. *Organ v. Memphis & L. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 75, 51 *Ark.* 235, 11 *S. W. Rep.* 96.

A declaration sounding in tort against a railroad company for violation of its duty as a common carrier is not amendable by converting it in whole or in part into an action upon contract to carry. *Cox v. Richmond & D. R. Co.*, 87 *Ga.* 747, 13 *S. E. Rep.* 827.

The amendment of a petition, by leave and before trial, which changes the form of the action from one *ex contractu* to one *ex delicto* is not objectionable, provided the petition still relates to the same transaction or tort. *Robertson v. Springfield & S. R. Co.*, 21 *Mo. App.* 633.

The form of action may be changed by amendment when justice requires it to be done, and the question of justice, so far as it is a question of fact, is determined at the trial term. *Cocheco Aqueduct Assoc. v. Boston & M. R. Co.*, 62 *N. H.* 345.

148. What amendments will be refused as adding a new cause of action.—Where plaintiff has declared for injuries arising from the forming of a pond of water by a railroad by damming a stream, a proposed amendment to the effect that the injuries were caused by the throwing up of an embankment by the road, and exposing fresh earth to the sun and air and thus causing malaria, is a new cause of action. *Central R. & B. Co. v. Wood*, 51 *Ga.* 515, 8 *Am. Ry. Rep.* 9.

Where suit is brought against a railroad on a written contract for the shipment of live stock, the declaration cannot be amended so as to allege that the agents of the company procured the contract by fraud

and deceit as to the construction and capacity of the cars to be used, whereby the animals were overcrowded and seriously damaged. *Mitchell v. Georgia R. Co.*, 68 *Ga.* 644.

Where a declaration claims damages by reason of plaintiff having fallen into a well on the right of way of a railroad, and which had been carelessly left open and unguarded, an amendment which alleges that the well was on the land of plaintiff, and that defendant entered on the land without plaintiff's knowledge or consent and cut away the vegetable guards and protection around the well, seeks to introduce a new cause of action and is properly rejected. *Henderson v. Central R. Co.*, 73 *Ga.* 718.—FOLLOWED IN *Central R. Co. v. Wolff*, 74 *Ga.* 664.

Where the action is against a company to recover money paid for freight above the rate fixed by the railroad commissioners, the declaration cannot be amended by adding a count as at common law. *Parmelee v. Savannah, F. & W. R. Co.*, 78 *Ga.* 239, 2 *S. E. Rep.* 686.

To an action against a railroad company for injuries received in Alabama from defective materials furnished to its servant an amendment declaring on an Alabama statute giving a right of recovery on other grounds adds a new cause of action and is not allowable. Such amendments might be made if the statute were invoked, though defectively, in the original declaration. *Bolton v. Georgia Pac. R. Co.*, 83 *Ga.* 659, 10 *S. E. Rep.* 352.—FOLLOWING *Exposition Cotton Mills v. Western & A. R. Co.*, 83 *Ga.* 441.

A declaration sought to recover damages to machinery by reason of defendant's carelessness and negligence. Plaintiff offered an amendment alleging that defendant had received the machinery from a connecting road as in good order, and was therefore liable under *Ga. Code*, § 2084, which provides that in case of connecting railroads "the last company which has received the goods as 'in good order' shall be responsible to the consignee for any damage." *Held*, that as the original declaration stated a cause of action arising at common law, and the amendment a purely statutory liability, the amendment was properly rejected under *Ga. Code*, § 3840, which declares that no amendment adding a new and distinct cause of action shall be allowed unless expressly provided for by law. *Exposition Cotton Mills*

v. *Western & A. R. Co.*, 40 *Am. & Eng. R. Cas.* 169, 83 *Ga.* 441, 10 *S. E. Rep.* 113.—FOLLOWED IN *Bolton v. Georgia Pac. R. Co.*, 83 *Ga.* 659, 10 *S. E. Rep.* 352.

A declaration against a company for the value of land permanently appropriated by it under its charter is not amendable by adding a count for the value of soil taken from the land and appropriated to the use of the company, the two causes of action being different, the first treating the land as realty and as sold to the company, the second treating the soil taken as personalty and as sold to the company. *Chattanooga, R. & C. R. Co. v. East Rome Town Co.*, 89 *Ga.* 732, 16 *S. E. Rep.* 308.

Plaintiff commenced an action against defendant company, in the nature of ejectment, for wrongfully withholding certain premises from plaintiff. *Held*, that an amendment which would have the effect of changing the action so as to compel the company to purchase the land at a price fixed by the court, or to remove its road therefrom, was properly denied. *Gas-Light Co. v. Rome, W. & O. R. Co.*, 51 *Hun* 119, 24 *N. Y. S. R.* 154, 5 *N. Y. Supp.* 459.

Suit was commenced to enforce certain notes given by the superintendent of a railroad, whereupon the state interposed and became a party, setting up ownership of the road. Thereupon complainant filed an amended bill stating that he held certain bonds issued by the state which constituted a lien on the road. *Held*, that the amendment set up a new cause of action and that the amended bill was, therefore, demurrable. *Tappan v. Western & A. R. Co.*, 3 *Lea* (Tenn.) 106.

Where the original petition alleges that defendant agreed that when plaintiff should ask for and accept employment from it as a locomotive engineer it would give him such employment "for whatever length of time plaintiff should desire to retain it," an amendment which charges "that defendant promised to give plaintiff employment on its road for the period and term of the natural life of plaintiff" sets up a new cause of action. *East Line & R. R. Co. v. Scott*, 41 *Am. & Eng. R. Cas.* 396, 75 *Tex.* 84, 12 *S. W. Rep.* 995.

Plaintiff attached shares of stock of the A. company owned by the B. company. Later he filed an amended bill for himself and other creditors of the B. company averring that it had been dissolved by the sale of

its franchises under execution, and that first mortgage bonds of the A. company had been assigned to the B. company, and by it transferred to the C. company, and praying that the latter company be made a party and required to disclose what amount of said bonds it held, how and from whom they were acquired, and to maintain or relinquish its claim to these bonds. Afterwards those creditors also filed a petition alleging that the C. company had been dissolved by reason of its insolvency and the sale of its charter rights under executions, and claiming that the assets of that company be subjected to the payment *pro rata* of the claims of all its creditors. *Held*, on demurrer, (1) that the amended bill and petition make a new case and an unallowable departure from the case made by the original bill, and should be dismissed; (2) that insolvency, *per se*, does not work a dissolution of a corporation. *Shenandoah Valley R. Co. v. Griffith*, 13 *Am. & Eng. R. Cas.* 120, 76 *Va.* 913.—REFERRED TO IN *Crumlish v. Shenandoah Valley R. Co.*, 28 *W. Va.* 623.

149. What amendments do not add a new cause of action.—(1) *In general.*—A fair test as to whether a proposed amendment of a complaint is allowable under N. Y. Code Civ. Pro. § 723, relating to amendments, or whether it sets up a new cause of action, is to be determined by whether a recovery on the original complaint would bar a recovery under the amended complaint. *Davis v. New York, L. E. & W. R. Co.*, 110 *N. Y.* 646, 2 *Silo. App.* 94, 15 *Civ. Pro.* 62, 17 *N. E. Rep.* 733, 13 *Cent. Rep.* 162, 17 *N. Y. S. R.* 172; *affirming* 14 *N. Y. S. R.* 1.

The rule allowing an amendment to pleadings where the amendment does not change the cause of action applied in an action by a town against a railway for breach of contract in failing to erect round houses, etc. *Williamson v. Chicago, R. I. & P. R. Co.*, 84 *Iowa* 583, 51 *N. W. Rep.* 60.—QUOTING *Pittsburgh Junction R. Co. v. McCutcheon*, (Pa.) 7 *Atl. Rep.* 146.

(2) *Setting out facts more fully.**—Where a declaration alleges that the employes of a railroad violently, unnecessarily, and improperly blew the whistle of an engine, thereby frightening plaintiff's horse and causing him to run away and injure plaintiff, it may be amended by setting out more

* See also *post*, 152.

fully and distinctly the circumstances and facts of the tort. Such an amendment does not add a new cause of action. *Georgia R. Co. v. Thomas*, 68 Ga. 744. *Gourley v. St. Louis & S. F. R. Co.*, 35 Mo. App. 87.

An amendment to a petition against an express company for negligently delaying the shipment of machinery, in which it is alleged that defendant's agent had notice that the operation of plaintiff's mill would be suspended until the machinery should be returned, does not state a new cause of action, but merely perfects the cause of action already definitely stated. *Pacific Exp. Co. v. Darnell*, (Tex.) 32 Am. & Eng. R. Cas. 543, 6 S. W. Rep. 765.

An original petition charged that a street had been obstructed, and that the work of construction was not done in a careful and skilful manner, obstructing ingress and egress to plaintiff's premises. Held, that an amendment giving details of such obstruction was not a new cause of action. *Missouri Pac. R. Co. v. Speed*, 3 Tex. Civ. App. 454, 22 S. W. Rep. 527.

(3) *As affected by statute of limitations.**

—The original complaint, in an action for personal injuries, alleged that it was caused by the negligence of defendant in failing to light its station, by reason of which plaintiff fell from the station platform. One year afterwards a new count was filed as an amendment alleging that the construction of the platform was such as to render it unsafe. Held, that this did not introduce a new cause of action, but merely varied the allegations as to the matter already in issue, and was, therefore, not barred by the one-year statute of limitations. *Alabama G. S. R. Co. v. Arnold*, 30 Am. & Eng. R. Cas. 546, 80 Ala. 600, 2 So. Rep. 337.

Plaintiff sued for personal injuries and charged in the original complaint that defendant's train threw a cow from the track and against plaintiff, whereby he was injured, and that this was caused by a failure of the engineer to blow a whistle or ring a bell on entering the corporate limits of a town, and a failure to use all means in his power known to skilful engineers to stop the train. An amendment alleged that the train was running at a reckless and unusual rate of speed, and that the engineer failed to keep a proper lookout for obstructions on the track. Held, that this did not introduce a

new cause of action, nor materially vary the original, so that the statute of limitations might be pleaded. *Alabama G. S. R. Co. v. Chapman*, 83 Ala. 453, 3 So. Rep. 813; former appeal 80 Ala. 615.

Where the original complaint claims damages for personal injuries alleged to have been caused by defendant's negligent failure to keep its street-railway track in proper condition, whereby plaintiff was thrown from a vehicle in which he was crossing it, an amended count setting out a municipal ordinance which specifies the duties required of street-railway companies in keeping their tracks in safe and proper condition does not introduce a new cause of action, nor is the statute of limitations available as a defense against it. *Elyton Land Co. v. Mingea*, 43 Am. & Eng. R. Cas. 309, 89 Ala. 521, 7 So. Rep. 666.

In an action for negligence resulting in the derailment of an engine and the killing of plaintiff's intestate, an amendment, pleaded after the action would have been barred by the statute of limitations, setting up additional grounds of negligence contributing to the derailment and the consequent death, does not state a new cause of action; and a demurrer to such amendment based on the statute of limitations is properly overruled. *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Iowa 67, 40 N. W. Rep. 92.—APPLIED IN *Smith v. Missouri Pac. R. Co.*, 56 Fed. Rep. 458.

An original petition stated that defendant, by its agents and servants, recklessly, carelessly, and negligently caused one of its trains to strike, wound, and kill one Moody. The amended petition, filed after the statutory time, charged that by the negligence and unskilfulness of defendant's employes while running said train said Moody was struck and killed. Held, that the amendment set up no new cause of action. *Moody v. Pacific R. Co.*, 68 Mo. 470.

An amendment which differs from the original petition only in stating more fully the result of injuries caused by defendant does not set up such a new cause of action as to let the statute of limitations run between the filing of the two petitions. *International & G. N. R. Co. v. Irvine*, 23 Am. & Eng. R. Cas. 518, 64 Tex. 529.—QUOTED IN *Texas & P. R. Co. v. Davidson*, 68 Tex. 370.

(4) *Illustrations.*—Where the action is against a company for damages to property shipped, the declaration is amendable by

* See also *post*, 154, 155.

striking out an allegation that it was shipped over another road and thence over defendant's, and that the two roads connected and were managed by the other company. *Southwestern R. Co. v. Bryant*, 67 Ga. 212.

A suit against a company for damages from the careless and negligent manner of running its engine may be amended by setting out negligence in not discovering and remedying defects in the machinery of the engine which by the use of ordinary care and diligence could have been discovered and remedied so as to prevent the accident. Such amendment does not add a new cause of action. *Augusta & S. R. Co. v. Dorsey*, 68 Ga. 228.

Where a complaint charges that plaintiff, a passenger, was injured by the negligence of defendant in suddenly starting a car, an amendment setting up that the injury was due to the "wild, scary, untractable, and skittish" disposition of the horses attached to the car is not necessary to admit evidence of the disposition of the horses, and is not objectionable as substituting or adding a new cause of action. *Dougherty v. Missouri R. Co.*, 34 Am. & Eng. R. Cas. 488; see also 37 Am. & Eng. R. Cas. 206, 97 Mo. 647, 15 West. Rep. 235, 8 S. W. Rep. 900, 11 S. W. Rep. 251.

Plaintiff alleged in the declaration that his wife was injured by the negligence of defendant. An amendment alleging other negligent acts of the defendant at the same time which contributed to the injury neither changes the form nor the cause of action. *McIntire v. Eastern R. Co.*, 58 N. H. 137.

Plaintiff sued to enjoin defendant from maintaining a fence in front of a hotel, but his complaint simply alleged that he was in possession of the hotel. On the trial defendant moved to dismiss the complaint on the ground that it did not show plaintiff to be a party or a privy to certain covenants in a deed respecting the company's right of way, and its duty to keep an opening in the fence. *Held*, that it was proper to allow plaintiff to amend by setting up a lease of the property to himself. *Avery v. New York C. & H. R. R. Co.*, 31 Am. & Eng. R. Cas. 583, 106 N. Y. 142, 12 N. E. Rep. 619, 8 N. Y. S. R. 612, 7 Cent. Rep. 795.—QUOTED IN *Avery v. New York C. & H. R. R. Co.*, 17 N. Y. S. R. 392; *Avery v. New York C. & H. R. R. Co.*, 26 N. Y. S. R. 279.

Where an engineer sues to recover for per-

sonal injuries, and charges in the original complaint that they were caused by a failure of the defendant to furnish him a suitable locomotive, an amendment is allowable which avers that the fuel furnished by defendant for use in the engine was unfit and dangerous, by reason of which, and the defective condition of the boiler, the explosion occurred. Such amendment is within the discretion of the trial court, and is not reviewable on appeal as setting up a new cause of action. *Davis v. New York, L. E. & W. R. Co.*, 110 N. Y. 646, 2 Silv. App. 94, 15 Civ. Pro. 62, 17 N. E. Rep. 733, 13 Cent. Rep. 162, 17 N. Y. S. R. 172; *affirming* 14 N. Y. S. R. 1.

Where an original petition claims damages for the overflow of land, an amendment that claims additional damages for an injury to crops merely enlarges the scope of the recovery prayed for, but does not set up a new cause of action. *International & G. N. R. Co. v. Pape*, 73 Tex. 501, 11 S. W. Rep. 526.

Suit was filed January 31, 1890, to recover for an injury to growing crops of plaintiff resulting from the negligent construction of the roadbed of defendant near lands cultivated by plaintiff. By amendment plaintiff set up a further claim for damages to his crop on June 5, 1890. *Held*, no error in overruling a demurrer to this amendment based upon the ground that it was a new cause of action. *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. Rep. 1011.

Suit was commenced against a company to try the title to land, to recover damages for injuries to the land and to growing crops thereon, resulting from a trespass while the railroad was being constructed. By an amendment the question of title was pretermitted, and the action continued as to the question of damages. *Held*, that this was not the assertion of a new cause of action such as would authorize the court to adjudge costs to that date against plaintiff. *Gulf, C. & S. F. R. Co. v. Doran*, 2 Tex. Unrep. Cas. 442.

150. Amendments to conform to the proof.—In an action by an assignee of a debt the complaint must contain an averment of the assignment to plaintiff, but where such an allegation has been omitted and proof of the assignment is made, the court may allow plaintiff to conform the pleading to the proof after a verdict for

plaintiff. *New York, L. E. & W. R. Co. v. McHenry*, 12 *Am. & Eng. R. Cas.* 370, 17 *Fed. Rep.* 414, 21 *Blatchf. (U. S.)* 400.

The cause of action alleged being the death of plaintiff's husband by means of defendant's negligence, the allegations in the declaration touching the specific acts of negligence and the manner of causing death may be varied or added to by amendment during the trial so as to adapt the pleadings to the evidence. *Harris v. Central R. Co.*, 30 *Am. & Eng. R. Cas.* 581, 78 *Ga.* 525, 3 *S. E. Rep.* 355.

Where the proof does not correspond to the allegations of the petition, plaintiff should ask leave to amend during the trial. *Leduke v. St. Louis & I. M. R. Co.*, 4 *Mo. App.* 485.

An amendment of a petition to make it conform to the evidence is properly allowed at the close of the evidence. So where the action is to recover for frightening plaintiff's team by the escape of steam, an averment that the steam was let off by the engineer is properly amended so as to conform to the evidence by charging that it was let off by the engineer or fireman. *Andrews v. Mason City & Ft. D. R. Co.*, 77 *Iowa* 669, 42 *N. W. Rep.* 513.

In case against a common carrier the declaration stated the contract to be to carry the goods from New York to Cleveland, Ohio, and the proof was that defendant was interested only in part of the line. An amendment to conform to the contract as proved was allowed on the trial, it appearing that defendant had not been taken by surprise. *Jacobs v. Hooker*, 1 *Edm. Sel. Cas. (N. Y.)* 472.

151. Amendments to obviate a variance.—Where in an action for negligent injury both sides have without objection introduced such testimony as fully explains all facts bearing on the manner and cause of the injury, an amendment of the declaration should be allowed as a matter of course if objected to for variance so long as it is plain that no one could have been surprised by the testimony. *Wallace v. Detroit City R. Co.*, 58 *Mich.* 231, 24 *N. W. Rep.* 870.

152. Amendment as to descriptive matters — Setting out facts more fully.*—A complaint may be amended so as to describe more fully the nature of the

negligence imputed to defendant, as its failure to keep the roadbed in a reasonably safe condition at the point of the accident. *Elyton Land Co. v. Mingea*, 43 *Am. & Eng. R. Cas.* 309, 89 *Ala.* 521, 7 *So. Rep.* 666. *Alabama G. S. R. Co. v. Thomas*, 89 *Ala.* 294, 7 *So. Rep.* 762.

A declaration filed by a track hand alleging that he was injured by a fall of earth caused by the negligence of the company, its agents and servants, is amendable by setting out the particulars constituting the alleged negligence, and also by averring that plaintiff himself was without fault. *Smith v. Georgia R. & B. Co.*, 87 *Ga.* 764, 13 *S. E. Rep.* 904.—FOLLOWING *Ellison v. Georgia R. Co.*, 87 *Ga.* 691.

The declaration as thus amended sets out a cause of action, although it does not distinctly allege that plaintiff was ignorant of the danger to which he was subjected. *Smith v. Georgia R. & B. Co.*, 87 *Ga.* 764, 13 *S. E. Rep.* 904.

Plaintiff alleged that he approached a freight train with a cab for the accommodation of passengers and inquired of the engineer if the train would stop at a certain station, and was told that it would stop there or near there; whereupon he entered the car "orderly and decently and with money to pay his passage, and thereby became a passenger of said company"; that thereupon the conductor without provocation cursed and ill treated him, and struck him in the face with a lantern, and knocked him out of the car door, and caused him to fall on the track and to receive severe injuries. *Held*: (1) that the action was not for a breach of contract safely to carry plaintiff as a passenger, but an action of tort or trespass on the case, and it was error for the trial court to hold to the contrary; (2) that, it being an action *ex delicto*, amendments describing the tort more accurately should have been allowed. *Turner v. Western & A. R. Co.*, 63 *Ga.* 827.

It being apparent from the original declaration that the cause of action was the expulsion of a passenger from the cars because he refused to pay an alleged overcharge consisting of the difference between the ticket rate and the conductor's rate, an amendment showing more fully why a ticket was not and could not be procured was allowable, and, the explanation being that there was no agent at the station to furnish a ticket, the declaration as amended was

* See also ante, 149.

sufficient. *Georgia R. & B. Co. v. Murden*, 83 Ga. 753, 10 S. E. Rep. 364.

A declaration being for the recovery of overcharges on shipments to Dalton only, the same should be amended in order to recover for overcharges paid on shipments to Rome also if both sets of overcharges be embraced in the amount sued for. The *allegata* and *probata* in descriptive matters ought to correspond. *Georgia R. & B. Co. v. Smith*, 40 Am. & Eng. R. Cas. 123, 83 Ga. 626, 10 S. E. Rep. 235.

In an action by tenants in common to have the value of a right of way assessed, after the action had been pending for several years one of the plaintiffs entered a *retraxit*, and the court allowed the other to amend his description of the land so as to embrace his part still the subject of suit. *Held*, no error. *Sinclair v. Western N. C. R. Co.*, 111 N. Car. 507, 16 S. E. Rep. 336.

Where the action is to recover for an injury to crops caused by flooding land, and the original petition describes the land as "part of the Yandel Ferris place," an amendment which describes it as "parts of the Yandel Ferris and Brice places" does not constitute a new or different cause of action, especially where it would be sufficient without such description. *Gulf, C. & S. F. R. Co. v. McGowan*, 73 Tex. 355, 11 S. W. Rep. 336.

153. Amendment of the *ad damnum*.—In an action by a common informer to recover a penalty against a railroad for failing to ring a bell or sound a whistle at a crossing, the omission in the declaration to conclude with an *ad damnum* is not cause for demurrer. Such omission may be amended at any time, even after error brought. *Galena & C. U. R. Co. v. Appleby*, 28 Ill. 283.

Where the action is only to recover \$140 damages, and a verdict is returned for \$150, it is error to allow plaintiff to file an amendment to his complaint to make the damages demanded correspond to the verdict. *Cox v. Burlington & W. R. Co.*, 77 Iowa 478, 42 N. W. Rep. 429.

Plaintiff brought suit for damages in the sum of \$500. After the conclusion of the argument of counsel for plaintiff leave was obtained to amend the declaration and bill of particulars so as to claim \$750. Defendant objected on the ground that it was an amendment of a material allegation of the pleading, and that it operated as a sur-

prise. The jury found for plaintiff in the sum of \$250. *Held*, that no injustice was done defendant by the leave to amend, the verdict being for an amount less than that originally laid in the declaration. *Currie v. Natchez, J. & C. R. Co.*, 20 Am. & Eng. R. Cas. 303, 61 Miss. 725.

Where a suit is instituted against a street railway, before a justice of the peace, to recover damages to a horse and buggy caused by colliding with a car, and the horse dies pending an appeal to the county court, it is proper to allow the pleadings to be amended so as to claim damages for the full value of the horse. *North Side St. R. Co. v. Want*, 4 Tex. App. (Civ. Cas.) 237, 15 S. W. Rep. 40.

A consignee is entitled to a reasonable time for the examination of a consignment before receiving it, but if, having received it, he discovers it to have been damaged in transit, it is his duty to give notice, and proceed according to the rules of commercial usage to ascertain the injury; but while his failure in this respect will not preclude him from recovering damages, he should be held to strict proof, and should not be permitted to amend his libel to include damages discovered after the institution of the suit which by diligence might have been discovered before. *Williams v. Steamship Columbia*, 1 Wash. T. 95.

154. Amendment setting up the statute of limitations.*—It is error to refuse defendant privilege to amend its plea of the general issue by filing a plea of the statute of limitations, though the jury had been charged with the case and had retired to their room, and though plaintiff's counsel stated he would be surprised by the amendment; that his client had been sent home before he knew of the offer to amend the plea, and that were his client present he could testify to such facts as, in his opinion, would take the case out of the statute. *Savannah, F. & W. R. Co. v. Watson*, 86 Ga. 795, 13 S. E. Rep. 156.

155. Amendments barred by limitation.†—In an action seeking to charge a common carrier with the loss of goods, a count may be added by amendment charging it as a warehouseman; but if the amendment is not filed until after the lapse of one year from the accrual of the cause of

* See also *ante*, 149.

† See also *ante*, 149, 154.

action (Ala. Code, § 2619), the statute of limitations is available as a defense. *Annis-ton & A. R. Co. v. Ledbetter*, 92 Ala. 326, 9 So. Rep. 73. *People ex rel. v. Kalamazoo Circuit Judge*, 35 Mich. 227, 15 Am. Ky. Rep. 349.—FOLLOWING *People ex rel. v. Neway-go Circuit Judge*, 27 Mich. 138.

A damage suit for injury to a store and its contents was filed within two years after the alleged injury. *Held*, that an amendment more specifically describing the property, but setting up no new cause of action, could be filed after two years had elapsed. *Rouland v. Murphy*, 66 Tex. 534, 1 S. W. Rep. 658.

A tramway company was sued for injuries to plaintiff through its failure to maintain a certain road in a safe and proper condition. Six months after the close of the pleadings defendant applied for leave to amend its defense by setting up a contract under the Tramways Act 1870, § 29, by which the liability to maintain the road was shifted from it to the vestry, the road authority of the district. Since the close of the pleadings the statutory period within which plaintiff could have sued the vestry had elapsed. *Held*, that defendant ought not to be allowed to amend because plaintiff could not be placed in the same position as if defendant had pleaded correctly in the first instance. *Steward v. North Metropolitan Tramways Co.*, 16 Q. B. D. 556; *dismissing appeal from* 16 Q. B. D. 178.—DOUBTING *Howitt v. Nottingham Tramways Co.*, 12 Q. B. D. 16. QUOTING *Tildesley v. Harper*, 10 Ch. D. 393.

156. Amendments in stock-killing cases.—Where a statutory action is commenced before a justice of the peace against a company for killing stock and the company appeals to court, it is error to allow plaintiff to amend after the appeal by adding a count for damages to his grass land by fire. *Union Pac. R. Co. v. Sternberg*, 13 Colo. 141, 21 Pac. Rep. 1021.

Under Kan. Comp. Laws 1874, p. 784, in an action before a justice of the peace to recover damages for killing a colt, plaintiff recovered judgment, and defendant appealed to the district court, where plaintiff, with full notice to defendant, amended his bill of particulars so as to make it allege that plaintiff, more than thirty days before the commencement of his action, demanded of defendant the full value of the colt, and that defendant refused to pay anything therefor.

Held, that the court did not err in permitting the amendment. *Missouri Pac. R. Co. v. Piper*, 26 Kan. 58.

Where a petition for killing plaintiff's cattle states a good common law cause of action, it may be amended by changing the form of action to one under a special statute. *Roberts v. Wabash, St. L. & P. R. Co.*, (Mo.) 25 Am. & Eng. R. Cas. 298, 3 West. Rep. 783.

An original complaint charged that plaintiff's cows strayed upon defendant's track, and that the company so negligently managed its cars that two cows were killed and two others injured. An amendment alleged that the cows strayed upon the track through a fence which the company was bound to maintain, and that four cows were killed and three injured. *Held*, that this was but an amplification of the original complaint, and did not change the cause of action. *Becker v. New York, L. E. & W. R. Co.*, 31 N. Y. S. R. 750, 10 N. Y. Supp. 413, 57 Hun 585.

157. Granting amendments at the trial.—In an action on the case to recover damages to plaintiff's property occasioned by the erection and maintenance of a bridge, its piers and protections, by a railroad company, the court permitted plaintiff after the evidence was closed and the argument commenced to amend his declaration by adding a count in trespass, and refused a motion of defendant for a continuance on that ground, there being no affidavit in support of the last motion. *Held*, that the amendment was properly allowed, and that the motion for a continuance was properly overruled for the want of an affidavit, as required by the statute. *Chicago & P. R. Co. v. Stein*, 75 Ill. 41.—DISTINGUISHING *People v. St. Louis*, 10 Ill. 351; *Chicago v. Laflin*, 49 Ill. 172; *Middleton v. Pritchard*, 4 Ill. 510; *Canal Trustees v. Haven*, 11 Ill. 554.

A complaint charged that by the negligent act of defendant plaintiff was grievously bruised, hurt, and injured, and that his collar-bone was broken, and shoulder dislocated. *Held*: (1) that under such general allegations of injury plaintiff was entitled to prove any and all injuries which he received, and which were the natural consequence of the wrongful act of defendant, and that on the trial it was not error to allow plaintiff to insert another specific allegation that his shoulder-blade was broken, and to refuse defendant a continuance of the cause upon

affidavit made on the ground of surprise occasioned by such amendment; the specific averments of injury did not limit and restrict the proof of plaintiff to the injuries specified; (2) that where the law does not imply the damage as the natural and necessary consequence of the wrongful act the special damage should be set out with particularity. *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177.

It is too late, after the jury has been sworn and some of the witnesses have testified, to file an amended petition alleging that the injury complained of was caused by the negligence of those in charge of the "south-bound accommodation train," the issue having been made up and partly tried as to the negligence of those in charge of the "south-bound express train." *Eskridge v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 176, 89 Ky. 367, 12 S. W. Rep. 580.

Where plaintiff inadvertently omits to insert an allegation of incorporation, but the existence of the corporation is not the substance or gist of the action, and its name is such as to import a corporation, and defendant appears as such, files an answer verified by its agent, such allegation being merely formal, it is not error, after the evidence for plaintiff had been submitted, to allow plaintiff to amend by inserting such incorporation, nor in refusing to allow defendant to file a new answer raising different issues, when there is no claim of surprise, inadvertence, or mistake. Nor is it error to refuse the removal of the cause at such time to the United States court. *Wild v. Oregon S. L. & U. N. R. Co.*, 21 Oreg. 159, 27 Pac. Rep. 954.

158. — after verdict.—A declaration against a carrier alleged that it received sheep to transport to "Elwood, Kan.," and the proof showed an agreement to transport to "Ellinwood, Kansas." *Held*, no error to allow an amendment by striking out "Elwood" and inserting "Ellinwood," even after overruling a motion for a new trial. *McCullom v. Indianapolis & St. L. R. Co.*, 94 Ill. 534.

The widow and children of a railroad employé sued in Pennsylvania for the death of the employé, which occurred in West Virginia. After verdict and before judgment plaintiffs moved to amend by making the administratrix plaintiff, as required by the West Virginia statute. *Held*, that under the Pa. Act of 1852, allowing amendments

at any stage of the proceedings, the amendment should have been allowed. *Patton v. Pittsburgh, C. & St. L. R. Co.*, 11 Am. & Eng. R. Cas. 658, 96 Pa. St. 169.

159. — after reversal on appeal.—A complaint charging a company with negligently constructing its roadbed across a stream so as to injure plaintiff's lands was deemed sufficient on circuit, but on appeal was held to be defective. Thereafter plaintiff properly obtained leave to amend his complaint within twenty days as he might be advised, defendant being given twenty days after service to answer. *Wallace v. Columbia & G. R. Co.*, 37 So. Car. 335.

At a former trial of an action the complaint was based upon an alleged contract of defendant to collect, through its agent at X., a bill against A. of goods consigned to the care of said agent, and to transport and deliver to plaintiff at Y. the money so collected. After a judgment for plaintiff had been reversed he was allowed to amend his complaint so as to allege a cause of action as for money had and received. *Held*, no abuse of discretion. *Wells v. American Exp. Co.*, 49 Wis. 224, 5 N. W. Rep. 333.

160. Effect of amendments, generally.—An allegation that plaintiff could not secure his safety in any other way than by urging his horse forward to pass over a crossing before the arrival of a train is not materially different in a legal sense from an allegation that he believed it impossible to control his horse. *Grows v. Maine C. R. Co.*, 69 Me. 412.

A declaration which contains two causes of action in one count is amendable so as to set them out in separate counts, if plaintiff intends to rely upon both; and the allowance of the amendment is a decision that he intends to rely on both. *Daley v. Boston & A. R. Co.*, 33 Am. & Eng. R. Cas. 298, 147 Mass. 10, 16 N. E. Rep. 690, 6 N. Eng. Rep. 349.

Objections to an answer to a bill as it stood before amendment cannot be made after amendment, unless defendant, after being duly called upon to file his answer to the bill as amended, or voluntarily waiving such call, chooses to let it stand as the answer to the amended bill. *Angel v. Pennsylvania R. Co.*, 37 N. J. Eq. 92.

An amendment which was filed to a pleading before the adoption of the present rules by the supreme court did not have the effect to withdraw the amended pleading, or to

suppress or supplant any of its allegations, except in so far as the amendment effected that result by legal construction. *Houston & T. C. R. Co. v. Shafer*, 6 Am. & Eng. R. Cas. 421, 54 Tex. 641.—FOLLOWING SUTTON v. Page, 4 Tex. 142.

161. Retroactive effect.—Under the Florida Code an amendment of a complaint relates back to the commencement of the action. *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201.

Where a receiver is asked for the same property in two courts, the one that first takes jurisdiction of the property and the parties is entitled to retain it, and the fact that a demurrer is sustained to the complaint with leave to amend does not affect the question of jurisdiction, as all amendments germane to the bill relate back to the time when the bill was filed and are considered as a part of it. *Gaylord v. Ft. Wayne, M. & C. R. Co.*, 6 Biss. (U. S.) 286.

162. Making the amendment—Time within which, etc.—Where an order giving leave to amend has been granted without limiting the time, it should be made within fourteen days from the date of the order. Where circumstances prevent this being done, and no order dismissing the bill in the alternative of it not being done is embodied in the order granting leave to amend, the referee held it to be competent to the court to grant further time for amending, even on an application made after the fourteen days had expired, if a proper case is made out for it. *McMurray v. Grand Trunk R. Co.*, 3 Chan. Chamb. (U. C.) 306.

163. Notice of amendment to adverse party.—It is error to allow a pleading to be amended in a material respect and then to render judgment in the absence of the adverse party without notice to him. *Leavenworth, L. & G. R. Co. v. Van Riper*, 19 Kan. 317.—FOLLOWED in Kansas City, L. & S. W. R. Co. v. Richolson, 31 Kan. 28.

164. Time to answer amended pleading.—In an action against a company for loss and injury to property, after the issues had been made up and the case ready for trial it was discovered that the files were mislaid. The court thereupon permitted the filing of a substituted petition instantan, and required the company to answer and go to trial at once. *Held*, that as the substituted petition presented a number of new issues, a reasonable time

should have been given defendant to answer and prepare for trial. *Fremont, E. & M. V. R. Co. v. Marley*, 25 Neb. 138, 40 N. W. Rep. 948.

165. Presumption in favor of validity of amendment.—When an amendment to a complaint is necessary, and the record shows that the amendment was allowed by the court, although the record does not disclose that it was actually made, and the trial of the cause is proceeded with without further objections, it is not a violent presumption that the complaint was amended to show a good cause of action. *Kelsey v. Chicago & N. W. R. Co.*, 43 Am. & Eng. R. Cas. 43, 1 S. Dak. 80, 45 N. W. Rep. 204.

166. Supplemental pleadings.—Where a suit has been brought by holders of common stock to compel organization by the directors, and thereafter another bill to the same effect is filed by substantially the same parties, alleging in addition that defendant company was about to buy another road, and praying that the contemplated purchase be enjoined as *ultra vires*, to which bill the road about to be purchased is improperly made a party, if the right to the relief demanded in the original bill is established, the second bill is more properly considered as a supplemental bill, and although filed without leave of the court, as required by rule 54, should be allowed to stand as to the original defendants. *Mackintosh v. Flint & P. M. R. Co.*, 36 Am. & Eng. R. Cas. 340, 34 Fed. Rep. 582.

After the commencement of an action against a railroad company upon a contract it appeared that it and other companies were merged in a new company, the latter having assumed all of the contracts, liabilities, and obligations of the original companies. *Held*, that an order allowing defendant to file a supplemental complaint bringing in the new company as defendant was properly granted. *Prouty v. Lake Shore & M. S. R. Co.*, 85 N. Y. 272.

Plaintiff and his horses were both injured at the same time, but he brought two separate suits, one for the injury to himself, and the other for the injury to the horses. The action for injuries to himself resulted in a judgment in his favor, which defendant paid, and then moved for an order for leave to serve an amended or supplemental answer in the other action, setting up the judgment as a bar to a further recovery. *Held*, that the

judgment was not within N. Y. Code Civ. Pro. § 544, and that the amendment was properly denied. *McAndrew v. Lake Shore & M. S. R. Co.*, 23 N. Y. Supp. 1074, 70 Hun 46, 53 N. Y. S. R. 436.

VI. REMEDIES FOR ERRORS AND DEFECTS. WAIVER.

167. Striking out pleadings, generally.—Where a company institutes a condemnation proceeding and its articles of incorporation are not set out, an answer which alleges that such articles are defective and do not authorize the taking of land is deficient, unless it specifies the particulars in which such articles are deficient, and should be stricken out. *Denver R. L. & C. Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386. —APPLYING *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. Rep. 49.

Where an answer merely sets up that the complaint does not state facts sufficient to constitute a cause of action, it is in effect but a demurrer, and should be stricken out. *Denver R. L. & C. Co. v. Union Pac. R. Co.*, 34 Fed. Rep. 386.

Plaintiff in one count sued defendant for constructing side tracks in front of his premises, for improperly using such tracks, for casting snow upon his premises, and for constructing drains and ditches, and depositing dead animals in front of his premises. *Held*, that the court properly ordered him to plead his separate causes of action in separate counts, and that when he filed a substitute without attempting to comply with the order the court properly sustained a motion to strike it from the files. *O'Conner v. Chicago, R. I. & P. R. Co.*, 75 Iowa 617, 34 N. W. Rep. 795.

Plaintiffs filed a complaint in four counts, in two of which they claimed damages, under the general railroad act, from defendant for failing to restore a highway. In the other two counts they alleged substantially the same facts, but claimed treble damages under another statute. *Held*, that they could not recover under both statutes for the same act, and as there was doubt as to which remedy was applicable, the court would not compel them to elect, but set aside the whole complaint that the case might be stated anew. *Sipperly v. Troy & B. R. Co.*, 9 How. Pr. (N. Y.) 83.

168. — frivolous pleadings.—Where a passenger sues for personal inju-

ries, an answer which merely alleges "upon information and belief" that plaintiff was not bruised or injured by the collision as alleged, and which denies generally the several allegations of the complaint, and denies that plaintiff has suffered damages, is not good, and it is proper to give judgment on the answer as frivolous. *Powers v. Rome, W. & O. R. Co.*, 3 Hun (N. Y.) 285, 5 T. & C. 449.

169. — particular allegations or defenses, generally.—In case to recover for personal injuries caused by negligence, a count is not demurrable because the averment of one of the cumulative acts of negligence is defective. The remedy is by a request for instructions to the jury, or, possibly, by motion to strike out the defective part of the count. *Louisville & N. R. Co. v. Hall*, 48 Am. & Eng. R. Cas. 170, 91 Ala. 112, 8 So. Rep. 371.

Conn. Practice Act forbids a party to set out in his pleadings the evidence by which the material facts are to be proved; and it is, therefore, proper to expunge from a plaintiff's application mere statements of evidential facts tending to show his financial condition. *New York & N. E. R. Co.'s Appeal*, 55 Am. & Eng. R. Cas. 38, 62 Conn. 527, 26 Atl. Rep. 122. *Godfrey v. Ohio & M. R. Co.*, 37 Am. & Eng. R. Cas. 8, 116 Ind. 30, 15 West. Rep. 533, 18 N. E. Rep. 61.

Where plaintiff sues for breach of a contract for failing to leave cars for the purpose of receiving and taking away freight, an answer which merely sets up that plaintiff had formerly permitted cars to stand on the side track so near the main track that collisions had taken place, and that there was danger of others, and that plaintiff was unwilling to become responsible for the injuries, is properly stricken out. *Amsden v. Dubuque & S. C. R. Co.*, 13 Iowa 132.

An answer alleging that the injury resulted from the carelessness of plaintiff is properly stricken out on motion, as evidence of the fact pleaded is admissible under the general denial. *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 82.

Where a defendant wishes to avoid a charge of negligence by showing that the injury sued for was caused by the act of God, it is competent to do so under the general plea; so where both the general plea and a special plea that the injury was caused by an unprecedented storm are filed, it is proper to strike out the latter. *Ellis*

v. St. Louis, K. C. & N. R. Co., 12 *Am. & Eng. R. Cas.* 183, 76 *Mo.* 518.

Certain parties who were engaged in manufacturing leased a railroad company a right of way for a side track. Afterwards a suit in assumpsit was instituted against the railroad on this lease. The damages claimed were for an unpaid portion of the consideration money and for appropriating land not included in the lease. The declaration was afterwards amended so as to include a claim for damages for failing to construct the side track as agreed. At the trial the court struck out the amendment and withdrew it entirely, with all evidence to support it, from the jury. Another action was pending between the same parties at the time in trespass. *Held*, that while the issue made under the amendment might have been a bar to a recovery in the action of trespass, still the company could not complain of the action of the court in striking it out. *Middletown Furniture Mfg. Co. v. Philadelphia & R. R. Co.*, 145 *Pa. St.* 187, 22 *Atl. Rep.* 747.

If an allegation of breach of duty by a carrier is inserted in plaintiff's statement in an action of assumpsit, in addition to the allegation of breach of contract, the court will, on a rule for a more specific statement, direct the allegation of breach of duty to be stricken out. *Hunter v. Erie & W. Transp. Co.*, 1 *Pa. Dist.* 538.

170. — as irrelevant.—Where the action is to recover for death caused by cars being thrown from a track through alleged defects in the track, a charge that the cars at different times prior to the accident had been thrown from the track at the same place by reason of defects of which defendant had knowledge is proper as tending to show negligence, and it is error to strike out the charge as irrelevant and immaterial. *Wols v. Dry Dock, E. B. & B. R. Co.*, 36 *N. Y. S. R.* 328, 59 *Hun* 618, 13 *N. Y. Supp.* 129.

In an action for damages to abutting property from the construction and operation of a railroad in a street, an answer which is, in effect, a plea of license from the city to construct and operate the railroad in the street cannot be stricken out on the ground of irrelevancy or immateriality. *Hatch v. Tacoma, O. & G. H. R. Co.*, 6 *Wash.* 1, 32 *Pac. Rep.* 1063.—*FOLLOWED IN Silsby v. Tacoma, O. & G. H. R. Co.*, 6 *Wash.* 295.

171. — as impertinent.—A bill prayed that respondent might be enjoined from erecting a railroad bridge across a river upon the ground that it would injure the orator's bridge by infringing the vested rights conferred by his charter. The answer stated that railway communications were not discovered and brought into use until long after the date of the orator's charter. *Held*, that this statement was not impertinent, because in order to determine the rights of the parties it might become necessary to inquire whether the orator's bridge was intended and calculated to answer the purpose of a railway bridge, and whether the latter was so different from the former that it could not be considered as violating the exclusive privileges conferred by the orator's charter. *Tucker v. Cheshire R. Co.*, 21 *N. H.* 29.—*QUOTED IN Lake v. Virginia & T. R. Co.*, 7 *Nev.* 294. *REVIEWED IN Prop'rs of Bridges v. Hoboken L. & I. Co.*, 13 *N. J. Eq.* 503.

172. When motion to make more definite, certain, or specific is the proper remedy.—Where, in an action for damages resulting from negligence of defendant, the complaint contains a general averment of such negligence, objection that such averment is uncertain cannot be made by demurrer, but only by a motion to make more specific. *Pennsylvania Co. v. Sedwick*, 59 *Ind.* 336. *Ohio & M. R. Co. v. Collarn*, 5 *Am. & Eng. R. Cas.* 554, 73 *Ind.* 261, 38 *Am. Rep.* 134. *Cleveland, C. & I. R. Co. v. Wynant*, 100 *Ind.* 160. *Pittsburgh, C. & St. L. R. Co. v. Hixon*, 32 *Am. & Eng. R. Cas.* 374, 110 *Ind.* 225, 11 *N. E. Rep.* 285. *Ohio & M. R. Co. v. Walker*, 32 *Am. & Eng. R. Cas.* 121, 113 *Ind.* 196, 15 *N. E. Rep.* 234, 12 *West. Rep.* 731. *Ohio & M. R. Co. v. Hecht*, 34 *Am. & Eng. R. Cas.* 447, 115 *Ind.* 443, 15 *West. Rep.* 122, 17 *N. E. Rep.* 297. *Pittsburgh, C. & St. L. R. Co. v. Kitley*, 37 *Am. & Eng. R. Cas.* 511, 118 *Ind.* 152, 20 *N. E. Rep.* 727. *Wild v. Oregon S. L. & U. N. R. Co.*, 21 *Oreg.* 159, 27 *Pac. Rep.* 954.

The letters "C. O. D." used in a complaint against an express company, have acquired in the commerce of the country such a fixed and determinate meaning that courts and juries, from their general information, will readily understand what they mean. If such a complaint be defective for want of an averment of their meaning, the defect is one to be reached by a

motion to make more specific; a motion in arrest of judgment will not reach such defect. *United States Exp. Co. v. Keefer*, 59 *Ind.* 263.

If the petition fails to show whether the road obstructed was a public or private road, this defect should have been brought to the attention of the court by a motion to make the petition more definite and certain, and not by an objection to the admission of any testimony. The failure to file the proper motion must be treated as a waiver of the defect. *Autenrieth v. St. Louis & S. F. R. Co.*, 36 *Mo. App.* 254.

173. When motion to make more definite or specific will be granted.

—A complaint for a personal injury alleged that plaintiff, without his fault or negligence, was injured by "being on one of said defendant's trains, the servants of the defendant, while said train was in motion, ordered and compelled him to jump from said train, the coaches of which passed over his lower limbs," whereby, etc.; "that said injuries were committed and perpetrated upon him by the carelessness and negligence of the defendant's servants," etc. *Held*, that the refusal of a motion to make more specific, by showing by what right the plaintiff was on the train, and also more particularly the negligence of defendant's servants, was error. *Pennsylvania Co. v. Dean*, 18 *Am. & Eng. R. Cas.* 188, 92 *Ind.* 459.—**DISTINGUISHED** IN *Wabash R. Co. v. Savage*, 28 *Am. & Eng. R. Cas.* 288, 110 *Ind.* 156.

Where a complaint by an employé charges that plaintiff was ordered to perform certain hazardous work with which he was unacquainted, by "his superior in rank in the service" of such defendant, whereby, etc., the same is not sufficiently specific, and a motion to require him to make his complaint more certain, so as to show the position in defendant's service and the relation to both defendant and plaintiff occupied by the persons alleged to have given such orders to him, should be sustained. *Pittsburgh, C. & St. L. R. Co. v. Adams*, 23 *Am. & Eng. R. Cas.* 408, 105 *Ind.* 151, 5 *N. E. Rep.* 187.

On February 6, 1867, the electors of a county duly authorized their commissioners to subscribe to the stock of a railroad and to issue bonds in payment. Several conditions were prescribed, among them one that the company should complete and equip twenty-four miles of road before January 1,

1868. All the conditions were complied with except that the twenty-four miles were not completed for some time after the time fixed. In July, 1869, the commissioners issued the bonds and received the stock. In January, 1870, the term of office of the then county commissioners expired. The coupons of these bonds falling due in January, 1870 and 1871, were duly paid. No action or proceedings were had by the county to question the validity of the bonds until August, 1871, when this action was brought against the company to recover the value of the bonds. *Held*, that if the commissioners acted in good faith, honestly, and in obedience to their unbiased judgment as to the best interests of the county the action cannot be maintained; and if it be claimed that they fraudulently and corruptly combined and conspired with the company to defraud the county the petition should state the facts showing the terms, nature, and extent of the combination and conspiracy, and not simply allege in general terms that there was such a combination and conspiracy; and that as the latter was the only allegation a motion to make the petition more definite and certain ought to have been sustained. *Leavenworth, L. & G. R. Co. v. Douglas County Com'rs*, 18 *Kan.* 169, 15 *Am. Ry. Rep.* 256.

If a petition contains but a general allegation of negligence, it is subject to a motion requiring it to be made more definite and certain, and it is error for the court to overrule a proper motion presented for that purpose. *Atchison, T. & S. F. R. Co. v. O'Neill*, 49 *Kan.* 367, 30 *Pac. Rep.* 470.

The right of the trial court to order the pleadings to be made more specific is very largely a matter of discretion. So it was held that the court did not exceed its powers, in an action by a brakeman to recover for injuries received by his train being thrown from the track, in ordering the complaint to be made more specific, where it alleged that the injuries were due to the conduct of the company "in failing, neglecting, and omitting to use due care and diligence to repair said track at said point after the same was defective, and said repairs were necessary, to its knowledge," and in permitting ties to remain that were "defective, rotten, and unsafe," and "in not properly fastening the rails." *Madden v. Minneapolis & St. L. R. Co.*, 30 *Minn.* 453.—**FOLLOWED** IN *Lehnertz v. Minneapolis & St. L. R. Co.*, 15 *Am. & Eng. R. Cas.* 370, 31 *Minn.* 219.

Where the action is to recover damages for failing to furnish shipping facilities for railroad ties, a charge that the company demanded exorbitant freight rates and refused to furnish such facilities in order that it might take all of the profit of the business to itself is too indefinite. *Spurlock v. Missouri Pac. R. Co.*, 93 Mo. 530, 12 West. Rep. 347, 6 S. W. Rep. 349.

Where the action is to recover damages for a discrimination in freight rates, a complaint which merely alleges that the services rendered to plaintiffs and those rendered to other shippers were the same, and were rendered upon like conditions and similar circumstances, is but a deduction derived from a comparison of the different shipments, and should be amended by setting out the facts attending the different shipments. *Langdon v. New York, L. E. & W. R. Co.*, 39 N. Y. S. R. 471, 60 Hun 584, 15 N. Y. Supp. 255; 27 Abb. N. Cas. 166.

174. When the motion should be denied.—Where plaintiff sues to recover damages by reason of the negligence of defendant in suddenly accelerating the speed of a train while he was alighting from it, a motion to require plaintiff, to make the complaint more specific by stating what agent or employé of defendant caused the motion of the train to be accelerated and what acts of such agent caused the accelerated motion is properly refused, such facts being peculiarly within defendant's knowledge, and the pleading being construed in view of the general knowledge of the manner of running trains. *Louisville & N. R. Co. v. Crunk*, 41 Am. & Eng. R. Cas. 158, 119 Ind. 542, 21 N. E. Rep. 31. — DISTINGUISHED IN *Coleman v. Georgia R. & B. Co.*, 84 Ga. 1. OVERRULED IN *Little Rock & Ft. S. R. Co. v. Lawton*, 55 Ark. 428.

A complaint alleged that defendant was a common carrier, and at a certain date plaintiff took passage and was admitted as a passenger in one of defendant's cars to be carried from Medora, in Jackson county, to his home in Sparksville, both of said stations being on said defendant's road. Held, that a motion to make the complaint more specific in alleging how and in what manner he was admitted as a passenger, and whether he purchased a ticket or was prevented therefrom, and, if so, how, or whether he paid or tendered his fare from the point of entrance to the point of destination, is prop-

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erly overruled. The facts stated made him a passenger. *Ohio & M. R. Co. v. Craucher*, 132 Ind. 275, 31 N. E. Rep. 941.

In an action by an employé for injuries sustained while coupling cars it was averred that the engine used was defective, and could not be handled or controlled so as to be safe, such difficulty in handling and managing being in part caused by the leaking of the throttle, and in part by defects unknown to plaintiff and which he is unable to more particularly describe or specify, and that said defects combined were such that when said engine was reversed and caused to move backward it would often give a sudden spring or start, and would move with a sudden rush or spring. It was also alleged that defendant knowingly employed an incompetent engineer to operate said engine; that defendant had long known of the dangerous and defective condition of the engine. Held, that a motion to make the complaint more specific in that plaintiff should be required to state the length of time the engine had been defective and the length of time the engineer had been negligent, the exact defects in the engine, the particulars which constituted the incompetency of the engineer, was properly overruled. *Wabash & W. R. Co. v. Morgan*, 132 Ind. 430, 31 N. E. Rep. 661, 32 N. E. Rep. 85.

In an action for damages against a railway company the petition alleged that "defendant, by its agents and servants, did run * * * one of their engines in such a grossly negligent and careless manner that the same ran against and over" plaintiff's cow and killed her. Held, that the petition was not vulnerable to a motion for a more specific statement. *Grinde v. Milwaukee & St. P. R. Co.*, 42 Iowa 376.

Plaintiff sued for injuries received in coupling cars, and alleged that the draw bars of the coupling appliances of the two cars "were not properly fastened, and were loose, defective, and insufficient, and on account thereof would not and did not remain in their proper places when such cars were driven together, as was usual and necessary in making said couplings," in consequence of which he was injured. The company moved to strike out the words "defective and insufficient" as irrelevant and redundant, or that, as to them, the complaint be made more definite and certain. Held, that the motion was properly refused. *Tierney v. Minne-*

apolis & St. L. R. Co., 15 *Am. & Eng. R. Cas.* 290, 31 *Minn.* 234, 17 *N. W. Rep.* 377.

A complaint alleged that plaintiff was injured through the negligence of defendant in leaving unguarded in its yard a receptacle for boiling water, into which plaintiff fell "while he was lawfully upon the premises by invitation of defendant, having been invited there by said defendant to obtain employment." *Held*, that a motion to make the pleading more definite and certain by stating how and when such invitation was extended, and the name and occupation of the person or agent of defendant who extended it, was properly denied. *Lee v. Minneapolis & St. L. R. Co.*, 34 *Minn.* 225, 25 *N. W. Rep.* 399.—FOLLOWED IN *Todd v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 358, 35 *N. W. Rep.* 5.

The indefiniteness or uncertainty to be relieved against on motion is only such as appears on the face of the pleading itself, and not an uncertainty arising from extrinsic facts as to what particular evidence may be produced to support it. *Todd v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 358, 35 *N. W. Rep.* 5.—FOLLOWING *Lee v. Minneapolis & St. L. R. Co.*, 34 *Minn.* 225, 25 *N. W. Rep.* 399.

A complaint need not state the names of officers or agents of the defendant who did the act constituting plaintiff's cause of action, but such acts may be pleaded generally as done by defendant. *Todd v. Minneapolis & St. L. R. Co.*, 37 *Minn.* 358, 35 *N. W. Rep.* 5.

A petition charged several defendants jointly with operating a railroad construction train in a negligent and careless manner by negligently running it at a high rate of speed through a herd of cattle which were near the track, whereby a part of the cattle were run over, and the train derailed and thrown from the track, by which plaintiff, who was riding thereon, was injured. *Held*, that the district court did not err in overruling a motion to require a more specific statement in the petition by showing which one of defendants was operating the road, if either one, or, if all, whether jointly or severally, which one employed the trainmen, and which was charged with the alleged negligence. *Chicago, B. & Q. R. Co. v. Clark*, 38 *Am. & Eng. R. Cas.* 192, 26 *Neb.* 645, 42 *N. W. Rep.* 703.

Where the action is to vacate a charter to build an underground railroad, and both

the original company and its vendee are made defendants, a motion by the vendee to require the plaintiff to amend by describing more definitely the tunnels to be constructed is properly overruled, as the maps and profiles filed by the original company sufficiently describe such tunnels. *People v. New York C. U. R. Co.*, 39 *N. Y. S. R.* 571, 15 *N. Y. Supp.* 245, 60 *Hun* 583, *mem.*

In an action for killing plaintiff's intestate at a highway crossing, the complaint stated that the highway approached the track from the north through a deep cut, so that a person approaching from that direction was unable, for a long distance before reaching the track, to see a train coming from the west; that defendant was negligently running a train from the west at the rate of fifty miles an hour without giving a signal; that the track was so negligently constructed as to lower the grade of the highway and create a high bank on the north side of the track, which obstructed the view of the track and rendered the highway dangerous. *Held*, that the court properly refused a motion that the complaint be made more definite and certain by specifying for what distance north of the track the view of the train coming from the west was obscured to a person approaching on the highway from the north, and also by specifying the direction from which the intestate was approaching the track. *Schneider v. Wisconsin C. Co.*, 81 *Wis.* 356, 51 *N. W. Rep.* 582.

175. Waiver of defects by failing to demur.—An objection that there is a defect of parties defendant, in that the directors who were charged with fraud as being interested in the sale sought to be annulled should have been made parties defendant, is waived by a failure to raise it by demurrer or answer. *Smith v. Dorn*, 96 *Cal.* 73, 30 *Pac. Rep.* 1024.

Where a declaration against a common carrier is susceptible of being construed equally as an action upon contract or an action of tort based upon an alleged violation of a public duty by the carrier, and the same is not demurred to, plaintiff at the trial may, at his option, elect to treat it as either species of action. *Central R. Co. v. Pickett*, 87 *Ga.* 734, 13 *S. E. Rep.* 750.

Where there is no special demurrer to a declaration, it is not error to refuse to strike from the latter certain words, as not relevant either in matter of form or substance,

the motion to strike being made orally at the trial. *Augusta R. Co. v. Glover*, 58 Am. & Eng. R. Cas. 269, 92 Ga. 132, 18 S. E. Rep. 406.

Where the action is to recover damages for injuries both to plaintiff's person and to his property sustained by colliding with defendant's car, while driving on the street, damages both for injuries to his person and to his property may be recovered under a single count, properly declaring on both, especially where there is no demurrer, and no objection to the introduction of evidence as to both injuries. *Chicago W. D. R. Co. v. Ingraham*, 41 Am. & Eng. R. Cas. 243, 131 Ill. 659, 23 N. E. Rep. 350.—NOT FOLLOWING *Brunsdon v. Humphrey*, 14 Q. B. D. 141.

If a declaration in an action for negligence is defective in failing to aver due care on the part of plaintiff, defendant should demur, or call the attention of the court to it in some other way, before final judgment, so as to afford an opportunity to obviate the defect by amendment. Such defects are cured by the verdict. *Chicago, R. I. & P. R. Co. v. Clough*, 134 Ill. 586, 25 N. E. Rep. 664, 29 N. E. Rep. 184; affirming 33 Ill. App. 129.

Where not demurred to, a declaration for negligent injury must be held sufficient, after verdict, if it states a cause of action though it does not specify the negligence, and especially if it counts upon other negligence which it does set forth. *So held*, where a workman sued his employer for an injury suffered from the use of defective machinery and did not point out the defect, but also averred as negligence that he had been set at work that was outside the scope of his employment. *Broderick v. Detroit Union R. S. & D. Co.*, 56 Mich. 261, 22 N. W. Rep. 802, 56 Am. Rep. 382.

Under Oreg. Code each cause of action must be separately stated, with the relief sought, so as to be intelligently distinguished, yet where the corporate existence of a defendant and the ownership of its road is not only made certain by reference, but the answer supplies the defect in each count, in the absence of a demurrer specifying the objection, after the evidence is submitted, the objection comes too late. *Eaton v. Oregon R. & N. Co.*, 43 Am. & Eng. R. Cas. 57, 19 Oreg. 391, 24 Pac. Rep. 415.

Plaintiff sued for an injury received while attempting to get on a passenger-car, and

the complaint, after describing the manner of the injury, charged that the conductor acted negligently, and further charged that the injury was caused by his wilfulness and gross negligence. *Held*, that an objection that the complaint was bad for duplicity could only be taken advantage of by demurrer, and not by a motion at the trial for a nonsuit. *Winterson v. Eighth Ave. R. Co.*, 2 Hill. (N. Y.) 389.

176. Effect of pleading to cure prior errors.—When the objection of a misjoinder of two causes of action, one for a personal injury and the other for a subsequent injury to property, is properly raised by demurrer, a defendant does not waive the objection by answering and going to trial after the demurrer has been overruled. *Thelin v. Stewart*, 100 Cal. 372, 34 Pac. Rep. 861.

Where a defendant pleads a tender, he admits that plaintiff has a valid cause of action for the amount tendered, and he cannot afterwards claim, in a motion in arrest of judgment, that plaintiff's petition does not contain the necessary averments to entitle him to recover in any sum. *Wilson v. Chicago, M. & St. P. R. Co.*, 68 Iowa 673, 27 N. W. Rep. 916.

In plaintiff's first amended petition she alleged that the deceased made the coupling by order of his superiors. This allegation was not denied in the answer to such petition. In plaintiff's second amended petition she specifically alleged that the deceased was ordered to make the coupling by the conductor, and this allegation was positively denied. *Held*, that the denial to the second amended petition cured the omission in the answer to the first amended petition, and put the burden of proving that deceased acted under the order of the conductor upon the plaintiff. *Brice v. Louisville & N. R. Co.*, (Ky.) 38 Am. & Eng. R. Cas. 38, 9 S. W. Rep. 288.

A defect in a complaint in failing to allege that the person whose death is sued for was a passenger on defendant's train is waived by an issue presented by defendant that he was not a passenger and accepted by plaintiff. *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512, 3 L. R. A. 156, 10 S. W. Rep. 486.

Although plaintiff charges in his petition that the accident occurred at a street crossing, yet if defendant alleges that it occurred while he was working on a trestle, plaintiff may recover if he is injured by defend-

ant's negligence at the latter place. *Gulf, C. & S. F. R. Co. v. Anderson*, 42 *Am. & Eng. R. Cas.* 160, 76 *Tex.* 244, 13 *S. W. Rep.* 196.

177. Waiver by failing to object.—

When, in a suit to enjoin a railroad company from occupying plaintiff's premises, plaintiff improperly joins a prayer for damages which can only be recovered at law, a failure on the part of defendant to object to the misjoinder before defense is made, as required by the Arkansas Code of Practice, is a waiver of the defect. *Organ v. Memphis & L. R. R. Co.*, 39 *Am. & Eng. R. Cas.* 75, 51 *Ark.* 235, 11 *S. W. Rep.* 96.

Under Iowa Code, § 2646, when a petition contains more than one cause of action, each must be stated in a count or division by itself, and must be sufficient in itself; but when this rule is violated defendant must make his objection in the court below, and if he fails to do so and goes to trial he thereby waives the objection. *Cruver v. Chicago, M. & St. P. R. Co.*, 62 *Iowa* 460, 17 *N. W. Rep.* 661.

When no motion is made for a more specific statement, a complaint averring plaintiff's ownership of certain wheat destroyed, the number of bushels, a demand for the same or payment of its value, and demanding damages in the sum of \$600, interest, and costs, is sufficient to entitle plaintiff to judgment, although no value of the wheat, nor the fact that plaintiff was damaged by its loss, is specifically alleged. *Independence Mills Co. v. Burlington, C. R. & N. R. Co.*, 32 *Am. & Eng. R. Cas.* 456, 72 *Iowa* 535, 34 *N. W. Rep.* 320.

An averment in a petition that a certain person was general manager of a railway company, and that on behalf of the company he promised to give a pass over its roads, is a sufficient allegation of the authority of the agent after judgment for plaintiff, when there is no showing that such averment was challenged in the trial court. *Atchison, T. & S. F. R. Co. v. English*, 38 *Kan.* 110, 16 *Pac. Rep.* 82.

Under Wagn. Mo. St. 1015, § 10, an objection to a petition for misjoinder of counts, or a union of several causes in one count, if not made by demurrer or motion to strike out, will be deemed to have been waived, and cannot be raised by motion in arrest of judgment. *House v. Lowell*, 45 *Mo.* 381.—**OVERRULING** *Hoagland v. Hannibal & St. J. R. Co.*, 39 *Mo.* 451.

In an action on municipal bonds, every essential element of the power given to the municipality to make the subscription must be pleaded. So where the action is on county bonds issued to one railroad, a petition alleging that they were issued to another road, but failing to show any connection between the two roads, or that the county ever subscribed to the stock of the first road, or that the company had ever accepted a subscription, or that a vote of the people had been taken, is so defective as not to be cured by a failure of defendant to object, or by judgment by default, or by the statute of jeofails. *Weil v. Greene County*, 69 *Mo.* 281.

Where, on a trial of an action for the death of a person resulting from the negligent act of a railroad, both parties on the introduction of the evidence, and by their instructions, treat an issue as properly before the jury, the objection that such issue was not within the averments of the petition is waived. *Hils v. Missouri Pac. R. Co.*, 101 *Mo.* 36, 13 *S. W. Rep.* 946.

Where plaintiff alleges with reasonable precision several injuries resulting from one act, with separate claims of damage therefor, the defendant, without having urged any special exception to the manner of the averment, cannot construe the pleading most favorable to himself, and require the court to charge upon such construction. Such case is not one in which the rule that the pleading is to be construed most strongly against the pleader should be applied. *Texas C. R. Co. v. Stuart*, 1 *Tex. Civ. App.* 642, 20 *S. W. Rep.* 962.

178. — by delay in objecting.—

An objection that an amendment of a petition entirely changes the cause of action, as that it changes the action from one to recover from a carrier a statutory penalty to one based upon the common law, must be made at the time of the amendment. It cannot be made for the first time at the trial, nor on appeal. *Spurlock v. Missouri Pac. R. Co.*, 93 *Mo.* 530, 12 *West. Rep.* 347, 6 *S. W. Rep.* 349.

179. Disregarding surplusage and non-prejudicial errors.—One count in a complaint for killing stock only averred negligence in running a train at a greater speed than eight miles per hour, in violation of the statute. There was no statute regulating speed in the absence of an ordinance, and it was not averred that the

speed was dangerous or unreasonably high. *Held*, that the count was faulty and properly disregarded. *Duggan v. Peoria, D. & E. R. Co.*, 42 Ill. App. 536.

Where plaintiff sues to recover the value of land appropriated as a right of way by defendant, and joins a cause of action for damages sustained by reason of the faulty construction of the road, and the court does not have jurisdiction of the first cause of action, it may be treated as surplusage, and plaintiff may recover under the second cause of action. *Allen v. Wilmington & W. R. Co.*, 102 N. Car. 381, 9 S. E. Rep. 4.

180. Errors cured by verdict.—In an action against a railroad for causing death at a crossing, a declaration that does not charge that the railroad causing the death was used in the state and county where the action is brought is good after verdict. *Chicago & N. I. R. Co. v. Morris*, 26 Ill. 400.—FOLLOWED IN *Toledo, P. & W. R. Co. v. Webster*, 55 Ill. 338.

Where the action is based upon a personal injury caused by defendant's negligence, a failure to aver in the declaration that plaintiff exercised proper care is cured by verdict. *Illinois C. R. Co. v. Simmons*, 38 Ill. 242.—OVERRULING DICTUM OF *Chicago, B. & Q. R. Co. v. Hazzard*, 26 Ill. 373.—*Louisville, N. A. & C. R. Co. v. Ader*, 110 Ind. 376, 9 West. Rep. 190, 11 N. E. Rep. 437.

A complaint for killing an animal, under Ind. Rev. St. 1881, § 4025, good in other respects, which avers that defendant "ran against and over said mare and killed her," not showing that the injury was done by the locomotives, cars, or other carriages run upon the road, is good after verdict. *Louisville, N. A. & C. R. Co. v. Harrington*, 19 Am. & Eng. R. Cas. 606, 92 Ind. 457.—DISTINGUISHING *Pittsburgh, C. & St. L. R. Co. v. Troxell*, 57 Ind. 246; *Pittsburgh, C. & St. L. R. Co. v. Hannon*, 60 Ind. 417; *Ricketts v. Sandifer*, 69 Ind. 318.

While an objection to a complaint, upon the ground that it does not state facts sufficient to constitute a cause of action, is not waived by defendant's failure to present such objection either by demurrer or by answer, but may be made for the first time by an assignment of error on appeal, still such error can only be predicated upon the complaint as an entirety, and will not call in question the sufficiency of the facts stated in the separate paragraphs or counts thereof. *Louisville, N. A. & C. R. Co. v. Ader*, 110

Ind. 376, 11 N. E. Rep. 437, 9 West. Rep. 190.

A petition in an action by a servant against the master for negligently furnishing unsafe appliances to the servant stated that "defendant, wholly disregarding its duty to this defendant, in that behalf, did furnish," etc.; it being quite apparent that the second use of the word "defendant" was a clerical mistake, and as it appeared from other averments in the petition that the appliance in question was negligently furnished plaintiff by defendant, the defect in the petition is cured by verdict. *Johnson v. Missouri Pac. R. Co.*, 96 Mo. 340, 9 S. W. Rep. 790.—FOLLOWED IN *Pope v. Kansas City Cable R. Co.*, 43 Am. & Eng. R. Cas. 290, 99 Mo. 400, 12 S. W. Rep. 891.

A petition containing facts sufficient to fix a liability upon a common carrier at common law is good after verdict. *Austin v. St. Louis & St. P. Packet Co.*, 15 Mo. App. 197.

Though a complaint claims damages for "profits" of land, yet where the whole complaint shows that the object of the action was to recover damages for being deprived of the use of the land, that construction should be given the complaint after verdict. *Weller v. Oregon R. & N. Co.*, 15 Oreg. 153, 13 Pac. Rep. 768.

PLEASURE GROUNDS.

At seaside resort, condemnation of, see EMINENT DOMAIN, 98.

PLEDGE; COLLATERAL SECURITY.

Of assets, power of receivers to make, see RECEIVERS, 53.

— corporate property, authority of president to make, see PRESIDENT, 4

— — by directors, see DIRECTORS, ETC., 40.

Power of corporations to pledge, see CORPORATIONS, 11.

Rights of holders of bonds as, see BONDS, 38; MORTGAGES, 270.

— — pledgee of corporate bonds, see BONDS, 38.

Transfer of bill of lading as, see BILLS OF LADING, 124-128.

— — stock by way of, see STOCK, 48-49.

Waiver of lien by taking, see LIENS, 30.

1. Railroad, when subject to pledge.—A railroad constructed on soil not belonging to the owner of, nor to the corporation which built, the road, is mova-

ble property, and as such liable to the law regulating pledges on movables. *Woodward v. American Exposition R. Co.*, 30 *Am. & Eng. R. Cas.* 256, 39 *La. Ann.* 566, 2 *So. Rep.* 413.

2. Pledge of stock, effect of.—Upon a pledge of stock in a railroad corporation in New Hampshire there should be such delivery as the nature of the thing is capable of, and to be good against a subsequent attaching creditor the pledgee must be clothed with all the usual muniments and indicia of ownership. *Pinkerton v. Manchester & L. R. Co.*, 42 *N. H.* 424.

Where stock in a corporation has been pledged for the "redemption of certificates of debt," and the certificates bind the debtor for the payment of "the sum therein mentioned, and the interest thereon," the stock is bound for the payment of the interest itself, and a foreclosure may be decreed on default in payment of any instalment of interest. *Swasey v. North Carolina R. Co.*, 1 *Hughes (U. S.)* 17.

A contractor who was entitled to stock in a newly organized railroad executed an instrument pledging it as security for the fulfilment of an existing contract. *Held*, that the instrument was a valid pledge of the stock, and when the certificates were issued by the railway company vested the stock in the pledgee. *Appeal of Harris, (Pa.)* 12 *Atl. Rep.* 743.

3. Rights and liabilities of pledgee.—The pledgee of a railroad may take legal possession through a third person chosen by him and the pledgor. *Woodward v. American Exposition R. Co.*, 30 *Am. & Eng. R. Cas.* 256, 39 *La. Ann.* 566, 2 *So. Rep.* 413.

Where a railroad company under statutory authority pledges its bonds as collateral authorizing the pledgee corporation to sell them without notice in case of non-payment of the loan at maturity, with the further provision that the pledgee may become the purchaser thereof in his own right, the sale and purchase of these bonds under and within the terms of the railroad company's note and pledge are not *per se* void, but only voidable at the instance of the corporation or its stockholders, third parties or strangers having no right to question the purchaser's title, and the purchaser may foreclose for the full amount thereof, though such amount be largely in excess of the amount of the loan remaining unpaid. *Farmers' L. & T. Co. v. Toledo & S. H. R.*

Co., 57 *Am. & Eng. R. Cas.* 144, 54 *Fed. Rep.* 759.

Where a railroad company pledges its own bonds as collateral for the payment of debts contracted by the company, and the pledgee cuts therefrom and collects of the agents of the company the interest coupons that afterwards become due, such acts cannot operate as a conversion of the bonds by the pledgee. *Androscoggin R. Co. v. Auburn Bank*, 48 *Me.* 335.

A perfected pledge—*held*, not avoided or terminated by the fact that for a special purpose, and for the benefit of the pledgee, he caused the property to be nominally consigned, on a shipment of the same, to the pledgors. *Cooley v. Minnesota Transfer R. Co.*, 55 *Am. & Eng. R. Cas.* 616, 53 *Minn.* 327, 55 *N. W. Rep.* 141.

A subsequent garnishment by an existing creditor of the pledgors would not thereby secure a right superior to that of the pledgee. *Cooley v. Minnesota Transfer R. Co.*, 55 *Am. & Eng. R. Cas.* 616, 53 *Minn.* 327, 55 *N. W. Rep.* 141.

A sale of the pledged property by the pledgors to the pledgee subsequent to the garnishment would not extinguish the rights of the pledgee as between himself and the garnishing creditor. *Cooley v. Minnesota Transfer R. Co.*, 55 *Am. & Eng. R. Cas.* 616, 53 *Minn.* 327, 55 *N. W. Rep.* 141.

Where a wife pledges her trunk to pay the railroad fare of a child traveling under her charge, and the husband agrees to pay the fare if the trunk is forwarded, and when forwarded replevins it, the road, the pledgor, is entitled to a finding that its special interest in the trunk is the amount of the fare thus promised to be paid. *Coquard v. Union Depot Co.*, 10 *Mo. App.* 261.

In such case the husband's contract is not to pay the debt of another and is not within the statute of frauds. *Coquard v. Union Depot Co.*, 10 *Mo. App.* 261.

An incorporated company was authorized by its charter to "advance moneys * * * upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held*, that, conceding the discount was in violation of the provision of the statute against unauthorized banking, so as to render the note void, the loan and its security were valid and could be enforced. *Duncomb v. New York, H. & N. R. Co.*, 4 *Am. & Eng. R. Cas.* 293, 84 *N. Y.* 190; reversing 23 *Hun* 291.

A creditor of a railroad obtained judgment against it, and sued out execution, and levied upon bonds which were pledged to him to secure his debt, and at the execution sale bought the bonds. *Held*, that he had a right to waive the lien created by the pledge, and by the purchase obtained title to the bonds, subject to the right of the company to redeem by paying the amount of the debt for which the bonds were pledged. *Sickles v. Richardson*, 23 Hun (N. Y.) 559.

A railroad bond was placed in the hands of a director of the company to be used as collateral in raising money for the use of the company on notes of a third party. He did not so use it, but pledged it with his own notes, which he discounted and paid the proceeds to the company. *Held*, that the company, having received the proceeds of the notes without objection, must be considered as having ratified the disposition of the bond and was liable to the pledgee. *Flemming v. Camden & A. R. Co.*, 16 Phila. (Pa.) 60.

Where bonds are pledged as collateral, the holders have a right to receive the full amount of the bonds, and not only the face of their claims with interest, unless subsequent creditors can show a resulting interest in their debtor. The holders must be left to account to their principal for any balance that may be over the amount due to themselves. *Rice v. Southern Pennsylvania I. & R. Co.*, 9 Phila. (Pa.) 294.—FOLLOWING *McElrath v. Pittsburg & S. R. Co.*, 68 Pa. St. 37.

Where a railroad corporation pledges its bonds as collateral to secure a debt smaller than the par value of the bonds, the pledgee is only entitled to recover the amount secured by the pledge. *Jesup v. City Bank of Racine*, 14 Wis. 331.

4. Invalid and unauthorized pledges.—Stockholders of a street-car company voted to issue bonds "for the purpose of extending and constructing the road, purchasing rolling stock and equipments, paying for labor done and to be done in the construction" and operation of the road. After several attempts to sell them the president and vice-president of the company pledged them to secure antecedent debts which were due largely to other companies of which such officers were directors and officers. *Held*, that the pledge was in fraud of the rights of the stockholders and in-

valid. *Farmers' L. & T. Co. v. San Diego Street-Car Co.*, 45 Fed. Rep. 518.

A transfer of bonds belonging to a railroad company by the president of the corporation as collateral security for a pre-existing debt due by himself, no new consideration having passed at the time, is void, although the president was authorized by the board of directors to negotiate the bonds for the company. *Pittsburgh & C. R. Co. v. Barker*, 29 Pa. St. 160.

Where such bonds are pledged as collateral security for money previously deposited with the president as a banker, and no further time is given for the payment of the deposit, the certificates being retained by the depositor, and no change made upon the books of the banker, it is strong evidence that the deposits remained after the pledge of the bonds as before subject to immediate withdrawal. Such facts negative any inference to be drawn from the pledge of the securities that "further time" for the payment of the deposits was given in consideration of such pledge. *Pittsburgh & C. R. Co. v. Barker*, 29 Pa. St. 160.

POLES.

Right to erect, in streets, see ELECTRIC RAILWAYS, 9-15.

POLICE OFFICERS.

Liability of company for false imprisonment by, see FALSE IMPRISONMENT, 10.

POLICE POWER.

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By company, when consent or deed from landowner will be presumed, see **EMINENT DOMAIN**, 207.

Demand for, prior to bringing ejectment, see **EJECTMENT**, 21.

— of, before bringing ejectment, see **EMINENT DOMAIN**, 1025.

Effect of judgment to warrant company in taking, see **EMINENT DOMAIN**, 849.

Necessary in plaintiff to maintain trespass, see **EMINENT DOMAIN**, 1063.

Necessity that defendant be in, to maintain ejectment, see **EJECTMENT**, 12.

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Persons in, when entitled to land damages, see **EMINENT DOMAIN**, 427.

Right of, in defendant as a defense in ejectment, see **EJECTMENT**, 17.

— party in, to appeal in condemnation proceedings, see **EMINENT DOMAIN**, 877.

— person in, to sue for damages caused by fire, see **FIRES**, 145-154.

— trustees to take, on default by mortgage, see **MORTGAGES**, 136-138.

Surrender of, as an element of land damages, see **EMINENT DOMAIN**, 680.

Under license from owner as a defense in ejectment, see **EMINENT DOMAIN**, 1020. What is adverse, see **ADVERSE POSSESSION**, 2, 3.

— necessary in order to maintain trespass, see **TRESPASS**, 9.

— — — plaintiff to support trover, see **TROVER**, 5.

POSSESSORY WARRANT.

Form and sufficiency, generally, see **PROCESS**, 12.

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Carriage of, see **CARRIAGE OF PASSENGERS**, 54.

POSTHUMOUS CHILD.

Right of, to sue for damages for causing death of parent, see **DEATH BY WRONGFUL ACT**, 51.

When entitled to land damages, see **EMINENT DOMAIN**, 439.

POSTING.

Of rates, under New Hampshire statutes, see **CHARGES**, 68.

— rules of carrier, see **CARRIAGE OF PASSENGERS**, 68.

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POWER OF ATTORNEY.

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— instructions, see CARRIAGE OF LIVE STOCK, 153; CARRIAGE OF PASSENGERS, 602-607; NEGLIGENCE, 112-114.

— — appealing from denial of, see APPEAL AND ERROR, 18.

— — as to contributory negligence, see CONTRIBUTORY NEGLIGENCE, 112, 113.

— — in actions for causing death, see DEATH BY WRONGFUL ACT, 348-362.

— — — injuries to trespassers, see TRESPASSERS, INJURIES TO, 126, 127.

— — — stock-killing cases, see ANIMALS, INJURIES TO, 575, 576.

— — on trial, generally, see TRIAL, 159-178.

— — necessity of, see APPEAL AND ERROR, 100; EMINENT DOMAIN, 917.

— — refusal of, when ground for new trial, see NEW TRIAL, 7.

— — to jury on assessment of land damages, see EMINENT DOMAIN, 590, 591.

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— — — equity, see PLEADING, 85.

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Nature of and right to, see DIVIDENDS, 8.

PREFERRED STOCK.

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Priority of holders of, see MORTGAGES, 276.

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- On gold as damages in case of loss, see CARRIAGE OF MERCHANDISE, 759.
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- Of damages, waiver by landowner of, see EMINENT DOMAIN, 1022.

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- Of evidence as to contributory negligence, or its absence, see CONTRIBUTORY NEGLIGENCE, 101.
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- Acquirement of easements by, see EASEMENTS, 8.
- Acquiring right to turn surface water on land by, see FLOODING LANDS, 25.
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PRESIDENT.

- Authority of, to employ physician, see MEDICAL SERVICES, 9.
- Service of process on, see PROCESS, 22.

1. Authority, generally.*—(1) *In general.*—A president of a corporation may perform, without special or express authority, the numerous every-day affairs of the corporation, such as are incident to the execution of the trust reposed in him—such as custom or necessity has imposed upon the office. *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill 297.

The act of the president of an incorporated company in accepting conditional subscriptions is binding on the company. *Pittsburgh & C. R. Co. v. Stewart*, 41 Pa. St. 54.

And he may collect subscriptions to the capital stock. *East N. Y. & J. R. Co. v. Lighthall*, 5 Abb. Pr. N. S. (N. Y.) 458, 36 How. Pr. 481, 6 Robt. 407.

An authority to the president of a corporation "to make all contracts, and draw on the treasurer for all disbursements (countersigned by the secretary) under the direction of the board" does not authorize him to accept a bill without "the direction of the board." *Lasarus v. Shearer*, 2 Ala. 718.

Where the agent of a company drew a check for \$1000 in the company's name payable to himself and kept the money on the authority of the president of the company, who it appears was not authorized to allow the agent so to dispose of the funds, the agent must account to the company for the money and interest. *Sioux City R. Contracting Co. v. Walker*, 47 Iowa 699.

After a company had sold its road to a second company, a third company proposed to locate its road on lands purchased for the existing road, but being ignorant of the sale, gave notice to the original company. A trustee of the bondholders of the original company, who was also president of the second company, appeared, but did not disclose the sale. *Held*, that the second company was chargeable with notice, and was bound by the proceedings taken. *New York & N. E. R. Co. v. New York, N. H.*

*General powers of president and vice-president of corporations, see note, 14 L. R. A. 356.

Liability of company for contracts made by president, superintendent, division superintendent, and general agents or managers, see note, 20 L. R. A. 606.

& H. R. Co., 25 *Am. & Eng. R. Cas.* 215, 53 *Conn.* 274. — DISTINGUISHING *Platt v. Birmingham Axle Co.*, 41 *Conn.* 255. QUOTING *Fitchburg R. Co. v. Boston & M. R. Co.*, 3 *Cush. (Mass.)* 77.

A corporation can only act by its agents, and in order to bind the corporation the agency must appear, but this need not be shown by any resolution or other written evidence, but may be implied from facts and circumstances. A company, through its secretary, advertised a quantity of old rails for sale. Plaintiff's agent called on the secretary and was referred to the acting president, who was informed that plaintiff was a broker and would charge a commission of one per cent. for making the sale, to which the president agreed. *Held*, sufficient facts to justify the jury in finding that the president was authorized to contract for payment of a commission. *Northern C. R. Co. v. Bastian*, 15 *Md.* 494.

Where the president of a company obtains advances to pay interest, and the company pledges its earnings to secure the same, such pledge is for the security of the president, and it does not prevent him from paying out such earnings on other debts, if he deems it to the interest of the company to do so. *Duncan v. Mobile & O. R. Co.*, 3 *Woods (U. S.)* 567.

Defendant company was engaged in the manufacture and sale of a certain device for heating cars, and plaintiff sued to recover commissions for procuring railroad companies to fit up trains with the device, under a contract with defendant's president. Defendant claimed that the president was not authorized to make such a contract, as its by-laws made it the duty of the vice-president to attend to such matters. *Held*, that the contract being within the apparent scope of the president's duties, and relating strictly to the company's business, plaintiff was not bound by a by-law of which he did not have notice, and might recover. *Smith v. Martin A. F. Car Heater Co.*, 47 *N. Y. S. R.* 26, 64 *Hun* 639, 19 *N. Y. Supp.* 285.

(2) *Construction contracts*.—The president of a railroad company has no power, by virtue of his office simply, to let a contract in behalf of the company for the construction of its road, when the same is already under contract by the board of directors. *Templin v. Chicago, B. & P. R. Co.*, 34 *Am. & Eng. R. Cas.* 107, 73 *Iowa* 548, 35 *N. W. Rep.* 634.—FOLLOWED IN *Griffith v. Chicago, B.*

& P. R. Co., 74 *Iowa* 85, 36 *N. W. Rep.* 901. — *Griffith v. Chicago, B. & P. R. Co.*, 74 *Iowa* 85, 36 *N. W. Rep.* 901.—FOLLOWING *Templin v. Chicago, B. & P. R. Co.*, 73 *Iowa* 548.

After a company has entered into a written contract for the performance of certain work, the promise of its president to allow additional compensation to the contractors for the same work is without consideration, and not binding on the company. *Colcock v. Louisville, C. & C. R. Co.*, 1 *Strobb. (So. Car.)* 329. *Nesbitt v. Louisville, C. & C. R. Co.*, 2 *Spears (So. Car.)* 697.

Where a president of a corporation appears as the active agent in the execution of any work, parties employed by him have a right to assume that he is acting for the corporation, and that his acts in that respect are its acts and binding upon it. *Solomon R. Co. v. Jones*, 15 *Am. & Eng. R. Cas.* 201, 30 *Kan.* 601, 2 *Pac. Rep.* 657.

The authority of the president of a railroad company to make contracts for necessary labor for the company is incident to his office. And he may furnish evidence of the amount payable under the contract, either before or after the service, and put that evidence, in his discretion, into the form of a due bill or promissory note, unless such power is restricted by special legislation or by regulations of the company known to the other contracting party. *Richmond, F. & P. R. Co. v. Snead*, 19 *Gratt. (Va.)* 54.

A railroad company delivered bonds to trustees to be used in the construction of a railroad, and the trustees delivered a portion of them to the president of the company to be delivered to certain contractors, with whom the president had contracted for the company. When sued to compel him to deliver up the bonds, he set up the defense that directly after the contract was made he became an assignee of part of the contract and was entitled to retain the bonds, not only on account of such interest in the contract, but because the other contractors owed him. It appeared that the contract was made with the agreement that an interest therein was to be transferred to the president. *Held*, that such contract, as between the company and its president, was fraudulent and void, and the facts set up constitute no defense. *Flint & P. M. R. Co. v. Dewey*, 14 *Mich.* 477.

2. — *to purchase for company*.—Immediately before an alleged sale, the

president made a large purchase of railroad iron, and the corporation sanctioned the proceeding, received and used the iron and paid for it in the manner agreed to by the president. Upon application to plaintiff by the contractor for the building of defendant's road, for railroad material to be used, and afterwards actually used in the building of the road, plaintiff told the president that he would sell to the company the material in question upon its order, but would not sell to the contractor, and thereupon the president told him to send the materials to the company. Plaintiff's bill was sent to the president, who replied that he would present it to the directors. The president always acted for the company, and the directors, when spoken to upon this subject, always referred to the president, and took no part themselves. *Held*, that it was a question for the jury whether the president was the authorized agent of the company in making the purchase. *Reed v. Ashburnham R. Co.*, 120 *Mass.* 43.

3. — to sell corporate property.—In an action for the conversion of railroad ties both parties claimed title from the company, plaintiff setting up a bill of sale from the president to secure a debt from the company, under which possession was delivered by the president; and defendant claimed under a prior title derived from the company. The company's charter provided that its affairs should be managed by a board of directors, one of whom should be president, but his powers were not prescribed. *Held*: (1) that the president had no power, by virtue of his office merely, to make the sale; (2) that such power was not conferred by a resolution of the directors, making him the fiscal agent of the company, and directing him to purchase such equipments as the board might direct; (3) that possession itself, where the bill of sale was invalid, was not sufficient to enable plaintiff to maintain the action. *Watworth County Bank v. Farmers' L. & T. Co.*, 14 *Wis.* 325. —REVIEWED IN *Chicago & N. W. R. Co. v. James*, 22 *Wis.* 194.

The board of directors of a railroad corporation that was in debt passed a resolution authorizing the president and vice-president "to enter into such arrangements with its creditors or the holders of its securities for such relief as the circumstances and necessities of the case require, and to make such stipulations and agreements in

the premises as they may deem proper and expedient." *Held*, sufficient to confer upon them a joint authority to sell property belonging to the corporation to pay debts. *Watworth County Bank v. Farmers' L. & T. Co.*, 16 *Wis.* 629.

Under the above authority the president, with the consent of the vice-president, sold ties to a certain bank in payment of a debt. The vice-president was president of the bank, and acted for it in effecting the sale. *Held*, that the vice-president could not act for both parties, and as the resolution conferred a joint authority upon the president and vice-president, the transaction stood as though it was made by the president alone, and, therefore, was not within the power conferred. *Watworth County Bank v. Farmers' L. & T. Co.*, 16 *Wis.* 629.

4. — to pledge or mortgage corporate property.—Where the management of the affairs of a corporation is intrusted by its charter to a board of directors, the president and cashier, unless specially authorized by the charter, have no power to assign the choses in action of the corporation to its creditor as security for a precedent debt of the corporation, without authority from the board of directors. An assignment so made is not merely voidable, but absolutely void. *Hoyt v. Thompson*, 5 *N. Y.* 320; *reversing 3 Sandf.* 416.

A by-law authorizing the president of a company to act as its business and financial agent only makes him an agent for the ordinary business of the corporation, and does not authorize him to execute a mortgage, under the corporate seal, of an engine belonging to the company, to secure a debt, and such mortgage creates no lien on the engine. *Luse v. Isthmus Transit R. Co.*, 6 *Oreg.* 125.

A resolution of the board of directors authorizing the president of a company to execute a mortgage to secure bonds which were to run fifteen years, with interest payable semi-annually, does not authorize him to insert a provision that a failure to pay interest shall make the principal fall due before the fifteen years, at the option of the holder, where it appears that it was not usual to insert such a provision in railroad mortgages. *Jesup v. City Bank of Racine*, 14 *Wis.* 331.

And the power to insert the above provision cannot be inferred from a resolution of the board passed several years before, au-

thorizing the president and another person, jointly or severally, to make loans for the company "in such manner as they should deem advisable"; but such provision did not affect the validity of the mortgage generally. *Jesup v. City Bank of Racine*, 14 *Wis.* 331.

The president and general manager of a company, who was also its principal owner, was in the habit of mingling the moneys of the company with his own. He bought certain locomotives which he delivered to the company, and it used the same as its own for several years. Afterwards the president made a contract of sale of certain of the locomotives to guarantee certain persons against loss for indorsing his note, but the company remained in possession. *Held*, that the transaction amounted to a mere pledge without delivery, and that the pledgees were not entitled to possession, upon the insolvency of the president, as against the judgment creditors of the president. *Fairbanks v. Barlow*, 14 *Can. Sup. Ct.* 217; *affirming* 2 *Montr. L. R.* 332.

5. Representations of, when bind the company.—Persons who are asked to vote taxes in aid of a railroad may reasonably presume that the president of the company has authority to make representations as to the location of the road; and where a favorable vote of a township is secured by means of representations of the president of the company that the road would be permanently located through the center of the township, but it is afterwards located along its border, the collection of the tax may be enjoined, notwithstanding the president believed his representations to be true. *Curry v. Decatur County Sup'rs*, 13 *Am. & Eng. R. Cas.* 80, 61 *Iowa* 71, 15 *N. W. Rep.* 602. — **ADOPTING** *Sinnett v. Moles*, 38 *Iowa* 25.

In such case, where notice is given to the president before any grading is done in the township that the taxpayers would resist the collection of the tax, the taxpayers are not estopped from insisting upon the forfeiture of the tax after the railroad is actually built. *Curry v. Decatur County Sup'rs*, 13 *Am. & Eng. R. Cas.* 80, 61 *Iowa* 71, 15 *N. W. Rep.* 602.

The president of defendant street-car company procured a loan from plaintiff on

his individual note, and gave a certificate of stock in defendant company as collateral, but some of the signatures to the certificate were forged by the president. *Held*, that the president was acting for himself in procuring the loan, and therefore the company was not bound by his representations. *Manhattan Life Ins. Co. v. Forty-second St. & G. S. F. R. Co.*, 46 *N. Y. S. R.* 130, 64 *Hun* 635, 19 *N. Y. Supp.* 90; *affirmed* in 139 *N. Y.* 146, 34 *N. E. Rep.* 776, 54 *N. Y. S. R.* 474. — **DISTINGUISHING** *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 *N. Y.* 195, 8 *N. Y. S. R.* 209.

A junction railroad was built and owned by the Pennsylvania railroad company and two others. A part of its track was built by the Pennsylvania company through its yard, without any purchase or condemnation, under the direction of the president of the Pennsylvania company, who was also president of the junction road. *Held*, that the latter company was not entitled to a decree adjudging it entitled to the exclusive ownership, possession, and use of that part of the road through the yard; that no acts or declarations of such president could pass rights or franchises by way of estoppel. *Pennsylvania R. Co.'s Appeal*, 80 *Pa. St.* 265.

6. Powers of de facto president.—A president *de facto* of a railroad company, when a suit is pending in which his right to the office is to be tried, and just before the decision of such suit, has no right to make a distribution of the funds of the company to such creditors as he may elect to give preference. *Walker v. Flemming*, 70 *N. Car.* 483.

For the ordinary purposes of the company, and in order to keep the machinery in motion, a *de facto* president will be recognized as having power to act. *Walker v. Flemming*, 70 *N. Car.* 483.

7. Right to deal for his own benefit.—The president of a packet company, after having endeavored to obtain contracts for carrying the mails for his company and failed, is not precluded from making such contracts in his own behalf, but having done so he must use all the facilities afforded by his company in performing them, and will not be allowed to make profit out of such use, but will be held to account to the company for all that he received for the services performed by it. *Keokuk N. L. Packet Co. v. Davidson*, 95 *Mo.* 467, 8 *S. W. Rep.* 545.

* Power of president to bind the corporation, see note, 34 *AM. & ENG. R. CAS.* 110.

The president of a railroad company entered into a contract for the construction and equipment of the road for a certain sum in stock and bonds of the company. In accordance with a previous arrangement the contract was assigned to the president, who, with others, performed the contract at an expense less than the par value of the stock and bonds agreed to be paid. It appeared that the assignment was made in good faith, after full deliberation and consultation, with the knowledge and assent of all the directors and stockholders of the company, as the only means to insure the construction of the road, and that the amount expended exceeded the actual value of the stock and bonds given in payment. *Held*, that the stock was to be considered as fully paid up, and that a receiver of the road could not maintain an action to recover a proportionate share of the difference between the par value of the stock and the cost of construction. *Van Cott v. Van Brunt*, 2 *Am. & Eng. R. Cas.* 307, 82 *N. Y.* 535; *reversing* 2 *Abb. N. Cas.* 283.—FOLLOWED IN *Coe v. East & W. R. Co.*, 52 *Fed. Rep.* 531.

A president or director of a corporation bears the relation of trustee to the corporation, and is disqualified from acting officially upon any matter of immediate personal and pecuniary interest to himself. *Austin City R. Co. v. Swisher*, 1 *Tex. App. (Civ. Cas.)* 33.

8. Contracts directly with company.—The president of a corporation executed to certain of its directors a mortgage of land to which his wife had an equitable claim by virtue of an unrecorded deed to her. *Held*, that, having acted in the transaction, not for the corporation, but solely for himself, his knowledge of his wife's equities is not the knowledge of the company, and cannot affect its rights unless shown to have been communicated to it. *Winchester v. Baltimore & S. R. Co.*, 4 *Md.* 231.

An elevated railroad company let a contract, through its president, for the construction and equipment of its road for a fixed sum per mile, payable in stock and bonds of the company as each mile of the road should be completed and certified by the engineer. The president acted as engineer and took an assignment of the contract to himself, and made the certificates as the several amounts fell due to the contractor.

Held, that the position of president was inconsistent with the other duties; and the fact that he claimed to hold the contract as trustee for others, who were to furnish the money to carry it out, does not make the contract valid, where it provides that the contractor is bound to furnish the money himself. *Keeler v. Brooklyn El. R. Co.*, 9 *Abb. N. Cas. (N. Y.)* 166.

9. Ratification by directors—Acquiescence.—If the directors of a railroad company, upon being informed by the president that he had executed at the request of certain other railroad companies an agreement by which running powers were secured over a bridge, do not dissent therefrom and attack the validity of the agreement, they will be presumed to have concurred in and ratified the same. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371, 9 *Sup. Ct. Rep.* 770.—FOLLOWED IN *Augusta, T. & G. R. Co. v. Kittel*, 52 *Fed. Rep.* 63, 2 *U. S. App.* 409, 2 *C. C. A.* 615.

If the president of a railroad company executes a contract by which the company undertakes to reimburse another company the sums expended by it as rental and tolls for the use of a bridge, and the comptroller of the company examines and settles accounts rendered directly by the owners of the bridge to the railroad company, the evidence is sufficient to justify the court in holding that the railroad company acquiesced in the contract and is bound by it. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371, 9 *Sup. Ct. Rep.* 770.

If the president of a railroad company executes a contract by which the company guarantees the payment of rent and tolls for the use of a bridge, and subsequently the president and directors, in their printed annual report to the stockholders, declare it to be the policy of the company to secure a continuous line to the west, and that by means of the contract for the use of a bridge this has been accomplished, the evidence is sufficient to justify a finding that the guarantee was either authorized by the company or its execution ratified. *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 39 *Am. & Eng. R. Cas.* 213, 131 *U. S.* 371, 9 *Sup. Ct. Rep.* 770.

Where a company accepts through a series of years the benefits of a contract made by its president, it cannot then be heard to

repudiate its obligations thereunder and claim that he had no authority to enter into it. *Green v. Missouri Pac. R. Co.*, 82 Mo 653. *Hilliard v. Gould*, 34 N. H. 230. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *affirming* 40 Barb. 179.

The president of a corporation, who had general powers in the prosecution of the company's projects, bought a house to be used as an office for the company, and it took possession and the trustees held their meetings in it for six weeks. *Held*, that this was a ratification of the purchase, even if the president was not authorized to buy it, and a subsequent rejection of the contract by the company would not relieve it from payment of the purchase money. *Shaver v. Bear River & A. W. & M. Co.*, 10 Cal. 396.

The president of defendant company retained plaintiff, a lawyer, to render certain legal services for the company. During the time that the services were being rendered the president frequently advised with the board of directors concerning the business upon which plaintiff was engaged. *Held*, that this was a ratification of the act of the president in retaining him, though it did not formally appear on the books of the directors and plaintiff might recover on a verbal retention by the president. *Pixley v. Western Pac. R. Co.*, 33 Cal. 183.

If the president of a corporation clearly exceeds his authority in making a contract, it is not binding unless ratified by the corporation, but such ratification may be by express assent, or by acts or conduct of the corporation inconsistent with any other supposition than that it intends to adopt the contract made in its name. *Wehrhane v. Nashville, C. & St. L. R. Co.*, 4 N. Y. S. R. 541, 42 Hun 660.

In order to effect a lease of the property of a corporation, which had been authorized by a vote of the directors, it was necessary that a replevin bond should be given by the corporation to replevy certain portions of such property then under attachment, and this bond was executed by and in the name of the corporation by its president, a majority of the directors being aware of the execution of the bond, and the corporation by this means obtained possession of the property. *Held*, that it was no defense to an action on the bond against the corporation that no vote had been passed by the directors authorizing its execution or con-

ferring upon the president authority to execute it. Neither was it any defense to such a bond that the seal attached to it as the seal of the corporation was not its usual and regularly adopted corporate seal. *Middlebury Bank v. Rutland & W. R. Co.*, 30 Vt. 159.—REVIEWED IN *State ex rel. v. Smith*, 48 Vt. 266.

10. Liability to company.—Where the president of a company sues to recover salary, the company cannot set up as a set-off or as damages the wrongful expenditure of the company's funds by him for counsel fees, if it appears that he acted for the company in good faith and did only what the directors should have authorized, though it was his duty to have consulted the directors in incurring the expense. *Davis v. Memphis City R. Co.*, 22 Am. & Eng. R. Cas. 1, 22 Fed. Rep. 883.

Plaintiff company, through its directors, passed a resolution intrusting its president with certain bonds for the purpose of selling them at a certain price, but the president loaned them to an individual to enable him to raise money to pay for certain bonds of the company which he had subscribed for and had not been able to pay. *Held*, that the resolution furnished the measure of the president's authority as to the disposition of the bonds, and that his act amounted to a conversion, without reference to his general powers as president. *Second Ave. R. Co. v. Mehrbach*, 17 J. & S. (N. Y.) 267.

The president of a corporation was authorized to raise money for the company on his personal note secured by the bonds of the company, but he gave his note secured by bonds and by other securities owned by a third person, and paid over to the company a portion of the money and the balance to such third person. *Held*, that his act amounted to a conversion. *Second Ave. R. Co. v. Mehrbach*, 18 J. & S. (N. Y.) 1.—FOLLOWING *Lavery v. Snethen*, 68 N. Y. 522.

11. Liability to third persons.—Purchasers of railroad bonds cannot maintain a personal suit against the president of the company for losses through fraudulent representations contained in circulars sent out by him as president, which induced the purchase. *Van Weel v. Winston*, 24 Am. & Eng. R. Cas. 179, 115 U. S. 228, 6 Sup. Ct. Rep. 22.

Persons holding bonds of a railroad, secured by a mortgage on the railroad prop-

erty, cannot maintain a suit against the president of the company for diverting funds from their proper use. If such has been done, he is answerable alone to the company and its stockholders. *Van Weel v. Winston*, 24 *Am. & Eng. R. Cas.* 179, 115 *U. S.* 228, 6 *Sup. Ct. Rep.* 22.

Where the president and active manager of a railroad corporation procures donations of property to himself in trust for the company, by means of an exercise of oppressive power, he will hold the property in trust for the donors, and not for the company. *Union Pac. R. Co. v. Durant*, 3 *Dill. (U. S.)* 343.

Where a railroad company deposits bonds with its president to be held as security for notes which certain persons had intrusted with the company, the president is personally liable for the trust, independent of his financial character, and cannot set up a defense that he was directed by the company to make another disposition of the bonds. *Wilkinson v. Stewart*, 30 *Ill.* 38.

12. — for personal injuries.—The president of a corporation is not made liable for a personal injury merely by transmitting an order of the corporation to a servant who in executing it uses illegal force; but if the order is issued by him on his own responsibility, he is liable. *Hewett v. Swift*, 3 *Allen (Mass.)* 420.

13. Salary.—One suing to recover salary as president of a railway corporation must show that he was such president *de jure*. It is not enough to show that he was *de facto* president. *Waterman v. Chicago & I. R. Co.* 34 *Ill. App.* 268; affirmed in 139 *Ill.* 658, 29 *N. E. Rep.* 689.—QUOTING AND FOLLOWING *People ex rel. v. Weber*, 86 *Ill.* 283.

Where a president of a railroad only performed the ordinary duties of the office, without his salary being previously fixed—*held*, that he could not recover even after an auditing committee of the company had drawn an order for his salary. *Gridley v. Lafayette, B. & M. R. Co.*, 71 *Ill.* 200.—QUOTING *Kilpatrick v. Penrose Ferry Bridge Co.*, 49 *Pa. St.* 121.

Where the action is to recover the salary of the president of defendant corporation, a plea is bad which sets up a resolution that the salary of the president was to be paid monthly out of any money that came into the hands of the treasurer from the sale of bonds, as such resolution did not create a

condition precedent to the payment of the salary. *Indianapolis, E. R. & S. W. R. Co. v. Hyde*, 122 *Ind.* 188, 23 *N. E. Rep.* 706.

Where the president of a company undertakes to perform services for the company not strictly within the line of his duties as president, such as superintending the construction of a building he should require a stipulation for pay, if he expects any. He has no right to employ himself as master builder, then expect pay. *Levisse v. Shreveport City R. Co.*, 27 *La. Ann.* 641.

Plaintiff was president of a railway company from 1869 to 1875. In 1871 he became a member of a construction company to complete the road, which company was to take all the assets, assume the debts and pay all claims and expenses of the corporation. In 1875 the company was merged in another company *Held*, that plaintiff could not recover of the consolidated company for his services as president of the original company in procuring the right of way, etc., his construction company having assumed to pay for such services. *Nebraska R. Co. v. Leavitt*, 8 *Neb.* 251, 20 *Am. Ky. Rep.* 324.

Where a railroad company contracts with a construction company to pay a sum stated to the president of the railroad company for his salary, such contract may be considered by the jury in determining an issue between a president subsequently elected and his company as to what his salary was, but the president, not being a party to such contract, is not bound to look to the construction company alone for payment, even though he knew of the contract when he accepted the office. *Bowen v. Carolina, C. G. & C. R. Co.*, 34 *So. Car.* 217, 13 *S. E. Rep.* 421.

14. Transfer of corporate property to successor in office.—*N. Car. Act of Feb. 16, 1871*, requiring "the president and directors of the several railroad companies of this state, upon demand, to account with and transfer to their successors all the money, books, papers, and choses in action belonging to such company," is sufficiently general, taken by itself, to embrace bonds of the state; but the act must be construed in connection with two other acts, *v. r.* of Feb. 5, 1870, and of March 8, 1870. Thus construed, the acts of Feb. 5, 1870, and of March 8, 1870, dispose of the bond known as special tax bonds and the act of 1871 has reference only to "money choses in action, property, and

effects belonging to the company." *State v. Jones* 67 N. Car. 210.

An indictment under the act of Feb., 1871, cannot be sustained against a former president of the Western R. Co. for refusing to transfer to his successor in office certain special tax bonds, which were issued under the act of Feb. 3, 1869, and which came into the hands of said former president, for the use and benefit of the company. *State v. Jones*, 67 N. Car. 210.

PRESS OF BUSINESS.

Delays caused by, see CARRIAGE OF MERCHANDISE, 57.

— caused by unusual, see CARRIAGE OF MERCHANDISE, 140.

PRESUMPTIONS.

Against carrier for loss of baggage, see BAGGAGE, 6.

— in cases of loss or injury, see EXPRESS COMPANIES, 32.

— shipper's assent to limitation of liability, see LIMITATION OF LIABILITY, 42.

As to condition of car as regards safety, see STREET RAILWAYS, 333.

— — — goods carried, see CARRIAGE OF MERCHANDISE, 695.

— — — in hands of final carrier, see CARRIAGE OF MERCHANDISE, 653.

— — — — intermediate carrier, see CARRIAGE OF MERCHANDISE, 638.

— — — — due care of person injured at crossing, see CROSSINGS, INJURIES, ETC., AT, 341.

— — — — place where animal entered on track, see ANIMALS, INJURIES TO, 128.

— — — — was killed, see ANIMALS, INJURIES TO, 207.

Facts presumed need not be alleged in pleading, see EMPLOYÉS, INJURIES TO, 512.

Generally, see EVIDENCE, 116-132.

In actions against carriers of passengers, see CARRIAGE OF PASSENGERS, 581, 590.

— by and against express companies, see EXPRESS COMPANIES, 87.

— for causing death, see DEATH BY WRONGFUL ACT, 231-233.

— — — damages caused by fire, see FIRES, 257-277.

— — — injuries caused by collisions, see COLLISIONS, 12, 13.

— — — — to employees, see EMPLOYÉS, INJURIES TO, 623-630.

— — — — — passengers by derailment, see DERAILMENT, 4.

— — — — — trespassers, see TRESPASSERS, INJURIES TO, 119.

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In favor of general verdict, see TRIAL, 192.

— — — the award of damages, see EMINENT DOMAIN, 929.

— — — validity of amendment, see PLEADING, 165.

— stock-killing cases, see ANIMALS, INJURIES TO, 469-494.

Of acceptance of charter, see CHARTERS, 6.

— attorney's authority, see ATTORNEYS, 11.

— citizenship of corporation, see CITIZENSHIP, ETC., 2.

— competency of servants, see FELLOW-SERVANTS, 490.

— consent or deed from landowner from long possession by company, see EMINENT DOMAIN, 207.

— dedication from public user, acquiescence, etc., see STREETS AND HIGHWAYS, 11.

— existence of relation of landlord and tenant, see LANDLORD AND TENANT, 1.

— knowledge on part of passenger of rules of carrier, see CARRIAGE OF PASSENGERS, 67.

— loss of goods while in carrier's hands, see CARRIAGE OF MERCHANDISE, 107.

— negligence, see ANIMALS, INJURIES TO, 84; NEGLIGENCE, 99-101.

— — — burden of proof to rebut, see CARRIAGE OF PASSENGERS, 594.

— — — from accident at crossing, see CROSSINGS, INJURIES, ETC., AT, 342.

— — — failure to account for goods, see CARRIAGE OF MERCHANDISE, 466.

— — — — — give signal, see ANIMALS, INJURIES TO, 193.

— — — — — speed at crossings, see CROSSINGS, INJURIES, ETC., AT, 188.

— — — — — time of existence of defect in fence, see FENCES, 89.

— — — — — in action against carrier of cattle, see CARRIAGE OF LIVE STOCK, 147.

— — — — — case of injury to passenger, see CABLE RAILWAYS, 8.

— — — — — cases of collision between street-cars, see COLLISIONS, 26.

— — — — — not raised by proof of loss where liability is limited, see CARRIAGE OF MERCHANDISE, 465.

— — — — — of initial carrier where goods reach destination damaged, see CARRIAGE OF MERCHANDISE, 569.

— — — — — person injured by street-car, see STREET RAILWAYS, 515.

— — — — — when raised by proof of loss, see CARRIAGE OF MERCHANDISE, 173, 178.

— — — — — — — by fire, see CARRIAGE OF MERCHANDISE, 151.

— — — — — — — notice from lapse of time, see ANIMALS, INJURIES TO, 143.

— — — — — — — payment from lapse of time, see PAYMENT, 8.

Of payment of land damages from lapse of time, see EMINENT DOMAIN, 382.

— prejudice from erroneous instructions, see APPEAL AND ERROR, 56.

— presence or absence of contributory negligence, see CONTRIBUTORY NEGLIGENCE, 102.

— regularity in court below, see APPEAL AND ERROR, 29-35.

— on appeal, see EMINENT DOMAIN, 805.

— shipper's assent to bill of lading, see BILLS OF LADING, 31.

Right of trainmen to presume that person will get off track, see CROSSINGS, INJURIES, ETC., AT, 210.

That agent's act has been ratified, see AGENCY, 110-113.

— company discharged its duty, burden of proof to rebut, see EMPLOYÉS, INJURIES TO, 593.

— has knowledge of defective appliance, see EMPLOYÉS, INJURIES TO, 140.

— used due care in selection of servant, see FELLOW-SERVANTS, 488, 489.

— goods are delivered by carrier in good condition, see CARRIAGE OF MERCHANDISE, 267.

— holder of bonds is a bona fide purchaser, see MUNICIPAL AND LOCAL AID, 368-375.

— injury was within risks assumed, burden of proof to rebut, see EMPLOYÉS, INJURIES TO, 594.

— person killed at crossing stopped, looked, and listened, see CROSSINGS, INJURIES, ETC., AT, 234.

— on train is passenger, see CARRIAGE OF PASSENGERS, 22.

When a conveyance will be presumed, see ADVERSE POSSESSION 13.

— grant will be presumed, see LAND GRANTS, 9.

PRESUMPTIVE EVIDENCE.

Collision as prima facie evidence of contributory negligence, see CROSSINGS, INJURIES, ETC., AT, 230.

In actions for damages caused by fire, see FIRES, 257-277.

— injuries by negligence of fellow-servants, see FELLOW-SERVANTS, 473.

Of capacity of foreign corporation to contract, see CARRIAGE OF MERCHANDISE, 753.

PRICE.

Decline in, as an element of damages, see CARRIAGE OF LIVE STOCK, 158.

Of C. O. D. goods, duty of carrier to collect, see CARRIAGE OF MERCHANDISE, 270.

Of goods sold, seller's action for, see SALES, 12.

— rolling stock, lien for, see LIENS, 3.

PRICE LISTS.

When may be carried as baggage, see BAGGAGE, 41.

PRIMA FACIE EVIDENCE.

Admissibility and effect generally, see ANIMALS, INJURIES TO, 469-494.

In actions against carriers of passengers, see CARRIAGE OF PASSENGERS, 581, 590.

PRINCIPAL.

Agent must contract in name of, see AGENCY, 24.

Knowledge of agent when imputed to, see AGENCY, 42, 43.

Liability of agent to, see AGENCY, 29-32.

— for acts of agent, generally, see AGENCY, 37-44.

— torts of agents, see AGENCY, 71-105.

Notice to agent when notice to see AGENCY, 39-41.

When bound by agent's contracts, see AGENCY, 45-70.

PRINCIPAL CAUSE.

Challenge to jurors for, see TRIAL, 31, 32.

PRINCIPAL DEBTOR.

Notice to, of attachment, see ATTACHMENT, ETC., 43.

Who may be sued as, see ATTACHMENT, ETC., 8-10.

PRIORITY.

Among coupons on distribution in foreclosure, see MORTGAGES, 272, 273.

— holders of land warrants, see PUBLIC LANDS, 28.

— mortgages, see RECEIVERS, 77.

Ascertaining, by reference, in foreclosure, see MORTGAGES, 202.

Between conflicting attachments, see ATTACHMENT, ETC., 5.

— deeds of trust and other liens, see DEEDS OF TRUST, 11.

— executions and other claims and liens, see EXECUTION, 16.

— junior and senior surveys, see PUBLIC LANDS, 27.

— land grants, see LAND GRANTS, 5; PUBLIC LANDS, 36.

— mortgages and other liens, see MORTGAGES, 87-129.

- Between mortgages of rolling stock, see MORTGAGES, 52.
 — rival locations of route, see LOCATION OF ROUTE, 25-31.
 — tax lien and other encumbrances, see TAXATION, 307.
 Of claims for wages, see EMPLOYÉS, 10.
 — coupons, see COUPONS, 11.
 — debts due to government railroads, see GOVERNMENT RAILROADS, 5.
 — — in cases of receivership, see MORTGAGES, 228.
 — grants of right of way over public lands over other conveyances and titles, see PUBLIC LANDS, 40.
 — judgments, see JUDGMENT, 38.
 — laborers' claims in insolvency, see INSOLVENCY, 7.
 — mortgages over equities subsequently arising, see MORTGAGES, 107-129.
 — passage at crossing of railways, see CROSSING OF RAILROADS, 75.
 — receivers' certificates, how questioned, see RECEIVERS, 103.
 — — — over other liens, see RECEIVERS, 99.
 — third parties' claims in attachment, see ATTACHMENT, ETC., 64.

PRIVACY.

- Measure of damages for interference with, see EMINENT DOMAIN, 1195.
 Of dwellings, measure of damages for invasion of, see ELEVATED RAILWAYS, 131.

PRIVATE ACTS.

- Admissibility and effect of, as evidence, see EVIDENCE, 239.
 Construction of, see STATUTES, 49.
 Judicial notice of, see EVIDENCE, 111.

PRIVATE CARRIERS.

- Distinguished from carriers of passengers, see CARRIAGE OF PASSENGERS, 5.
 Who are, see CARRIAGE OF MERCHANDISE, 4.

PRIVATE CARS.

1. Right of owner to recover for personal injury.—The owner of a private car arranged to have his car attached to a regular passenger train, agreeing that he would attend to the brakes on his own car. *Held*, that this did not make him an employé of the company so as to prevent a recovery for a personal injury. *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. St. 382.

2. Assumption by owner of "all risks."—A company agreed to haul cars of

a circus according to a certain schedule of time, and for a price less than the regular rates, the proprietors agreeing at their own expense to load and unload the cars, to save the defendant harmless from all claims for damages to persons and property however accruing, and to "assume all risk of accident from any cause." An accident occurred by one of the cars running off the track by reason of its trucks not being in proper condition, and an employé of the proprietors who was riding in one of the cars was injured. *Held*, that the employé could not recover, as defendant had no control over the condition of the cars and no power to interfere with them. *Robertson v. Old Colony R. Co.*, 156 Mass. 525, 31 N. E. Rep. 650.

PRIVATE CORPORATIONS.

- Distinguished from public, see CORPORATIONS, 2.

PRIVATE CROSSINGS.

- Cost of, as an element of land damages, see EMINENT DOMAIN, 676.
 Duty to fence track at, see FENCES, 57.
 — — give signals at, see CROSSINGS, INJURIES, ETC., AT, 115, 116.
 — — look and listen at, see CROSSINGS, INJURIES, ETC., AT, 281.
 Injuries to children at, see CHILDREN, INJURIES TO, 22.
 — — persons and teams at, see CROSSINGS, INJURIES, ETC., AT, 5.
 Power of commissioners to provide for, see RAILWAY COMMISSIONERS, 23.
 Right of landowner to construction of, see EMINENT DOMAIN, 144.

PRIVATE INDIVIDUALS.

- Power of, to condemn lands, see EMINENT DOMAIN, 83.

PRIVATE RAILROADS.

- Private branch lines, see BRANCH AND LATERAL ROADS, 9.

1. Condemnation of lands for.*—When, in proceedings to condemn lands for a private railroad, the judge, under the Eminent Domain Act, enters an interlocutory order granting the petitioners possession of the land pending the proceedings, it is not

* Authority of small railroad companies promoted partially as private enterprises to exercise power of eminent domain, see note, 44 AM. & ENG. R. CAS. 25.

error, when it sustains a general demurrer to the petition, to vacate such rule, as the statute leaves the matter of granting such a rule in the first place entirely in the discretion of the court. *People ex rel. v. District Court*, 11 Colo. 147, 17 Pac. Rep. 298.

Where, in proceedings under the Eminent Domain Act to condemn lands for a private railroad, the judge vacates an order granting the petitioners possession of the land pending the proceedings, he cannot be said to have abused his discretion when it appears that the right to condemn the land in controversy did not exist. *People ex rel. v. District Court*, 11 Colo. 147, 17 Pac. Rep. 298.

Where a petition for a private railroad has been filed and granted upon a survey which lays down the grades, courses, and distances, the location cannot be changed after the damages have been assessed, except upon a new petition. *Lance's Appeal*, 55 Pa. St. 16.—APPROVED AND QUOTED IN *Lyon v. McDonald*, 47 Am. & Eng. R. Cas. 217, 78 Tex. 71.

2. Power of city to grant franchise for.*—A railroad corporation is not necessarily a public corporation such as may use a city's street, because it is connected with a grain elevator which is public in so far as that its charges may be regulated by law. *Mikesell v. Durkee*, 36 Kan. 97, 12 Pac. Rep. 351; *former appeal* 34 Kan. 509, 9 Pac. Rep. 278.—DISTINGUISHING *Munn v. Illinois*, 94 U. S. 113.

Where the owners of a mill apply to a city council for a right of way through a public alley for a track to connect with a regular railroad track, and the city refuses to grant the right, a grant of the right to the railroad company which is evidently for the sole benefit of the mill owners, who construct the track at their own expense, is but an evasion, and the owners of the mill will not be allowed to secure for themselves in this indirect way a privilege which no citizen would be allowed to secure for himself directly. *Com. v. Frankfort*, 92 Ky. 149, 17 S. W. Rep. 287.

The licensing of an individual to occupy a part of a public street exclusively for his own benefit by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to the

* Abutting owner cannot enjoin the construction of a private railroad in the street though it be a nuisance. see 25 AM. & ENG. R. CAS. 256, *adist.*

city council of Portland by the ninth section of its charter or by any other statute. *Green v. Portland*, 32 Me. 431.

The common council of a city has no authority, under the general power to regulate streets, to grant to an individual a license to lay a railroad track across a public street for his own use. Streets and highways are intended for the common and equal benefit of all citizens, to which end they must be regulated. *State v. Trenton*, 36 N. J. L. 79.

The city of New York has no power to contract with individuals for the right to construct and operate a street railroad for an indefinite period for private gain. *Milhau v. Sharp*, 27 N. Y. 611; *affirming* 7 Abb. Pr. 220, 28 Barb. 228, 17 Barb. 435.—FOLLOWING *Davis v. Mayor*, etc., of N. Y., 14 N. Y. 506. QUOTING *Williams v. New York C. R. Co.*, 16 N. Y. 97.

A resolution attempting to confer such a right is not a license, but a contract, and is void as attempting to confer powers which the city holds only in trust. *Milhau v. Sharp*, 27 N. Y. 611; *affirming* 7 Abb. Pr. 220, 28 Barb. 228, 17 Barb. 435.—APPROVING *People ex rel. v. Sturtevant*, 9 N. Y. 273.—APPLIED IN *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173. FOLLOWED IN *Mayor*, etc., of N. Y. v. *New York & S. I. Ferry Co.*, 8 J. & S. (N. Y.) 232; *Forty-second St. & G. S. F. R. Co. v. Thirty-fourth St. R. Co.*, 20 J. & S. 252. QUOTED IN *Appeal of North Beach & M. R. Co.*, 32 Cal. 499; *Henderson v. New York C. R. Co.*, 78 N. Y. 423.

3. Liability for personal injuries.—A railroad company when backing its cars upon a private track laid by its owner by permission of the city across a public street, at the request and for the convenience of such owner, is not engaged in the performance of its own business under its charter, but is employed in a special and temporary service, differing in no legal sense from what might have been rendered by men or horses pushing or drawing cars for the same person on his own premises. *McWilliams v. Detroit C. Mills Co.*, 31 Mich. 274.—FOLLOWING *Detroit v. Corey*, 9 Mich. 165.

Persons having a contract to erect a sea wall operated a temporary railway to carry sand and other material. Plaintiff, who was driving a team, was injured while hauling rock for the wall for a subcontractor, by his team taking fright while crossing the track.

Held, that defendant was bound to exercise ordinary care for the safety of employés, including subcontractors and their employés, though the road had been constructed for private use; hence it was not error for the court to refuse to instruct the jury that the crossing was not on a public street. *Carraher v. San Francisco Bridge Co.*, 100 Cal. 177, 34 Pac. Rep. 828.

Where an employé is injured while crossing the track of a private railway, a verdict in favor of plaintiff will not be disturbed on appeal where there is a substantial conflict both as to the negligence of defendant and as to the contributory negligence of plaintiff. *Carraher v. San Francisco Bridge Co.*, 100 Cal. 177, 34 Pac. Rep. 828.

Where the owners of a private railroad track, occasionally employed by a railroad company for a special use, have negligently suffered it to remain in a dangerous condition for such use, though trains are run upon it slowly and carefully, the company voluntarily running its trains thereon is liable for an injury to one of its own employés caused proximately by such negligence. *Stetler v. Chicago & N. W. R. Co.*, 49 Wis. 609, 6 N. W. Rep. 303, 21 Am. Ry. Rep. 89.

PRIVATE USE.

Of side tracks, see SIDE TRACKS, 5.

Property cannot be taken for, see EMINENT DOMAIN, 179-182.

PRIVATE WAYS.

Action for damages for obstruction of, see EMINENT DOMAIN, 995.

Obstruction of, as an element of land damages, see EMINENT DOMAIN, 719.

Prosecutions for obstructing, see CRIMINAL LAW, 34.

I. GENERAL PRINCIPLES..... 1077

II. REMEDIES FOR INTERFERENCE OR OBSTRUCTION..... 1079

I. GENERAL PRINCIPLES.

1. Creation of, generally.—A town voted to change the location of a private road which belonged to it, and appointed the selectmen to attend to the matter. A majority of them accepted a license from a railroad company, revocable at pleasure, to place the road on the company's right of way. *Held*: (1) that they had no authority to bind the town by such an acceptance; (2)

that if the town knowingly used the way, it could not acquire a right by prescription where the company had no knowledge of any such claim, but supposed that the town was using the way under the license. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325, 4 N. Eng. Rep. 189, 11 N. E. Rep. 105.

The use of the words "on condition," or words of a like import, will not necessarily create a conditional estate. And when a deed, conveying for a pecuniary consideration a right of way to a railway company, contains a condition that the company shall establish and maintain a reasonable passway and wagon road across its railroad, but there is nothing further in the deed which is indicative of an intention to make the compliance with such provision a condition subsequent to the grant, such provision may be construed as a part of the consideration for the deed and as the reservation of a mere easement right. *Stilwell v. St. Louis & H. R. Co.*, 39 Mo. App. 221.—QUOTING. *Morrill v. Wabash, St. L. & P. R. Co.*, 96 Mo. 174.

A right of way cannot be granted by deed, estoppel, or otherwise by any one but the landowner; a mere equitable owner of an undivided interest in a possible reversion cannot give it, and it cannot well exist over an undivided interest alone. *Tapert v. Detroit, G. H. & M. R. Co.*, 11 Am. & Eng. R. Cas. 413, 50 Mich. 267, 15 N. W. Rep. 450.

2. — by prescription — Adverse user.—Mass. St. 1861, ch. 100, providing that the occupancy of land belonging to a railroad shall not create any right by reason thereof, does not prevent the acquisition of a right to a private way across the railroad by twenty years' use thereof. *Fisher v. New York & N. E. R. Co.*, 17 Am. & Eng. R. Cas. 80, 135 Mass. 107.—REVIEWED IN *Turner v. Fitchburg R. Co.*, 35 Am. & Eng. R. Cas. 317, 145 Mass. 433.

Prior to the passage of Mass. Act of 1853, ch. 414, § 4, imposing a penalty upon any person who wrongfully stands or walks on a railroad track, a private right of way across a railroad could not be acquired by prescription. *Gay v. Boston & A. R. Co.*, 141 Mass. 407, 6 N. E. Rep. 236.

A right of way by prescription cannot be acquired over a railroad whose location runs through the land of the person claiming such right while the corporation neglects to comply with a decree of the county commissioners, under Mass. Rev. St. ch. 39, §

61, made upon the petition of such land-owner that the corporation give security for the payment of damages for the land taken, and no payment or settlement of such damages is made. *Smith v. New York & N. E. R. Co.*, 25 Am. & Eng. R. Cas. 205, 142 Mass. 21, 6 N. E. Rep. 842.

To acquire a right of way over the land of another by prescription, the user must be adverse and acquiesced in by the owner of the land. It is not necessary that a claim of right be expressly made, or that the acquiescence be declared. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325, 4 N. Eng. Rep. 189, 11 N. E. Rep. 105.

Where a town claims a private way to a cemetery by prescription over the lands of a railroad company, any acts of the inhabitants of the town in passing over the way, or the acts of the town in repairing it, are competent evidence as tending to prove a prescriptive right. *Deerfield v. Connecticut River R. Co.*, 144 Mass. 325, 4 N. Eng. Rep. 189, 11 N. E. Rep. 105.

Where a railroad is located on a right of way three rods wide, and a private way is claimed across the location, and the right of way is afterwards widened to five rods, the adverse user started while the right of way was but three rods cannot be ripened by use as to the right of way as widened. *Abbott v. New York & N. E. R. Co.*, 33 Am. & Eng. R. Cas. 146, 145 Mass. 450, 5 N. Eng. Rep. 527, 15 N. E. Rep. 91.

On the issue whether a right of way by prescription has been acquired over the location of a railroad, an agreed statement of facts stated that plaintiff and his grantors had used the way openly, adversely, and uninterruptedly for more than twenty years. Held, that the court might assume that defendant had knowledge of the acts of user. *Turner v. Fitchburg R. Co.*, 35 Am. & Eng. R. Cas. 317, 145 Mass. 433, 14 N. E. Rep. 627.

The proprietor of lands may by open, adverse, and uninterrupted use for more than twenty years acquire a right of way by prescription over the track of a railroad, notwithstanding the existence of statutes which prohibit under penalty the traveling upon or crossing of a railroad without the consent of the company. *Turner v. Fitchburg R. Co.*, 35 Am. & Eng. R. Cas. 317, 145 Mass. 433, 14 N. E. Rep. 627. —REVIEWING *Fisher v. New York & N. E. R. Co.*, 135 Mass. 107.

Evidence that for more than forty years

an individual had crossed a railroad track without objection, and that the company had directly recognized the crossing by different acts, but that for thirty-seven years he had only crossed on foot, is sufficient to justify a finding that he enjoyed a right of way at the crossing for passage on foot, by grant, reservation, or prescription. *Fitchburg R. Co. v. Frost*, 147 Mass. 118, 6 N. Eng. Rep. 374, 16 N. E. Rep. 773.

Evidence that for ten years a railroad company maintained a crossing for the accommodation of an individual's private way, and that subsequently, upon a change of line, the company agreed to maintain the crossing over the new line, is sufficient to support a finding that the individual had a right of way at the new line which had previously been granted or reserved. *Fitchburg R. Co. v. Frost*, 147 Mass. 118, 6 N. Eng. Rep. 374, 16 N. E. Rep. 773.

In building its road defendant company left a subway under a trestle, and the evidence showed that plaintiff, the owner of the land, enjoyed the open and continuous use of the subway as of right for more than twenty-five years, but that the company was proceeding to fill it up. Held, that plaintiff could not prevent the filling of the subway, but he might recover damages. *Wells v. Northern R. Co.*, 35 Am. & Eng. R. Cas. 314, 14 Ont. 594.

In such case plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the company, which deed was lost, or he was entitled to claim the easement under the prescription act from long and uninterrupted enjoyment as of right. *Wells v. Northern R. Co.*, 35 Am. & Eng. R. Cas. 314, 14 Ont. 594. —DISTINGUISHING *Clouse v. Canada Southern R. Co.*, 4 Ont. 28, 11 Ont. App. 287, 13 Can. Sup. Ct. 139.

3. Of necessity.—If the owner of a tract of land cut off from any public highway by the land of another has a defined right of way appurtenant to the tract over such other land to a highway, and, upon a railroad corporation's acquiring title to the servient estate for depot purposes, releases to it by deed all his title and interest in the right of way, describing it by metes and bounds, including "all rights of crossing said depot lot as a private way, if any I have or may appear to have," no right of way by necessity to the highway will remain to him

out of the right of way thus described and released; and his heirs, upon the taking of a part of the tract for railroad purposes, cannot recover damages for the deprivation of a right of way by necessity to the portion of the tract remaining. *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120, 26 N. E. Rep. 418.

4. In lands dedicated to public use, but not accepted.—Private owners of lots can get no better right of way over premises on which the lots abut than that which was offered to the public for acceptance in the dedication thereof for public uses, though the public's non-acceptance of an offer to dedicate may still leave private rights of way in the land so offered. *Tapert v. Detroit, G. H. & M. R. Co.*, 11 Am. & Eng. R. Cas. 413, 50 Mich. 267, 15 N. W. Rep. 450.

5. Pass to purchaser of dominant estate.—The right to the maintenance of a wagon road after its establishment will pass to and enure to the benefit of subsequent purchasers of the dominant estate as an easement running with the land, though not mentioned in the conveyances to such purchasers. *Stilwell v. St. Louis & H. R. Co.*, 39 Mo. App. 221.

6. May be used for what purposes.—Where land to which access is had by means of a private way is required by a railway company which builds cattle-pens thereon, the company may use the private way for passage to and from the highway of cattle although at the time of the grant the user was exclusively for agricultural purposes. *Finch v. Great Western R. Co.*, L. R. 5 Ex. D. 254, 41 L. T. 731, 28 W. R. 229.

7. Extinguishment, generally.—The mere fact that a portion of the public traveled over a way for twenty years cannot make it a highway. The road must not only be traveled upon, but it must be kept in repair or taken in charge and adopted by the public authorities. Otherwise it is but a private way. *Speir v. New Utrecht*, 121 N. Y. 420, 31 N. Y. S. R. 414, 24 N. E. Rep. 692; *modifying 49 Hun* 294, 17 N. Y. S. R. 727, 2 N. Y. Supp. 426.

A claim of a highway by twenty years' user will not be defeated by the fact that a railroad is laid on a portion of the highway where it was open to travel, except so far as the track made it inconvenient to travel on that portion of the highway. *Speir v. New Utrecht*, 121 N. Y. 420, 31 N. Y. S. R. 414,

24 N. E. Rep. 692; *modifying 49 Hun* 294, 17 N. Y. S. R. 727, 2 N. Y. Supp. 426.

A private railway act extinguishing the right of way over footways crossed by the railway deals only with the public rights of way, and private rights secured to the landowner by previous agreement with the company are not taken away by such act. *Wells v. London, T. & S. R. Co.*, 37 L. T. 302, 25 W. R. 325.

8. — by abandonment.—In 1889 plaintiffs sued for disturbing their right of way, acquired by grant, across defendant's railroad, which they held as appurtenant to lands northerly of the railroad. It was changed somewhat from its accustomed course by defendant upon the southerly side of the railroad, as follows: (1) In 1881, digging cellars and erecting four houses fronting upon a highway which had been located in 1876, and which structures covered about 150 feet along the way; (2) in 1888, excavating the surface along which the way ran to the depth of five or six feet, to get a practicable grade for a spur track leading from the main track to a gravel-pit belonging to defendant. A new and convenient way passing over defendant's land, and connecting with a public highway, was substituted by defendant for that part of the old way interrupted by the houses. Plaintiffs made no claim for damages, but used the substituted way for seven years. *Held*, that plaintiffs had accepted the new way in lieu of that destroyed, and had acquiesced in the change and intentionally surrendered and abandoned the old way in consideration of the new one. *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33, 24 Atl. Rep. 432.

II. REMEDIES FOR INTERFERENCE OR OBSTRUCTION.

9. Right of action, generally.—A railroad company may lawfully erect a depot or station building on its right of way, though in doing so it obstructs a private way. Mass. Gen. St. ch. 63, § 46, providing that if a railroad is laid out across a turnpike or other way, it shall be so as not to obstruct the same, does not apply to private ways. *Boston Gas Light Co. v. Old Colony & N. R. Co.*, 14 Allen (Mass.) 444.—**CRITICISING** *Boston & W. R. Corp. v. Old Colony R. Corp.*, 12 Cush. (Mass.) 605.—**DISTINGUISHED IN** *New Central Coal Co. v. George's Creek C. & I. Co.*, 37 Md. 537. **REVIEWED**

IN *Vermilya v. Chicago, M. & St. P. R. Co.*, 66 Iowa 606.

If a railroad is laid out through a man's land, and he afterwards gives a deed of the location to the railroad company, and acquires a right of way across the location by adverse possession for more than twenty years, he may maintain an action of tort for the obstruction of the way by the railroad corporation; and the statute of 1874, ch. 372, § 105, does not apply. *Fisher v. New York & N. E. R. Co.*, 17 Am. & Eng. R. Cas. 80, 135 Mass. 107.

Where an abutting owner sues a railroad company for depositing snow in a private way opposite his house, and files a count that he was hindered and deprived of the free use of the way by reason of the snow, evidence of injury to his property, or of obstructions not injurious to him personally, is not competent. *McDonnell v. Cambridge R. Co.*, 151 Mass. 159, 23 N. E. Rep. 841.

10. — under English and Canadian statutes.—The Railways Clauses Act of 1845, §§ 6, 55, take away the remedy by action for interference by railways with a private way, except where special damage has been suffered. *Watkins v. Great Northern R. Co.*, 16 Q. B. 961, 15 Jur. 1127, 20 L. J. Q. B. 391.

When a railroad company is authorized to build its road along a certain line, an action against it for obstructing the private way of an abutting owner cannot be maintained. If any recompense is given to the owner of such an easement, it is by arbitration, unless the 9th clause of 4 Wm. IV. c. 29, § 9, applies, and then the action should be for not restoring the way in the manner there directed. *Carron v. Great Western R. Co.*, 14 U. C. Q. B. 192.

In building its road defendant company left a subway under a trestle, and the evidence showed that plaintiff, the owner of the land, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that defendant was proceeding to fill it up. *Held*, that plaintiff could not prevent the filling up of the subway, but he was entitled to damages. *Wells v. Northern R. Co.*, 35 Am. & Eng. R. Cas. 314, 14 Ont. 594.

11. Form of action — Case — Trespass.—The owner of mortgaged land sold to a railroad company a portion of it, to be used for its track, and there was a road over the part conveyed, the right to which had

been reserved in the agreement for sale, but was omitted in the conveyance. In an action by one who subsequently purchased the land at a sheriff's sale, under the mortgage, against the company for obstructing this way—*held*: (1) that the right of way did not originate in the reservation in the agreement, but existed previous thereto, and was merely recognized therein; (2) that such rights established by an owner over his own land continue unaffected by liens or sale, public or private; (3) that the purchaser under the mortgage was entitled to the road, and to an action on the case against the company for obstructing it. *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417.—QUOTED IN *Kemp v. Pennsylvania R. Co.*, 156 Pa. St. 430.

The general statutes of a state prescribing the mode in which the amount of compensation to which the owner of private property may be entitled, when the same is taken under the right of eminent domain, apply to all species of property that may be so taken, including a private right of way. The only remedy of the owner of such right of way, which has been obstructed by the construction of a railroad, is to proceed under such general statutes to obtain compensation, and not in an action for damages. This is so although such statutes speak generally of "lands," this term including all rights and easements growing thereout. *Ross v. Georgia, C. & N. R. Co.*, 46 Am. & Eng. R. Cas. 34, 33 So. Car. 477, 12 S. E. Rep. 101.—APPLYING *Railroad Comrs v. Columbia & G. R. Co.*, 26 So. Car. 353.

The owner of a private way cannot maintain an action of trespass for damages for the obstruction of such way by a railway company, where a statute prescribes a specific penalty for the obstruction by a railway company of a highway or other way, across which its road is laid. *Ross v. Georgia, C. & N. R. Co.*, 46 Am. & Eng. R. Cas. 34, 33 So. Car. 477, 12 S. E. Rep. 101.

12. Who may sue.—The person who, for the time being, owns a private road in possession, is the "owner" of such road and entitled to recover penalties for its interruption under the Railways Clauses Act of 1845, § 54. *Mann v. Great S. & W. R. Co.*, 9 Ir. C. L. R. 105.

If a railway company or its successor destroys a wagon road after the establishment of it, the owner, at the time, of the land to which it is appurtenant, has a right of ac-

tion for damages against the wrong-doer; and after this right of action has once accrued it will not be divested by a subsequent sale of the land. *Stitwell v. St. Louis & H. R. Co.*, 39 Mo. App. 221.

13. — and who may not.—A tenant of a farm over which a private road passes cannot sue a railway company for the penalty for obstructing such road, where the statute makes such penalty "payable to the owner." *Collinson v. Newcastle & D. R. Co.*, 1 C. & K. 546.

14. Sufficiency of notice of obstruction.—The notice of an obstruction of a private way, required to be given to a railroad by N. H. Act of 1847, need not specify the particulars of the obstruction. *Greenwood v. Wilton R. Co.*, 23 N. H. 261.

15. Pleading — Defenses.—In an action for obstructing a prescriptive right of way across the location of defendant's railroad, it is no defense that, after the way was used, a statute was passed allowing the corporation to relocate its road, and for that purpose, under proper proceedings, to take lands, in the absence of evidence that such proceedings were had. *Turner v. Fitchburg R. Co.*, 35 Am. & Eng. R. Cas. 317, 145 Mass. 433, 14 N. E. Rep. 627.

A private way should be described as extending from one place to another; otherwise the declaration is insufficient. *Lamphier v. Worcester & N. R. Co.*, 33 N. H. 495.

In case for obstructing a private way, "a certain lot of land in N." is an insufficient description, whether the way is set forth as appendant to the land, or the land is intended as a terminus of the way. *Lamphier v. Worcester & N. R. Co.*, 33 N. H. 495.

Where an action is against two railroad companies to recover for obstructing a private alley, and it is shown that the first company, after erecting the obstruction, transferred its road to the other company, which had continued and maintained the obstruction, facts are stated sufficient to maintain a separate action against each company, but not a joint action. *Hess v. Buffalo & N. F. R. Co.*, 29 Barb. (N. Y.) 391.

16. Amount recoverable — Damages.*—In making excavations which de-

prived plaintiffs of the use of their way for two hundred and fifty feet defendant company invaded plaintiffs' rights, but as another suitable way about twenty feet distant was provided as a substitute for the old one, and after the lapse of about two weeks was adopted and used by them, only nominal damages should be allowed. *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33, 24 Atl. Rep. 432.

Plaintiffs refused for a short time to travel on the substituted way, under the impression that by so doing they would recognize a right in defendant to make the change and thereby surrender their rights in the old location. They claimed substantial damages for this interruption. *Held*, that the law makes it incumbent on a person for whose injury another is responsible to use all ordinary care and to take all reasonable measures available to avoid the loss and render the damage as light as practicable; and it will not permit him to recover any damage which might have been prevented by the exercise of such care and diligence. Plaintiffs' right of way was not extinguished by defendant's exercise of the power of eminent domain, and was not paid for in the estimation of land damages, and therefore plaintiffs' rights were invaded in making the excavations. *Fitzpatrick v. Boston & M. R. Co.*, 84 Me. 33, 24 Atl. Rep. 432.

17. Injunction.—Individuals may maintain a suit for an injunction to restrain parties from constructing a street railroad in the street in front of their lots so as to interfere with access from the street to the lots. *Wetmore v. Story*, 3 Abb. Pr. (N. Y.) 262.—**DISTINGUISHING** *Gould v. Hudson River R. Co.*, 6 N. Y. 522.

An act of parliament reciting that it is expedient that the rights of way in respect of footways which cross a certain railway on the level should be extinguished, and enacting that all rights of way in, over, or affecting certain footways be extinguished, does not interfere with private rights of way, but only with public rights of footways, and an injunction restraining the railway company from obstructing a private carriage-way is properly granted. *Wells v. London, T. & S. R. Co.*, L. R. 5 Ch. D. 126, 25 W. R. 325, 37 L. T. 302.

PRIVILEGED COMMUNICATIONS.

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* Damages for the obstruction of a private way, see note, 30 AM. & ENG. R. CAS. 395.

What are, see **LIBEL, ETC., 3.**

— extent of privilege, etc., see **WITNESSES, 88-93.**

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PRIVILEGES.

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What is want of, and how proved, see **MALICIOUS PROSECUTION, 9, 14.**

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Effect of appearance as a waiver of defects in, see **APPEARANCE, 4, 5.**

In condemnation proceedings, see **EMINENT DOMAIN, 301-304.**

— criminal prosecutions, see **CRIMINAL LAW, 4.**

— justices' courts, see **JUSTICE OF THE PEACE, 5.**

— stock-killing cases in justice's court, see **ANIMALS, INJURIES TO, 610.**

— suits against foreign corporations, see **FOREIGN CORPORATIONS, 25, 26.**

— — receivers, see **RECEIVERS, 133.**

— — for injuries to live stock, see **ANIMALS, INJURIES TO, 206.**

Objections to, how to be taken, see **APPEAL AND ERROR, 91.**

Seizure of goods on, when excuses carrier for non-delivery, see **CARRIAGE OF MERCHANDISE, 205-302.**

— under, when a defense to carrier, see **CARRIAGE OF MERCHANDISE, 27.**

I. GENERAL PRINCIPLES..... 1082

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III. SERVICE, AND HOW PROVED..... 1085

I. GENERAL PRINCIPLES.

1. Validity of statute.—Ga. Act of 1860, providing special mode of service on a given railroad, is not special legislation, *Nashville & C. R. Co. v. McMahon*, 70 Ga. 585.

The legislature may prescribe a different rule for the service of process against a corporation from that in force at the time it is created. *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

2. Statute must be followed.—A private corporation being the creature of statute may be sued in such manner as the legislature may provide. The statutes of Oregon prescribe a mode for the commencement of an action against parties, including corporations, and it must be pursued in order to confer jurisdiction upon the court over the person of the defendant. *Holgate v. Oregon Pac. R. Co.*, 16 Oreg. 123, 17 Pac. Rep. 589.

Where a corporation is sued in a federal court, service of process must conform to the United States statutes, and not to the statute of the state where the action is brought. *Hume v. Pittsburgh, C. & St. L. R. Co.*, 8 Biss. (U. S.) 31.

Under Wagn. Mo. St. 1007, § 7, a summons must be served on a minor precisely as on an adult. An acknowledgment in writing on the writ of the service of summons (1008, § 9) can only be made by adults or those capable of acting for themselves. A minor cannot do it, nor can his guardian for him. The statute relative to the appropriation of lands (326, 327, § 1) requiring guardians to be made defendants, does not alter the rule as to the service of process. *Kansas City St. J. & C. B. R. Co. v. Campbell*, 62 Mo. 585.

3. Sufficiency of compliance with statute.—The fifteen days' notice specified in the Georgia Act of 1853-54, defining the liability of railroad companies, within which notice is to be given or suit brought for an injury, applies exclusively to cases where

the demand is under \$30. *Jones v. Central R. & B. Co.*, 18 Ga. 247.—FOLLOWED IN *Muscogee R. Co. v. Neal*, 26 Ga. 120.

The notice to be given under the above act must be in the name and by authority of the aggrieved party, and a declaration in the usual form, with process attached by the clerk and served by the sheriff, is not a sufficient compliance with the act. *Jones v. Central R. & B. Co.*, 18 Ga. 247.—DISTINGUISHED IN *Hodges v. Atlantic & G. R. Co.*, 51 Ga. 244. FOLLOWED IN *Muscogee R. Co. v. Neal*, 26 Ga. 120.

II. HOW FRAMED AND ISSUED.

4. Naming and describing the parties.—Under a statute, providing that process in attachment or garnishment proceedings may designate defendants "by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles, or titles as they are generally known," a garnishee process against the "United States Express Company" is good whether it be a corporation or a partnership. *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

The words "United States Express Company"—held, to imply a corporation, so as to authorize service of process thereon as is provided for corporations. *United States Exp. Co. v. Bedbury*, 34 Ill. 459.

While it seems to be the better practice to name the local agent of a railroad company or other corporation upon which notice is to be served, yet an omission to do so does not invalidate the citation, where the return shows that it was served upon such local agent so as to constitute a legal service. *Missouri Pac. R. Co. v. Wise*, 3 Tex. App. (Civ. Cas.) 461.

5. Misnomer—Variance.*—Where a citation in a suit against an incorporated "railway" company describes it as a "railroad" company, there is no error in overruling a motion to quash the service. *Galveston, H. & S. A. R. Co. v. Donahoe*, 9 Am. & Eng. R. Cas. 287, 56 Tex. 162.

Where a suit is against a "railway" company, and the citation commands the sheriff to summon the defendant, described as a "railroad" company, the variance is immaterial. *Central & M. R. Co. v. Morris*, 28

Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.

6. Curing misnomer by amendment.—Where a summons names the defendant as a "railroad" company, when its proper designation is a "railway" company, an amendment may be allowed after default and judgment, so as to insert the true name. *Chicago & I. A. L. R. Co. v. Johnston*, 13 Am. & Eng. R. Cas. 181, 89 Ind. 88. *Parks v. West Side R. Co.*, 82 Wis. 219, 52 N. W. Rep. 92.

Defendant corporation was sued as the Baltimore & Washington railroad company, when its true name was the Baltimore & Ohio railroad company; but process was served upon one of its agents, and it appeared by counsel, but made no objection to the misnomer. Held, that the misnomer could not be used as error on appeal; but a judgment against defendant as sued could not be enforced by execution, but the misnomer might be obviated by an amendment at another trial of the cause. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32.

Defendants were sued as a foreign corporation, and process was served upon one of the members; but an answer was filed alleging a voluntary association and not a corporation. Held, that it was proper to allow an amendment by substituting the names of the individuals composing the association, instead of the corporate name. *Evoy v. Expressmen's Aid Soc.*, 51 N. Y. S. R. 38, 66 Hun 636, mem., 21 N. Y. Supp. 641.

The New York Central railroad company and the Hudson River railroad company, separate corporations, consolidated pursuant to an act of the New York legislature under the name of the New York Central & Hudson River R. Co. The new corporation was sued as a common carrier, by the name of the New York Central railroad company, for damage to property received at a station on the line of what was formerly the New York Central railroad, and appeared in court and claimed a misnomer. Held, that plaintiff was properly allowed on trial to amend the writ by inserting the true name of the new corporation. *Hosford v. New York C. & H. R. R. Co.*, 47 Vt. 533.

7. Issuing to another county.—Where, in an action against a corporation, the clerk of the county in which the action is brought issues a summons for the defendant to another county, it will be presumed,

* Misnomers. Pleadings and writs containing "railroad" for "railway," see note, 50 AM. & ENG. R. CAS. 618.

in the absence of any showing to the contrary, that such summons was properly issued to, and served in, such county, under Ind. Rev. St. 1881, § 316, because there was no person, officer, or agent of the defendant in the county where the action is pending upon whom service could lawfully be had. *Rochester, R. & St. L. R. Co. v. Jewell*, 107 Ind. 332, 8 N. E. Rep. 215.—FOLLOWED IN *Rochester, R. & St. L. R. Co. v. Woodruff*, 107 Ind. 599.

8. Issuing pending appeal.—An appeal having been prayed from a judgment against a railroad company for killing cattle, thirty days' time was given to file a bond. Subsequently a motion was made by plaintiff for a writ requiring a conductor of the company to answer as to funds in his hands. Pending this motion, an appeal bond was filed and afterwards the writ was issued. *Held*, that the issuing of the writ was erroneous. *Indianapolis & C. R. Co. v. Kibby*, 28 Ind. 479.

9. Citation.—It is provided by a Texas statute that but one citation shall issue for all the defendants living in the same county, but an issuance of more than one citation does not render the service void; its only effect is to make the plaintiff responsible for additional costs. *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.

A citation to be valid must command the officer to summon the defendant in the suit, and a citation against a corporation which directs the officer to summon an agent of the corporation is insufficient, though, if it be properly issued against the corporation, it may be served upon a local agent, if such be found in the county where the suit is instituted. *International & G. N. R. Co. v. Sauls*, 2 Tex. App. (Civ. Cas.) 186.—OVER-RULING *Galveston & R. R. Co. v. Shepherd*, 21 Tex. 274.—*Gulf, C. & S. F. R. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. Rep. 430.

Citation was issued against "The Southern Pacific R. Co." The return of the sheriff showed service upon "The Southern Pacific Company." Plaintiff filed an amendment designating the defendant as "The Southern Pacific Company." This amendment was not served, and judgment by default was rendered against "The Southern Pacific Company." On error by "The Southern Pacific Company"—*held*, that the name of plaintiff in error as defendant was not stated in the citation. *The Southern Pacific R.*

Co. and the Southern Pacific company cannot be regarded as identical. Southern Pac. Co. v. Block, 84 Tex. 21, 19 S. W. Rep. 300.

10. Summons.—The provisions of 2 Ind. Rev. St., p. 454, that process cannot run less than three nor more than thirty days; of the act of 1853, that in suits before a justice of the peace, against a railroad company, for stock killed, a day should be fixed for trial without specifying within what time, and that at least ten days' notice thereof should be given by summons; and of the act of the same year, that where the principal office of the company is out of the state, at least thirty days' notice shall be given of the time and place of the pendency of suit, should be construed together; and in every summons the day of trial should be set not exceeding thirty days after the date of the summons. *Michigan S. & N. I. R. Co. v. Shannon*, 13 Ind. 171.

Plaintiff sued to recover a penalty given by New York Act of 1857 to prevent extortion by railroad companies, and served his complaint and summons both on the same piece of paper, and referred to the statute giving the right of action in the complaint, instead of indorsing it on the summons. *Held*, a sufficient compliance with 2 N. Y. Rev. St. 481, § 7, requiring a reference to the statute, in such actions, to be indorsed on the summons. *Cox v. New York C. & H. R. R. Co.*, 61 Barb. (N. Y.) 615.—QUOTED IN *Bissell v. New York C. & H. R. R. Co.*, 67 Barb. 385.

Where the action is against a railroad company to recover a statutory penalty for an extortionate charge, the summons and complaint should not be set aside because the summons is formed under N. Y. Code Pro. § 129, subd. 2, and gives notice of an intention to apply for relief, instead of to the clerk for judgment, as provided by subd. 1. *Abbott v. New York C. & H. R. R. Co.*, 12 Abb. Pr. N. S. (N. Y.) 465, 1 *Sheld.* 278.—APPLYING *Morehouse v. Crilley*, 8 How. Pr. (N. Y.) 431. DISTINGUISHING AND CRITICISING *People v. Bennett*, 5 Abb. Pr. 384; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Johnson v. Kemp*, 11 How. Pr. 186; *Bank of Waterville v. Beltzer*, 13 How. Pr. 270.

An action for demanding and receiving an illegal fare is an action on contract within the meaning of N. Y. Code, § 129, and the summons should conform to subd.

1 of the section. *McCoun v. New York C. & H. R. R. Co.*, 7 *Lans. (N. Y.)* 75; *appeal dismissed in 50 N. Y.* 176, 3 *Am. Ry. Rep.* 269.

11. Warrant.—A warrant against a railroad company "for the non-payment of the sum of \$35 due by damage sustained," there being nothing in any other part of the proceedings to make it more certain, is fatally defective. *Wagoner v. North Carolina R. Co.*, 5 *Jones (N. Car.)* 367.

12. Possessory warrant.—A possessory warrant which alleges the unlawful taking of goods from the owner, and placing them on the cars of the defendant railroad, by some person unknown, and which directs the seizure of the property, and the arrest of the unknown person, when found, is not a void warrant. *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 *Ga.* 432, 11 *Am. Ry. Rep.* 375.

III. SERVICE, AND HOW PROVED.

13. In general.*—Under the United States statutes, where service is had in such a way that it would have been good against a corporation, before its property was placed in the hands of a receiver, it is sufficient service to bring the receiver into court; and so service on a station agent is good as against a receiver, where it would have been good against the corporation. The fact that the sheriff may have understood that he was directed to serve the corporation, and believed that he had done so, is immaterial. *Proctor v. Missouri, K. & T. R. Co.*, 42 *Mo. App.* 124.

Notice of an appeal may be served upon an attorney of the opposite party, but when he is not found in his office it must be left in a conspicuous place. Sliding an unsealed and undirected notice through a slot in the attorney's office door where letters are received is ineffectual. *Livingston v. New York El. R. Co.*, 58 *Hun* 131, 33 *N. Y. S. R.* 818, 19 *Civ. Pro.* 258, 11 *N. Y. Supp.* 359; *affirmed in 125 N. Y.* 695, *mem.*, 34 *N. Y. S. R.* 1011, 26 *N. E. Rep.* 751.—**DISTINGUISHING** *Duval v. Busch*, 13 *Civ. Pro.* 366.

In a suit before a justice of the peace, for setting fire to property, the constable's return, showing that he served the writ by reading it to the company's agent, is not

sufficient. The service of process, as provided for in *Wagn. Mo. St.* 810, art. 1, § 9, is authorized in suits for killing stock; but in the case supposed it should be made conformably to the statute relating to corporations (*Wagn. St.* 294, § 26), by service on the chief officer, or by leaving a copy with an agent. And if made by reading the writ to the agent, the court will be bound, on general demurrer, or any motion which will bring to its attention the defect in the service, to dismiss the suit, unless the return is amended in accordance with the facts showing due service. And the court cannot refuse to act upon the motion or pleading on the ground that they fail to specify wherein the return is defective. *Jordan v. Missouri, K. & T. R. Co.*, 61 *Mo.* 52.

14. Statutory provisions.—In a proceeding against a company, under *Ind. Act* of March 4, 1863, § 5, relating to killing stock, to procure an order upon an agent to pay over money upon a judgment rendered in favor of the plaintiff against the company, service upon "the company by a copy left with a conductor of a train on said road" is not sufficient. The process should be served as prescribed in section 3. *Louisville, N. A. & C. R. Co. v. Thompson*, 62 *Ind.* 87.

N. J. Act of April 15, 1846, entitled "An act for the relief of creditors against corporations," and the supplement thereto of March 22, 1865, refer only to the mode of serving process in the higher courts, and not when issued by a justice of the peace. *Delaware, L. & W. R. Co. v. Ditton*, 36 *N. J. L.* 361.

Service of summons upon a California railroad corporation, made in accordance with section 29 of the Nevada Practice Act, is valid. *Caples v. Central Pac. R. Co.*, 6 *Nev.* 265.

In an action against a railroad company before a justice of the peace, the mode of service of summons prescribed by the act of March 21, 1850 (*Curwen's Ohio St.* 1538) is exclusive of any and all other modes, and the mode prescribed in the act of March 14, 1853, § 15, is not applicable in suits against railroads. *North v. Cleveland & M. R. Co.*, 10 *Ohio St.* 548.

Texas Act of March 21, 1874, entitled "An act to fix the venue in certain cases," § 2, and the act of April 17, 1874, relating to jurisdiction, did not repeal by implication

* Service of process upon railroad companies, see note, 40 *AM. & ENG. R. CAS.* 615.

the act of Feb. 7, 1854, relating to the manner of serving process. So service on a railroad company under the act of 1854 by leaving at its office a copy of the citation and the petition is valid service. *Houston & T. C. R. Co. v. Willie*, 5 *Am. & Eng. R. Cas.* 541, 53 *Tex.* 318, 37 *Am. Rep.* 756.—FOLLOWED IN *Houston & T. C. R. Co. v. Ford*, 2 *Am. & Eng. R. Cas.* 514, 53 *Tex.* 364.

15. Upon whom service may be made, generally.*—Under a statute providing that process against railroad companies may be served on any agent of the company when certain designated officers cannot be found in the county, the word "county" must be used in the sense of "district" when the action is in a federal court. *Miller v. Norfolk & W. R. Co.*, 41 *Fed. Rep.* 431. *Lung Chung v. Northern Pac. R. Co.*, 10 *Sawyer*. (U. S.) 17, 19 *Fed. Rep.* 254.

In an action against a corporation in a federal court for the district of Oregon, if the summons is served under Oreg. Code, § 54, subd. 1, on any agent of the defendant other than its president, secretary, cashier, or managing agent, unless it appears that the cause of action arose in the district, such service is illegal and will be set aside. *Lung Chung v. Northern Pac. R. Co.*, 10 *Sawyer*. (U. S.) 17.

Where a corporation is a party, it is only necessary to bring the corporation into court by service of process upon such officers as the statute directs. Subordinate agents, employés, or officers are not proper parties. *State v. Jacksonville, P. & M. R. Co.*, 15 *Fla.* 201.

Under Nebraska Civil Code, § 912, a summons against a corporation may be served upon its chief officer if he be found in the county. If not so found, then upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of these can be found, by copy left at the office or usual place of business of such corporation, with the person having charge thereof. This, as well as section 914, applies to foreign corporations, except where there are special provisions to the contrary. *Chicago, B. & Q. R. Co. v. Manning*, 35 *Am. & Eng. R. Cas.* 618, 23 *Neb.* 552, 37 *N. W. Rep.* 462.

In New Jersey a summons issued out of

the court for the trial of small causes, against a corporation, must be served upon the president, treasurer, cashier, or clerk of such corporation, if found, and if not found, on any of the directors or managers thereof. *State (Pennsylvania R. Co., Pros.) v. Bennett*, 47 *N. J. L.* 275.

Service of a petition and citation addressed to a corporation is fatally defective when made on one who is not a legal representative of such corporation, authorized to receive legal process. *Collier v. Morgan's L. & T. R. & S. Co.*, 41 *La. Ann.* 37, 5 *So. Rep.* 537.

Service upon a servant girl at the private residence of an attorney is good, and the service counts from the time the papers are left, and not from the time they come into possession of the attorney. *Murray v. Great Western R. Co.*, 6 *Ont. Pr.* 211.

16. Service on foreign corporations, generally.—Ala. Code, §§ 2934, 2935, authorizing the service of process, in actions against corporations, on certain designated officers or agents, or, affidavit being made of their non-residence, on any white person in the employment of the corporation, or doing business for it, do not authorize suits against foreign corporations, except on causes of action originating here, or on contracts entered into with reference to a subject-matter within this state. *Central R. & B. Co. v. Carr*, 23 *Am. & Eng. R. Cas.* 487, 76 *Ala.* 388.

When a railroad extends through two or more states, and is operated under a charter procured from each, identical in the powers and privileges conferred, the corporation is a unit, and has a legal residence in each of the states through which its road runs. *Central R. & B. Co. v. Carr*, 23 *Am. & Eng. R. Cas.* 487, 76 *Ala.* 388.

It is just and proper that foreign corporations should be subject to the legitimate police regulations of the state, and should have, if required, an agent in the state to accept service of process when sued for acts done or contracts made therein. *Stockton v. Baltimore & N. Y. R. Co.*, 32 *Fed. Rep.* 9, 1 *Int. Com. Rep.* 411.

Ark. Act. of 1887, requiring foreign corporations to file a certificate designating an agent upon whom process may be served before doing business in the state, does not repeal the statute of 1873 which provides that no foreign insurance company shall do business in the state without first filing with the

* Service of process on officers and agents, see note, 16 *AM. & ENG. R. CAS.* 552.

auditor a stipulation agreeing that process may be served on the auditor or an agent to be designated by the company. *Marine Ins. Co. v. St. Louis, I. M. & S. R. Co.*, 43 *Am. & Eng. R. Cas.* 79, 41 *Fed. Rep.* 643.

A foreign corporation doing business in a state is deemed to consent to a statutory provision that service may be made upon such corporations by serving a summons upon its agent, and is bound by service in this method. *Van Dresser v. Oregon R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 634, 48 *Fed. Rep.* 202.

Under Ind. Act of March 4, 1853, as amended (Special Acts 1861, p. 78), the persons who may be served with process against a corporation whose principal office is not in the state are all of one grade, and service on any one of them is good without reference to whether others are found or not. *Toledo, W. & W. R. Co. v. Owen*, 43 *Ind.* 405.

Before the enactment of the statute providing for service of process upon a foreign corporation, such corporation was sued by attaching its property, and leaving an attested copy of the writ with its treasurer. *Held*, that the cause was not so "commenced by the service of process," within Mass. Pub. St. ch. 169, § 25, that the plaintiff could take a deposition by serving notice of the taking of the same upon the treasurer. *Lewis v. Northern R. Co.*, 139 *Mass.* 294, 1 *N. E. Rep.* 546.

A mandamus directed to a foreign corporation engaged in business in New Jersey, commanding the performance of some duty growing out of that business, may be legally served upon any officer of the company in that state upon whom lawful service could have been made, according to the ancient common law, if the corporation were domestic; but where the thing enjoined by the writ was the building of a bridge, service upon a mere financial officer of the company—*held*, insufficient. *State ex rel. v. Pennsylvania R. Co.*, 42 *N. J. L.* 490.

In an action against a foreign corporation, where the plaintiff resides in the state, or when the corporation has property in the state, or when the cause of action arose therein, service of a copy of the summons upon the general or managing agent is sufficient; but where neither one of the above conditions exists service must be made upon some one of the principal officers.

Cunningham v. Southern Exp. Co., 67 *N. Car.* 425.

Any service which is sufficient as against a domestic corporation may be authorized to commence an action against a foreign corporation. *Pope v. Terre Haute C. & M. Co.*, 87 *N. Y.* 137; *affirming* 24 *Hun* 238, 60 *How. Pr.* 419.

N. Y. Code, § 134, authorizing the service of summons upon a foreign corporation by delivering a copy to an officer, simply provides a substitute for an order of publication; and to sustain such service it must appear that the corporation had property in the state at the time of the service which was liable to be taken by attachment. *Bates v. New Orleans, J. & G. N. R. Co.*, 4 *Abb. Pr. (N. Y.)* 72, 13 *How. Pr.* 516.

A foreign corporation consents to be amenable to suits by such mode of service as the law of the state provides when it invokes the comity of the state for the transaction of its business. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 63 *How. Pr. (N. Y.)* 459.

17. — of process of the federal courts.—A corporation is not amenable to process except in the state where its business is done. *Northern Ind. R. Co. v. Michigan C. R. Co.*, 5 *McLean (U. S.)* 444.

Indiana Act of March 29, 1879, relating to foreign express companies, and authorizing the service of process on the officers or agents of such companies within the state, is limited to claims or demands arising in the state, and includes both actions growing out of contract and tort, but does not apply where the cause of action arises out of the state. *Grover v. American Exp. Co.*, 11 *Fed. Rep.* 386.—**APPLYING** *Wilson Packing Co. v. Hunter*, 8 *Biss. (U. S.)* 429.

Plaintiff was a citizen of Vermont, and defendant was a New York corporation, lessee of a railroad in Vermont, and in possession of the road and running it there, under the lease. Under a statute of Vermont it had appointed a person there upon whom service of every kind of process known to the laws of that state might be made. The writ in this suit, brought in Vermont, was served on such agent in Vermont, in the manner provided by the laws of that state. Defendant moved to dismiss the suit, on the ground that jurisdiction over defendant was not obtained by service. *Held*, that the motion must be denied; that defendant did not become a citizen of Vermont, and that

the service of the process in that state was good under its laws. *Brownell v. Troy & B. R. Co.*, 18 *Blatchf. (U. S.)* 243, 3 *Fed. Rep.* 761.—REVIEWING *Baltimore & O. R. Co. v. Noell*, 32 *Gratt. (Va.)* 394; *Knapp v. Troy & B. R. Co.*, 20 *Wall. (U. S.)* 117.

Under Act of Congress of March 3, 1875, providing that no civil suit shall be brought against any person by original process, except in the district of which he is an inhabitant or in which he shall be found, a corporation cannot be served with process out of the state of its creation. *Hume v. Pittsburgh, C. & St. L. R. Co.*, 8 *Biss. (U. S.)* 31.

A corporation can only be said to be "found," within the meaning of the above statute, in the state of its creation; and the presence of an agent in another state is not the presence of the corporation, within the meaning of the statute. *Hume v. Pittsburgh, C. & St. L. R. Co.*, 8 *Biss. (U. S.)* 31.

A law of New York declaring a foreign corporation liable to be sued by summons in the same manner as corporations of New York, and that process might be served on an officer or agent of the corporation, cannot give to a U. S. circuit court jurisdiction of a suit against such corporation by the service of process, within its district, on an officer or agent of such corporation. *Pomeroy v. New York & N. H. R. Co.*, 4 *Blatchf. (U. S.)* 120.—DISTINGUISHED IN *Kelsey v. Pennsylvania R. Co.*, 14 *Blatchf.* 89.

The rules of procedure prescribed by a state for obtaining service upon a foreign corporation doing business therein govern the federal courts, and service in the manner prescribed confers upon them jurisdiction over such corporation. *Van Dresser v. Oregon R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 634, 48 *Fed. Rep.* 202.

18. When such corporation is "found" within the jurisdiction.—When a foreign corporation establishes an agency in a state whose laws provide that they may be summoned by a process served upon an agent, they are "found" within the district in which such agent is doing business, within the meaning of the Act of Congress of March 3, 1875, and may be served in the same manner in suits in federal courts. *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 *Fed. Rep.* 3.—FOLLOWING *Mohr & M. Distilling Co. v. Insurance Cos.*, 12 *Fed. Rep.* 474.—*Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 21 *Blatchf. (U. S.)* 109, 13 *Fed. Rep.*

358. *Block v. Atchison, T. & S. F. R. Co.*, 21 *Fed. Rep.* 529.—DISTINGUISHED IN *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 *Am. & Eng. R. Cas.* 574, 34 *Fed. Rep.* 286.—*Galveston City R. Co. v. Hook*, 40 *Ill. App.* 547.

A foreign corporation is "found" in the district where its agent is served, when it does business there, and the state laws authorize such a mode of service. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 63 *How. Pr. (N. Y.)* 459.

19. Chief place of business, or office, within state or district.—Under U. S. Rev. St. § 790, relating to the district of Columbia, an action can be brought in the supreme court of the district against a foreign corporation only when it has an established place of business in the district, and the process can be served upon the agent or other person by it employed to conduct such business as it is engaged in here. *Dallas v. Atlantic, M. & O. R. Co.*, 2 *MacArth. (D. C.)* 146.

If the chief office or place of business of a corporation is within the state, as designated by the Missouri statute, then a foreign corporation is regarded as a domestic one, and amenable to the jurisdiction of the courts by the common process of summons; but if its office or place of business is not in the state, then it must be proceeded against as a non-resident by attachment. *Middough v. St. Joseph & D. C. R. Co.*, 51 *Mo. 520*, 3 *Am. Ry. Rep.* 261.

Service upon a non-resident corporation having an office or doing business in the state, in the manner provided by Mo. Rev. St. 1879, § 3489, subd. 4, has the effect of personal service and gives the court jurisdiction to enter a general judgment. *McNichol v. United States M. R. Agency*, 74 *Mo. 457*.—APPROVED IN *New York, L. E. & W. R. Co. v. Estill*, 147 *U. S.* 591.

Where the suit is against a foreign corporation, in order to make service of the summons and complaint on a managing agent of the company good, it must appear that the company has some property in the state at the time of the service; but this may be established by proof that the company leases an office and owns the office furniture. *Tuchbaud v. Chicago & A. R. Co.*, 2 *Silv. Sup. Ct.* 352, 16 *Civ. Pro.* 241, 5 *N. Y. Supp.* 493, 53 *Hun* 629, 24 *N. Y. S. R.* 236; affirmed in 40 *Am. & Eng. R. Cas.* 612, 115 *N. Y.* 437, 17 *Civ. Pro.* 424, 22 *N. E. Rep.* 360, 26 *N. Y. S. R.* 440.

Unless a foreign corporation has within the state a managing agent, for the ordinary transaction of its business, it cannot be held liable in the courts of Ohio by any proceeding *in personam*. *Barney v. New Albany & S. R. Co.*, 1 *Handy (Ohio)* 571.

The first part of section 17 of the Common Law Procedure Act applies only to corporations whose chief place of business is within Upper Canada; the remainder to foreign corporations. Where, therefore, a writ against a foreign corporation is served in Upper Canada upon the president, but it is not shown that he transacted any business of the company there, the service is bad. *Wilson v. Detroit & M. R. Co.*, 3 *Ont. Pr.* 37.

20. Officer temporarily in state in individual capacity.—The presence of the chief officer of a foreign corporation in a state does not change the legal residence of the corporation; nor does the carrying of property of the corporation into such state for the purpose of exhibition make the corporation an "inhabitant," nor can it be said to be "found" there, within the meaning of the act of congress, so that it may be served with process. *Carpenter v. Westinghouse Air-Brake Co.*, 32 *Fed. Rep.* 434. —FOLLOWING *United States v. American Bell Telep. Co.*, 29 *Fed. Rep.* 17.—*Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 *Fed. Rep.* 850. *Midland Pac. R. Co. v. McDermid*, 91 *Ill.* 170. —FOLLOWED IN *Fairbank v. Cincinnati, N. O. & T. P. R. Co.*, 54 *Fed. Rep.* 420, 9 *U. S. App.* 212, 4 *C. C. A.* 403. —*Galveston City R. Co. v. Hook*, 40 *Ill. App.* 547. *Sheehan v. Bradford, B. & K. R. Co.*, 15 *Civ. Pro.* 249, 3 *N. Y. Supp.* 790. *Newell v. Great Western R. Co.*, 19 *Mich.* 336. *Latimer v. Union Pac. R. Co.*, 43 *Mo.* 105.

Where the cause of action arises in the state, service of process on a foreign corporation may be had by delivering a copy to the vice-president and manager, though he be in the state but temporarily and not engaged in any of the duties of his office. *Porter v. Sewell Car-Heating Co.*, 17 *Civ. Pro.* 386, 7 *N. Y. Supp.* 166. —FOLLOWING *Pope v. Terre Haute C. & M. Co.*, 87 *N. Y.* 137; *Hiller v. Burlington & M. R. R. Co.*, 70 *N. Y.* 223.

Under *N. Y. Code Civ. Pro.* § 432, providing for the service of summons upon a foreign corporation by delivering a copy in

the state to the president, secretary, or treasurer of the company, in order to make such service effectual it is not necessary that the officer served should be in the state in his official capacity, or engaged in the business of the company, or that it should have any property in the state, or that the cause of action arose in the state. *Pope v. Terre Haute C. & M. Co.*, 87 *N. Y.* 137; *affirming* 24 *Hun* 238, 60 *How. Pr.* 419. —FOLLOWED IN *Tuchband v. Chicago & A. R. Co.*, 115 *N. Y.* 437, 17 *Civ. Pro.* 424, 22 *N. E. Rep.* 360, 26 *N. Y. S. R.* 440; *Porter v. Sewell Car-Heating Co.*, 17 *Civ. Pro.* 386, 7 *N. Y. Supp.* 166.

21. Luring corporate officer within the jurisdiction.—Under the laws of Nebraska where a non-resident corporation is not doing business in the state, and has no offices there, it is not in the state so that process can be served on it. So where the president of a construction company was inveigled into a county in the state that service might be had on him—held, this would not give jurisdiction. *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 *U. S.* 98, 11 *Sup. Ct. Rep.* 36. —QUOTED IN *Fairbank v. Cincinnati, N. O. & T. P. R. Co.*, 54 *Fed. Rep.* 420, 9 *U. S. App.* 212, 4 *C. C. A.* 403.

22. President.—Ga. Act of Feb. 23, 1866, does not repeal the act of April 18, 1863, and where a suit has been commenced by service of process upon an express company in accordance with the previous act service may be perfected in accordance with the later act, by serving upon the president of the company; failure to serve upon the president in the first instance is not a bar to the action, but service must be perfected before going to trial. *Conner v. Southern Exp. Co.*, 37 *Ga.* 397.

A corporation created in the state cannot be served with a summons of garnishment by serving any one of its agents. The service must be on its president. *Clark v. Chapman & C. R. & B. Co.*, 45 *Ga.* 486. *Brigham v. Port Royal & A. R. Co.*, 74 *Ga.* 365.

It is only where the president of an express company resides in the state that service of process is required to be made upon him under Ga. Code, § 3412. Posting his name in each office where the company transacts business is of no efficacy, unless he resides in the state, whether his office be within the state or not. *Southern Exp. Co. v. Skipper*, 85 *Ga.* 565, 11 *S. E. Rep.* 871.

* Process cannot be served on agent of foreign corporation casually in jurisdiction, see note, 16 *AM. & ENG. R. CAS.* 557.

Under Ind. Rev. St. of 1852, service of process on the president of a railroad company is sufficient. *Branham v. Ft. Wayne & S. R. Co.*, 7 Ind. 524.

Delivery of a summons to the president of a company, he not being a party to the action, is but service upon the company itself. *Newport & C. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. Ry. Rep. 221.

Where a corporation is dissolved under Mo. Rev. St. of 1889, § 2664, service of process upon its president or managing officer confers no jurisdiction over the person of the dead corporation, as such officers can neither appear nor defend for such corporation. *Ford v. Kansas City & I. S. L. R. Co.*, 52 Mo. App. 439.

In an action on a note executed by one as president of a railway company, the clerk issued the writ commanding the sheriff to summon such person as president, etc., and service was made on him. *Held*, that the writ and service were good. *Galveston & R. R. Co. v. Shepherd*, 21 Tex. 274.

23. Secretary.—In the absence of any statutory mode of service of a notice upon a corporation, when it cannot be had upon the chief officer or managing agent, service upon any officer whose official relation to the governing body, or managing agent, or chief officer would make it his duty to communicate the notice will be sufficient. The secretary is such an officer. *Hellsell v. Chicago & A. R. Co.*, 16 Am. & Eng. R. Cas. 619, 77 Mo. 315.

Notice of an action against a railway company for overcharges served upon a station superintendent was insufficient under 8 & 9 Vict. c. 20, § 138, as it should have been served upon the secretary of the company in London, where the company's principal office was. *Garten v. Great Western R. Co.*, 4 Jur. N. S. 1036, 27 L. J. Q. B. 375.

24. Assistant secretary.—The assistant secretary of a foreign corporation, who is only charged with making such records as are expressly intrusted to him, is not "a managing agent" of the corporation, within the meaning of N. Y. Code Civ. Pro. § 432, subd. 3, which authorizes service of process upon a corporation by delivery of a copy to a managing agent. *Sterett v. Denver & R. G. R. Co.*, 17 Hun (N. Y.) 316.

Service of a writ may, under Man. St. § 35, be authorized upon an assistant secretary of a foreign corporation, but it must appear that service cannot be effected upon one of

the proper officers of the company, and the nature of the duties of the office must be shown. *Crotty v. Oregon & T. R. Co.*, 3 Man. 182.

25. Superintendent.—A return of an officer in an action against a corporation that he served process on the superintendent of the road, the highest officer found in the county, is a sufficient compliance with the Tenn. statute providing that in actions against corporations process may be served on the president, or other head of the corporation, or in his absence on the cashier, treasurer, or secretary, or in the absence of such officers, then on any director of such corporation, and if none of these officers reside in the state, service upon the chief agent of the corporation, residing at the time in the county where suit is brought, shall be sufficient. *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. Rep. 306; *affirming* 88 Tenn. 721 13 S. W. Rep. 698.

The general superintendent of the work of operating the telegraph lines of a company is the "managing agent" of the company within the meaning of N. Y. Code of Civ. Pro. § 431, in reference to service on domestic corporations. *Barrett v. American T. & T. Co.*, 138 N. Y. 491; *affirming* 56 Hun 430, 31 N. Y. S. R. 465, 10 N. Y. Supp. 138, 18 Civ. Pro. 363.

26. Assistant treasurer. Under N. Y. Code of Civ. Pro. § 431, service of summons upon a domestic corporation may be made by delivering a copy within the state to the president or other head of the corporation, to the secretary or clerk, cashier, treasurer, director, or managing agent. *Held*, that this did not authorize service upon an assistant treasurer of the company simply because the treasurer was a non-resident. *Winslow v. Staten Island R. T. R. Co.*, 51 Hun 298, 21 N. Y. S. R. 87, 4 N. Y. Supp. 169; *affirming* 2 N. Y. Supp. 682, 15 Civ. Pro. 202.

27. Directors.*—A director of a railroad company is not a head or managing agent thereof upon whom a summons and complaint may be served, under Ala. Rev. Code, § 2568. *Alabama & T. R. R. Co. v. Burns*, 43 Ala. 169.

Under N. Y. Code, § 134, service of summons upon a director of a railroad corpora-

* Service of process on a director who had ceased to hold office, see 48 Am. & Eng. R. Cas. 86, *abstr.*

tion is valid. *Curtis v. Avon, G. & M. M. R. Co.*, 49 *Barb. (N. Y.)* 148.

Service of summons upon a director of a foreign corporation is not authorized either by N. Y. Act of 1846, ch. 195, § 8, or by Code Civ. Pro. § 432. *Quade v. New York, N. H. & H. R. Co.*, 27 *J. & S.* 479, 14 *N. Y. Supp.* 875, 39 *N. Y. S. R.* 157.

In proceedings or actions against defunct corporations, service of process upon the members of its last acting board of directors is sufficient, under the statute, to give the court jurisdiction. *Warner v. Callender*, 20 *Ohio St.* 190.

Where process issues against a foreign corporation, and the sheriff returns that he served a certified copy of the summons on one of the directors personally, it is an insufficient service. In no case can a foreign corporation be served with process in the mode prescribed by Ohio Code, § 66. *Barney v. New Albany & S. R. Co.*, 1 *Handy (Ohio)* 571.

Where a statute provides that a writ may be served on a company by leaving it at or sending it by post to the office of the company, or by giving it to the secretary, or, if there be no secretary, to a director, the secretary of the company cannot commence suit against the company by serving a summons on a director. *Lawrenson v. Dublin M. J. R. Co.*, 37 *L. T.* 32.

Service of an English writ upon an Irish railway company should be upon the secretary or clerk of the company at the office in Ireland, and if they cannot be found, upon a director there; but service upon a director in England is void. *Evans v. Dublin & D. R. Co.*, 3 *Railw. Cas.* 760, 14 *M. & W.* 142, 2 *D. & L.* 865, 9 *Jur.* 474, 14 *L. J. Ex.* 245.

28. Agents, generally.—(1) *Federal decisions.*—Oreg. Code of Civ. Pro. § 54, as amended in 1876, provides for service of process against a private corporation on the president or other head of the corporation, secretary, cashier, or managing agent; but if none of these be found in the county, then upon any clerk or agent of the corporation that may be found. *Held*, that the word "county" must be understood as "district" when applied to suits in the federal courts. *Lung Chung v. Northern Pac. R. Co.*, 16 *Am. & Eng. R. Cas.* 548, 19 *Fed. Rep.* 254, 10 *Sawy.* 17.

And in such case service on an agent will be set aside, unless it appears that the cause of action arose in the district. *Lung Chung*

v. Northern Pac. R. Co., 16 *Am. & Eng. R. Cas.* 548, 19 *Fed. Rep.* 254.

Service of process, in an action against a foreign railroad corporation, cannot be made upon an agent whose authority is limited to soliciting business, although such agent may have been employed by the defendant for the purpose of compromising the suit. *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 *Am. & Eng. R. Cas.* 574, 34 *Fed. Rep.* 286.—APPLYING *Mackereth v. Glasgow & S. W. R. Co.*, L. R. 8 Ex. 149. DISTINGUISHING *Block v. Atchison, T. & S. F. R. Co.*, 21 *Fed. Rep.* 529. QUOTING *United States v. American Bell Telep. Co.*, 29 *Fed. Rep.* 17.

The Union Pacific railway company must be considered as doing business in Washington under the name of "The Union Pacific System," and a service of summons upon an agent therein who is authorized to act for all the companies of such system is a service upon the Union Pacific company. *Van Dresser v. Oregon R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 634, 48 *Fed. Rep.* 202.

Where a domestic corporation makes an unauthorized lease of its railroad to another company, but continues its corporate existence and receives revenue under the lease, its lessee must be considered as its agent to carry on the business, and in an action for a tort committed in operating the road service of summons upon an agent of the lessee is service upon the lessor company. *Van Dresser v. Oregon R. & N. Co.*, 50 *Am. & Eng. R. Cas.* 634, 48 *Fed. Rep.* 202.

Ill. Rev. St. 1891, ch. 110, § 5, providing for service of process against corporations upon any agent of the corporation found in the county, in the absence of the president, does not authorize service against a foreign railroad corporation upon a person employed to solicit business for the corporation, but who has no power to sell tickets or make contracts for the corporation, though he may have the company's name on his office window. *Fairbank v. Cincinnati, N. O. & T. P. R. Co.*, 54 *Fed. Rep.* 420, 9 *U. S. App.* 212, 4 *C. C. A.* 403.—FOLLOWING *Midland Pac. R. Co. v. McDermid*, 91 Ill. 170; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249. QUOTING *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 11 *Sup. Ct. Rep.* 36.

(2) *State decisions.*—Service of process against a railroad corporation upon an agent is not effective, unless the agent is la

fact the agent of the corporation. So where a state has indorsed the bonds of a road, and has seized the road for non-payment of interest, and placed it in the hands of a receiver, an agent under the receiver is not the agent of the corporation, so as to make service of process upon him valid as against the corporation. *Cherry v. North & S. R. Co.*, 59 Ga. 446.

Where the receivers of a foreign railroad operate a connecting railroad in Georgia as part of a through line, under a contract by which they were to operate the Georgia branch under the laws of Georgia, furnish their own rolling stock, for which the Georgia road should pay a certain amount, that each road should contribute its proportion of the expenses, and the net proceeds should be divided *pro rata*, a depot agent on the line of the Georgia corporation is such an agent of that company as can be served with process against it, though he is employed by the receivers and makes remittances to them, by whom the proceeds are afterwards distributed under the contract. *Georgia Southern R. Co. v. Bigelow*, 68 Ga. 219.

Under Illinois Act of Feb. 8, 1853, providing for service upon a corporation by leaving a copy with its president, if he be found in the county, and if not, by leaving a copy with the clerk, cashier, secretary, engineer, conductor, or any agent of the company found in the county, service on "any agent" is sufficient, where the president is not found. There is no limitation restricting the service to the agent whose duty requires him to attend to the law business of the corporation. *Chicago & R. I. R. Co. v. Fell*, 22 Ill. 333.—FOLLOWED IN *Chicago & R. I. R. Co. v. Whipple*, 22 Ill. 105.

In a suit against a corporation not residing or doing business in the state, and having no office or place of business in the state, service upon an agent appointed by the land commissioner of the corporation whose business it is to assist in making sales will not give the court jurisdiction, such person not being an agent of the corporation, in the sense of the statute. *Union Pac. R. Co. v. Miller*, 87 Ill. 45, 18 Am. Ky. Rep. 400.

Ill. Rev. St. 1874, ch. 79, § 21, requires summons against a corporation to be served on its president, secretary, superintendent, general agent, cashier, or principal clerk, if they, or any of them, can be found in the county; and it is only when such officers

are not found in the county that process may be served on some other agent. *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App. 118.—QUOTING *St. Louis, A. & T. H. R. Co. v. Dorsey*, 47 Ill. 289.

A return is not sufficient which simply states that the process was served upon "an agent" of the corporation, without showing that he was one designated by the statute. *Union Pac. R. Co. v. Pillsbury*, 29 Kan. 652.—FOLLOWED IN *Dickerson v. Burlington & M. R. Co.*, 44 Am. & Eng. R. Cas. 465, 43 Kan. 702.

The "general or special agent" of a corporation upon whom a summons in garnishment may be served under Mich. Comp. L., § 6463, is an agent having a general or special controlling authority, either generally or in respect to some particular department of corporate business. *Lake Shore & M. S. R. Co. v. Hunt*, 39 Mich. 469.

Service of process on a corporation other than a railroad or telegraph company must, under the laws of Mississippi, be made on the president or other head of the corporation, cashier, or treasurer, or in such manner as the court may direct. Service upon a mere agent is not sufficient to bring the corporation within the jurisdiction of the court, or authorize final judgment against it, by default. *Southern Exp. Co. v. Craft*, 43 Miss. 508.

Where the property of a company is in the hands of a receiver, service of process upon the agent of the receiver will give no jurisdiction over the company. *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.—DISTINGUISHING *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498; *McKinney v. Ohio & M. R. Co.* 22 Ind. 99; *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277.—DISTINGUISHED IN *Proctor v. Missouri, K. & T. R. Co.*, 42 Mo. App. 124.

At common law process must be served on the principal officer of a corporation within the jurisdiction creating it; but the corporation can waive this requirement and consent to be served in a different manner, and when it does so it stands on the same footing as natural persons. When it avails itself of the privilege of doing business in a state whose laws authorize it to be sued there by service on an agent, its assent to that mode of service is implied. *Merchants' Mfg. Co. v. Grand Trunk R. Co.*, 11 Abb. N. Cas. (N. Y.) 183.

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against a railroad corporation for loss of baggage by the service of summons upon a baggage master in its employ. He is not such a "managing agent" as the statute contemplates. But a general appearance waives the irregularity of such service. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308.—REVIEWED IN *Emerson v. Auburn & O. L. R. Co.*, 13 Hun 150.

Under Va. Acts 1883-84, p. 701, service on any corporation other than a bank of circulation may be on any agent thereof in the county or corporation in which he resides, or in which the principal office of the company is located, whatever may be the employment of such agent. *Norfolk & W. R. Co. v. Cottrell*, 31 Am. & Eng. R. Cas. 235, 83 Va. 512, 3 S. E. Rep. 123.

29. General passenger agent.—A general passenger agent for the state having an office in a county other than one through which the road runs is such an agency as is contemplated by the statute. Service upon such agent will bind the company. *St. Louis & S. F. R. Co. v. Trawweek*, 84 Tex. 65, 19 S. W. Rep. 370.

30. Managing agents.—(1) *In general.*—Where a foreign railroad corporation has an office in the state in which a substantial portion of its business is transacted by a person designated by itself as a general agent, although followed by words indicating his agency to be confined to some one department, such agent is a "managing agent" within the meaning of N. Y. Code Civ. Pro., § 432, as to the service of summons upon a foreign corporation defendant, and a service upon him is valid and binding upon the corporation. *Tuchband v. Chicago & A. R. Co.*, 40 Am. & Eng. R. Cas. 612, 115 N. Y. 437, 17 Civ. Pro. 424, 22 N. E. Rep. 360, 26 N. Y. S. R. 440; *affirming* 53 Hun 629, 24 N. Y. S. R. 236, 5 N. Y. Supp. 493, 2 Silv. Sup. Ct. 352, 16 Civ. Pro. 241.—FOLLOWING *Palmer v. Pennsylvania Co.*, 35 Hun 369; *Hiller v. Burlington & M. R. Co.*, 70 N. Y. 224; *Pope v. Terre Haute C. & M. Co.*, 87 N. Y. 137.

N. Y. Code Civ. Pro., § 432, does not specify the extent of the agency required to bind a corporation by service of process, except that the person upon whom service is made must be "a managing agent." Every object of the service is attained when the agent served is of sufficient character and rank to make it reasonably certain that the defendant will be apprised of the ser-

vice made. The statute is satisfied if he be a managing agent to any extent. *Palmer v. Pennsylvania Co.*, 35 Hun (N. Y.) 369, 2 How. Pr. N. S. 156; *appeal dismissed in* 99 N. Y. 679.—DISTINGUISHED IN *Winslow v. Staten Island R. T. R. Co.*, 51 Hun 298. FOLLOWED IN *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 17 Civ. Pro. 424, 22 N. E. Rep. 360, 26 N. Y. S. R. 440, 2 Silv. Sup. Ct. 352.

Under N. Y. Code, § 134, to make service of process upon a foreign corporation by service upon "a managing agent" legal, the agent must be one whose duties extend to all the transactions of the company. One whose duties extend only to a particular branch or department of the company's business is not a managing agent. *Brewster v. Michigan C. R. Co.*, 5 How. Pr. (N. Y.) 183.

(2) *Who is a "managing agent."*—An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is. *Porter v. Chicago & N. W. R. Co.*, 1 Neb. 14.

A division superintendent of an important division of a railroad, who is at a distance from the company's general office, is. *Brayton v. New York, L. E. & W. R. Co.*, 72 Hun 602, 54 N. Y. S. R. 763, 25 N. Y. Supp. 264.—FOLLOWING *Palmer v. Pennsylvania Co.*, 35 Hun 370, 99 N. Y. 679; *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 15 N. Y. S. R. 686.

A division superintendent, whose place of business includes the place where the cause of action arises, and who has charge of all the agents and servants of the company within his division, is. *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 48 Hun 190, 15 N. Y. S. R. 686, 14 Civ. Pro. 262.—QUOTING *Palmer v. Pennsylvania Co.*, 35 Hun 369, 99 N. Y. 679.

A superintendent and general manager of a foreign railroad company who is operating a railroad in the state, is. *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. (N. Y.) 1.

Where a railroad issues a freight receipt with the name of a certain person thereon as agent, he will be deemed a "managing agent." *Palmer v. Pennsylvania Co.*, 2 How. Pr. N. S. (N. Y.) 156, 35 Hun 369, mem.; *appeal dismissed in* 99 N. Y. 679, mem.

(3) *And who is not.*—A clerk of a corporation who sometimes assists in the work of treasurer in drawing checks, but where

there is nothing to show that he has any part in the management of the company's business, or that he exercises any authority as managing agent, is not. *Winslow v. Staten Island R. T. R. Co.*, 51 Hun 298, 21 N. Y. S. R. 87, 4 N. Y. Supp. 169; affirming 2 N. Y. Supp. 682, 15 Chv. Pro. 202.—DISTINGUISHING *Palmer v. Pennsylvania Co.*, 35 Hun 369.

One who is employed, during the company's pleasure, to superintend the running of horse-cars on a portion of a railroad not yet completed but who has no authority to make contracts for the company, except as to the purchase of horses and feed, and who has no knowledge of the company's books or of its affairs generally, is not. *Emerson v. Auburn & O. L. R. Co.*, 13 Hun (N. Y.) 150.—REVIEWING *Brewster v. Michigan C. R. Co.*, 5 How. Pr. 183; *Flynn v. Hudson River R. Co.*, 6 How. Pr. 308; *Doty v. Michigan C. R. Co.*, 8 Abb. Pr. 427.

31. Local agents.—After judgment against a company upon a summons of garnishment served upon a local agent alone the service will be held sufficient until the judgment is set aside, unless it affirmatively appears that the president resided in the state at the time. *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. Rep. 871.

A return of a summons against a railroad company, that it was served upon a certain individual "who is the local freight agent of said defendant" at a certain station, is not good, under Ind. Code, § 30, which designates certain officers or agents upon which process may be served, if they be found, and if not then upon some other agent. *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405.

Service of a notice to take depositions upon the local agent of a foreign railroad corporation, on whom process in the action may be served, is good, in the absence of anything to show that the corporation was prejudiced or misled thereby. *Katsenstein v. Raleigh & G. R. Co.*, 78 N. Car. 286.

In an action against a railroad company, service of summons upon a local agent is sufficient to bring the defendant into court. *Katsenstein v. Raleigh & G. R. Co.*, 78 N. Car. 286.

Where notice of another proceeding in the action is served upon such local agent, it is sufficient, in the absence of any allegation that thereby any injustice has befallen the defendant. *Katsenstein v. Raleigh & G. R. Co.*, 78 N. Car. 286.

Several railroads centering in a certain place maintained a joint warehouse which belonged to one of the companies, to the cost of maintaining which the other companies, including the defendant, contributed. An agent for the warehouse was employed by the company owning it, subject to the approval of certain of the other companies, but not the defendant. He was not on the pay rolls of defendant, collected no moneys for it, made no contracts for it, and was not subject to it in any way. *Held*, that he was not a local agent of defendant, within the meaning of 1 Sayles' Tex. Rev. St. art. 1223a, providing for service of process upon certain officers and agents of corporations, including "any local agent within this state." *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. Rep. 859.

Under Tex. Rev. St. art. 1223, a citation may be served upon a local agent of a railroad company in the county in which the suit is brought. So where a petition alleges that defendant company has an office for the transaction of business at a certain city in the county where the suit is brought, and names the agent in charge of said office, service upon such agent is sufficient. *Houston & T. C. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 59, 55 Tex. 323, 40 Am. Rep. 808.

Service of a notice to take depositions upon the local agent of a railroad company is legal service, under the Texas statutes. *Missouri Pac. R. Co. v. Collier*, 18 Am. & Eng. R. Cas. 281, 62 Tex. 318.

32. Station agents.—A summons upon a railroad company may, by statute, be served upon a station agent, or other person having control of any of the company's business, who has to report to the company, or upon the clerk or agent of any station in the county where it is issued. *Ex parte St. Louis, I. M. & S. R. Co.*, 16 Am. & Eng. R. Cas. 547, 40 Ark. 141.

Leaving a copy of a declaration and process with a depot agent is not sufficient service on an individual lessee of a railroad. *Jones v. Georgia Southern R. Co.*, 66 Ga. 558.—DISTINGUISHED IN *Singleton v. Southwestern R. Co.*, 21 Am. & Eng. R. Cas. 226, 70 Ga. 464, 48 Am. Rep. 574.—*Central R. Co. v. Smith*, 69 Ga. 268.

Under Ga. Code, § 3369a, providing for perfecting service on a railroad company which has leased its road by sending a letter "to the president of the leasing com-

pany," and serving the depot agent of the lessee, by "the leasing company" is meant the lessor, and the latter should be sent to its president. *Atlanta & C. A. L. R. Co. v. Harrison*, 76 Ga. 757.

The service upon a "station agent" of a railroad company of the notice required by Iowa Code, § 1289, as a foundation for the recovery of double damages, is sufficient, without a more specific showing that such agent was "employed in the management of the business of the corporation." *Schlenker v. Chicago, M. & St. P. R. Co.*, 19 Am. & Eng. R. Cas. 625, 61 Iowa 235, 16 N. W. Rep. 103.—FOLLOWING *Welsh v. Chicago, B. & Q. R. Co.*, 53 Iowa 632.

Where an information is filed against a railroad company for obstructing a highway, and a summons is issued and served by delivering a copy to a station agent, and one to an attorney and director of the company, the process and service are properly set aside. *State v. Ohio & M. R. Co.*, 23 Ind. 362.

Under Miss. Code 1880, § 1529, service on the station agent of a railroad company is binding, and this whether its principal place of business is in the county in which the suit is brought or not. *Alabama & V. R. Co. v. Bolding*, 69 Miss. 255, 13 So. Rep. 844.

The provision of the Missouri statute that "suit may be commenced by serving the summons on any director," etc., is permissive and additional to the common mode of service, and not mandatory or exclusive of other methods of service; so service upon a station agent is sufficient. *State v. Hannibal & St. J. R. Co.*, 51 Mo. 532, 3 Am. Ry. Rep. 266.

A summons against a railroad is properly served on its depot agent. *Hudson v. St. Louis, K. C. & N. R. Co.*, 53 Mo. 525.

Under Mo. Rev. St. § 2521, where service against a railroad corporation is made on an agent other than the president, secretary, treasurer, cashier, or other chief or managing officer, the agent served must not only be a station or freight agent, but he must be the nearest station or freight agent in the county where the action is pending. *Farmer v. Medcap*, 19 Mo. App. 250.—FOLLOWING *Haley v. Hannibal & St. J. R. Co.*, 80 Mo. 114.—*Werries v. Missouri Pac. R. Co.*, 19 Mo. App. 398.

In an action against a railroad company, the officer made a return that he had served the summons on a certain person named,

"freight agent of the defendants"; that no person had been designated by the company in the county upon whom process might be served, as the statute provides, and that no officer of the company resided in the county. *Held*, that the company had a right to show that the service was unauthorized, as it had a resident director in the county. *Wheeler v. New York & H. R. Co.*, 24 Barb. (N. Y.) 414.

Whether service on a mere station agent is good, *quære*. *Wagoner v. North Carolina R. Co.*, 5 Jones (N. Car.) 367.

Taylor, Wis. St. 1355, § 20, providing that in all actions for damages against any railroad company, service of process may be made upon any station or depot agent of the defendant, applies to actions on contract for labor or services performed. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

Since the Act of Congress of March 3, 1887, allowing receivers to be sued on matters connected with the property in their hands, without previous leave of the court, includes the service of process, and where defendant receivers have their residence and place of business out of the state, service on a local agent, according to the state law, seems to be good service; but to remove any doubt the court made an order that such service should be good. *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 40 Fed. Rep. 426.—FOLLOWED IN *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.

The station master of a railway company, the head office of which is not in Ontario, is not an agent on whom service against the company can properly be effected, under C. L. P. Act, § 17. *Taylor v. Grand Trunk R. Co.*, 4 Ont. Pr. 300.

33. Ticket agents.—A booking clerk employed to issue tickets although the only officer of a Scotch railway company in England, is not a head officer or clerk within the Common Law Procedure Act, 1852, § 16, so as to render valid the service of a writ upon him. *Mackereth v. Glasgow & S. W. R. Co.*, 42 L. J. Ex. 82, L. R. 8 Ex. 149, 21 W. R. 339, 28 L. T. 167.

Iowa Act of 1862, ch. 169, § 6, providing that in actions against railroads service may be made upon any station or ticket agent employed in the management of its business, obviates the necessity of a return of "not found" as to the company. *Brandt v. Chicago, R. I. & P. R. Co.*, 26 Iowa 114.

Service on a railway company by leaving a copy with a person in charge of a depot as ticket agent of the company, the company having designated no person in said county upon whom summons should be served, is good, without specifying in express terms that the road of the company runs into that county, or that the company transacts business therein. *Missouri, K. & T. R. Co. v. Crowe*, 9 Kan. 496.

In a proceeding under Minn. Gen. St. 1878, ch. 34, to condemn property by a domestic corporation, the mode of service of notice provided in section 15, is exclusive, and must be "upon the president, secretary, or any director or trustee of such corporation"; and, therefore, service upon any acting ticket or freight agent is not legal. *In re St. Paul & N. P. R. Co.*, 28 Am. & Eng. R. Cas. 255, 36 Minn. 85, 30 N. W. Rep. 432.

34. Traveling agents.—The provision of Tenn. Code, § 2834, that "when a corporation, company, or individual has an office or agency in any county other than that in which the principal resides, service of process may be on any agent or clerk employed therein," does not apply to a traveling agent of a railroad company whose business is to solicit patronage in several states, and who has no fixed residence or place of business. (Deaderick, C.J., and Turney, J., dissenting.) *Chicago & A. R. Co. v. Walker*, 16 Am. & Eng. R. Cas. 553, 9 Lea (Tenn.) 475.

35. Attorneys.—Service on the attorney of a railroad company in proceedings to open a street across its premises is not authorized by statute. *Detroit, M. & T. R. Co. v. Detroit*, 49 Mich. 47, 12 N. W. Rep. 904.

Where a foreign corporation has failed to designate a person in the state on whom process may be served, as required by N. Y. Act of 1855, ch. 279, service of a summons on the general solicitor or counsel of the corporation is good. *Clews v. Rockford, R. I. & St. L. R. Co.*, 49 How. Pr. (N. Y.) 117.

The Texas & Pacific railway company is not a non-resident, and service upon the attorney of record of a writ of error is insufficient. *Stephenson v. Texas & P. R. Co.*, 42 Tex. 162.

36. Conductors.—Ill. Act of 1853, providing that in suits against incorporated companies service of process may be upon

the president, or, if he does not reside in, or is absent from, the county, then on any agent, clerk, cashier, secretary, engineer, or conductor found in the county—*held*, to apply to foreign corporations, so as to make service on an agent and conductor good, no president residing in the state. *Mineral Point R. Co. v. Keep*, 22 Ill. 9.—OVERRULED IN *Nispel v. Western Union R. Co.*, 64 Ill. 311. QUOTED IN *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568.

Service of process upon a conductor is sufficient to compel the appearance of the company. *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3.—FOLLOWED IN *New Albany & S. R. Co. v. Mead*, 13 Ind. 258.

In an action for killing stock, the summons commanded the officer to summon the N. A. & S. "Railroad Co., their agent, or attorney," and the return was "served as commanded by copy given to conductor P., conductor on express train." *Held*, that the service was sufficiently shown under the act of 1853, p. 113. *New Albany & S. R. Co. v. Powell*, 13 Ind. 373. *Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426.

Michigan Act of March 28, 1849, authorizing the service of process against railroad companies upon the conductor of any freight or passenger train, is not repealed by the Justices' Act of 1855, § 49, so far as it relates to justices' courts. *Fowler v. Detroit & M. R. Co.*, 7 Mich. 79.

A railroad conductor is a "special agent" of a company, within the meaning of 2 Ind. Rev. St. 35, § 36, authorizing the service of process upon railroad companies by serving the same on certain designated officers, or on any "general or special agent." *New Albany & S. R. Co. v. Grooms*, 9 Ind. 243.

Service on a railroad company is had in compliance with Ind. Rev. St. 1881, § 4027, when a copy is delivered to a conductor on any train on the road passing into or through the county. The omission of the Christian name of the conductor is not good ground for quashing the return. *Cincinnati, H. & I. R. Co. v. McDougall*, 108 Ind. 179, 8 N. E. Rep. 571.—FOLLOWED IN *Baltimore & O. R. Co. v. Brant*, 132 Ind. 37.

37. Section foreman.—The service of a summons against a railway company upon its section foreman as "a legal superintendent of repairs," under Kan. Civ. Code, § 68a, is valid, where it appears that no person has been designated by the company upon

whom service can be made in that county. *St. Louis & S. F. R. Co. v. De Ford*, 38 Kan. 299, 16 Pac. Rep. 442.

38. Track master.—A track master is neither an officer nor a clerk engaged in the management of the business of a corporation, within the meaning of Iowa Code, § 1727, nor a president or secretary within the meaning of the act of 1853, § 17; and, therefore, service of an original notice upon such person is not good, where it appears that the corporation has officers. *Richardson v. Burlington & M. R. Co.*, 8 Iowa 260.

39. Time of service.—In an action against a railroad company, before a justice of the peace, for damages occasioned by killing plaintiff's horse, service of process upon a conductor ten days before the day set for trial is sufficient. *New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

Ind. Act of March 1, 1853, providing that in actions for compensation for animals killed or injured by a railroad company in this state the justice of the peace before whom such action is prosecuted "shall cause at least ten days' notice to be served on the company defendant, by service of summons by copy on any conductor of any train passing through said county," is confined to actions against the corporation. Such service will not, when there is no appearance, authorize a judgment against individuals, although they may represent themselves to be lessees, and have charge of the rolling stock of the road. *Wright v. Gossett*, 15 Ind. 119.

In actions against a railroad corporation whose principal office is not in the state, the summons must be served thirty days before the term to which it is returnable, or the cause must be continued. *Ohio & M. R. Co. v. Boyd*, 16 Ind. 438.

Perhaps, where process has been served ten days before court, the defendant should be deemed to be properly in court, unless it is made to appear that its principal office is not in the state. *Ohio & M. R. Co. v. Boyd*, 16 Ind. 438.

Ind. Laws of 1861 (Sp. Sess. p. 78), which require fifteen days' service of process upon railroads, where the principal office of the company is without the state, is repealed by the act of 1863. *Toledo, L. & B. R. Co. v. Shively*, 26 Ind. 181.—**DISTINGUISHING** *Toledo & W. R. Co. v. Talbert*, 23 Ind. 438.

Where the action is before a justice by a

non-resident against a resident corporation, what is known as a short summons under New York statute of 1831, p. 403, is proper. *Wilde v. New York & H. R. Co.*, 1 Hill. (N. Y.) 302.

A railroad company is to be treated as an inhabitant and freeholder in each county in which its track is laid; and is, therefore, entitled, when sued before a justice of the peace in a town through which its road passes, to what is known as a long summons, under the New York statute, returnable in not less than six nor more than twelve days from the time of service. *Belden v. New York & H. R. Co.*, 15 How. Pr. (N. Y.) 17.—**FOLLOWING** *Johnson v. Cayuga & S. R. Co.*, 11 Barb. 621; *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. 650.—*Sherwood v. Saratoga & W. R. Co.*, 15 Barb. (N. Y.) 650.—**FOLLOWED IN** *Belden v. New York & H. R. Co.*, 15 How. Pr. 17.

A garnishee summons was served at five o'clock A. M. upon the general solicitor of a railway company, who did not know that the company had any property of the principal defendant in its possession, whose business did not require him to have such knowledge, and who had no ready means of ascertaining the fact. Within two and one half hours afterwards the property in question was delivered to the consignee at a place nearly one hundred miles distant from the place of service. *Held*, that, as a matter of law, the company was not liable as garnishee. *Bates v. Chicago, M. & St. P. R. Co.*, 14 Am. & Eng. R. Cas. 700, 60 Wis. 296, 19 N. W. Rep. 72, 50 Am. Rep. 369.

40. Place of service.—(1) *Under American statutes.*—Where a citizen of another state sues in a federal court a corporation created in the state where suit is brought, and joins as a defendant an individual who is a citizen of a third state, service of process on such individual in the state where the suit is brought gives the court jurisdiction over him. *Mowrey v. Indianapolis & C. R. Co.*, 4 Biss. (U. S.) 78.

Under the Georgia statute which provides that the lessees of any railroad shall be subject to the same jurisdiction as the lessors were before the lease, service of process is sufficiently made by leaving a copy of the declaration at the place which is alleged to be the principal office of the lessee and to have been the principal office of the lessor. *Hills v. Richmond & D. R. Co.*, 37 Am. & Eng. R. Cas. 44, 37 Fed. Rep. 660.

Where suit is brought against a company in the county where the injury complained of took place, and the sheriff returns that he served a certain person as agent for defendant at a depot in that county, and a second original of the declaration and process also has been served upon the president of the company, such service is sufficient. *Mitchell v. Southwestern R. Co.*, 75 Ga. 398.

In an action under Ky. Civ. Code, § 73, against a common carrier, the summons may be served where the action is brought upon defendant's chief officer or agent who resides there. *Adams Exp. Co. v. Crenshaw*, 78 Ky. 136.

Under Mo. Rev. Code 1855, p. 376, § 2, process may be served on a railroad company in any county where there is any office or place of business of the company, although the president or chief officer may not be found in the county, or reside therein. *Dixon v. Hannibal & St. J. R. Co.*, 31 Mo. 409.—QUOTED IN *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561.

Under the Missouri statute, suits against corporations can be brought either in the county where the cause of action accrued, or in the county where such corporation has or usually keeps an office or agent for the transaction of its usual business, at the option of the plaintiff. Wagn. Mo. St. 294, § 26, provides for an enlargement and extension of service by issuing process to a different county from where the suit is brought, when the officers of the company do not reside there. *Mikel v. St. Louis, K. C. & N. R. Co.*, 54 Mo. 145.

Since the passage of the Act of Congress of March 3, 1887, providing, *inter alia*, that receivers may be sued without leave of court, process against the receiver of a railroad may be made by service upon the clerk or any station agent upon the road. *Proctor v. Missouri, K. & T. R. Co.*, 42 Mo. App. 124.—DISTINGUISHING *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

Where an attempted service of summons upon a California corporation is made in Nevada, and a subsequent service in California, under Nev. Practice Act, § 29, it matters not whether an order refusing to quash the first service was correct or not, it appearing that the second service was good. *Cables v. Central Pac. R. Co.*, 6 Nev. 265.

Plaintiff contracted with defendant, a foreign corporation, for a term of years, his business being to procure emigrants to

purchase and settle on lands in Nebraska. He was required to maintain an office in New York city, but to travel in Europe. The office was maintained until terminated by defendant, when plaintiff sued for services rendered, and damages for breach of contract. *Held*, that, as plaintiff's principal duties were to be discharged in New York, the cause of action arose in that state; therefore service upon one of defendant's directors while he was temporarily in the state on his own business was good service, although defendant had no property in the state. *Hiller v. Burlington & M. R. R. Co.*, 70 N. Y. 223, 18 Am. Ry. Rep. 557.—FOLLOWED IN *Tuchband v. Chicago & A. R. Co.*, 115 N. Y. 437, 17 Civ. Pro. 424, 22 N. E. Rep. 360, 26 N. Y. J. R. 440; *Porter v. Sewell Car Heating Co.*, 17 Civ. Pro. 386, 7 N. Y. Supp. 166.

Under N. Car. Rev. St. ch. 26, directing how service of process shall be made on a corporation, service on the president or other officer of a corporation may be in the county in which he actually resides, or in the one which is his official residence, and where he carries on and attends to the business of the corporation. *Governor of North Carolina v. Raleigh & G. R. Co.*, 3 Ired. Eq. (N. Car.) 471.

Service upon an official of the corporation be not made in the proper county, but the sheriff returns it executed, stating on whom it has been served, the corporation can only take advantage of the irregularity by a plea in abatement. *Governor of North Carolina v. Raleigh & G. R. Co.*, 3 Ired. Eq. (N. Car.) 471.

Service of notice of garnishment on a depot agent of a railroad company in a county other than that in which the company has its chief business office is not notice to the company, it not appearing that the matter in any way grew out of the business of the agency, nor any reason being assigned for failing to serve it on the president, secretary, treasurer, or a director. *Lambreth v. Clarke*, 10 Heisk. (Tenn.) 32.

If a non-resident corporation carries on business in the state, the venue in suits against it is fixed by statute in any county where such company may have an agency, and not in any other county. *St. Louis, A. & T. R. Co. v. Whitley*, 77 Tex. 126, 13 S. W. Rep. 853.

(2) *Under English and Canadian statutes.*—Under the Railways Clauses Act, 1845,

§ 138, the principal office of a railway company is at the place where its general business is transacted, where its secretary resides, and where orders are issued, although one of its semi-annual meetings is held at the other terminus of the road, from which place one half of the directors are chosen. *Garton v. Great Western R. Co., El., Bl. & El.* 837, 4 *Jur. N. S.* 1036, 27 *L. J. Q. B.* 375.

A railway company carries on its business, within the meaning of 9 & 10 Vict. c. 95 (County Courts Act), § 60, at the principal stations where the general superintendence is centered, and not at a station where the local management of any portion of the line is conducted. *Brown v. London & N. W. R. Co., 32 L. J. Q. B.* 318, 11 *W. R.* 884, 8 *L. T.* 695.—FOLLOWED IN *Le Tailleur v. South Eastern R. Co., L. R.* 3 C. P. D. 18.—*S. P. Shields v. Great Northern R. Co., 7 Jur. N. S.* 631, 30 *L. J. Q. B.* 331, 9 *W. R.* 739.

Where a company's line is partly in Scotland and partly in England, the principal office being in Scotland, and its act includes the Companies Clauses Act 1845, a writ may be served on the company's secretary while attending a meeting in London. *Wilson v. Caledonian R. Co., 6 Railw. Cas.* 772, 5 *Ex. 822*, 1 *L. M. & P.* 731, 15 *Jur.* 17, 20 *L. J. Ex.* 6.

Service on a Scotch railway company whose principal place of business is in Glasgow cannot be made at a station in England merely on the ground that the road has an ancillary incorporation in England. *Palmer v. Caledonian R. Co., [1892] 1 Q. B.* 823; *reversing [1892] 1 Q. B.* 607.—RE-FERRING TO *Newby v. Colt's P. F. Mfg. Co., L. R.* 7 Q. B. 293; *Garton v. Great Western R. Co., El., Bl. & El.* 837.

Service of process against the Grand Trunk railway company, at one of its stations, is not sufficient. Service ought to be made at its principal place of business. *Legendre v. Grand Trunk R. Co., 6 Low. Can.* 105.

41. Leaving process or copy.—Where a corporation is summoned as trustee, service of the writ by leaving a copy at the place of last and usual abode of the treasurer, or other proper officer, is sufficient. *Harris v. Somerset & K. R. Co., 47 Me.* 298.

And after the corporation has appeared, submitted to the jurisdiction of the court,

and made disclosure, and judgment has been entered, it is too late to object to a service defective in such a particular. *Harris v. Somerset & K. R. Co., 47 Me.* 298.

Vt. Comp. St. ch. 31, § 19, providing for service of writs upon corporations by leaving copies with any of their officers or stockholders in the absence of their clerks, has reference exclusively to the corporations within the state. *Hall v. Vermont & M. R. Co., 28 Vt.* 401.

Defendant was sued as "the Burlington and Lamoille Railroad Company, a company organized under the laws of this state." The service of the writ was like that required by the statute on a corporation, by leaving a copy with its clerk. A motion was filed to dismiss on the ground that the service was illegal; but it did not specify any error, or the method of correcting it. *Held:* (1) that, as there is a general law under which railroad corporations can be organized, it is presumed that defendant is a corporation organized under this law; (2) that the motion—if the objection is available on motion—is faulty in not pointing out both the defect and its correction. *Nye v. Burlington & L. R. Co., 60 Vt.* 585, 11 *Atl. Rep.* 689.

42. Service by publication.—To support a decree for foreclosure against an absent defendant, a railroad mortgage trustee, brought in by publication, the publication for the full period required is necessary. Publication for four lunar months is not sufficient where the statute directs publication for "four months." Such defendant is not estopped by a decree and sale of the road from showing in a foreclosure suit subsequently brought by him that by reason of defective publication the court acquired no jurisdiction over him. *Guaranty Trust & S. D. Co. v. Green Cove S. & M. R. Co., 45 Am. & Eng. R. Cas.* 689, 139 *U. S.* 137, 11 *Sup. Ct. Rep.* 512.

A highway was established over the track of a foreign railroad corporation, and no notice was given to it, except by publication, though it had agents in the county where the highway was established. Iowa Code, § 936, provides that a notice shall be served on each owner or occupier of land lying in a proposed highway, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county. The company owned its right of way, but this was not shown on the transfer books in the auditor's office. *Held*, that the notice was

sufficient. *State ex rel. v. Chicago, B. & Q. R. Co.*, 68 Iowa 135, 26 N. W. Rep. 37.—DISTINGUISHED IN *Chicago, R. I. & P. R. Co. v. Ellithorpe*, 78 Iowa 415, 43 N. W. Rep. 277.

Where a foreign corporation operating a railroad in the state has failed to file with the secretary of state a copy of its articles of incorporation or charter, as required by Iowa Laws of 1880, ch. 128, and the transfer books of a county through which the road runs fails to show the company's ownership of the road, a highway may legally be established across its right of way in that county without personal service of the notice required by section 936 of the Code. Service by publication is sufficient in such case. *State v. Chicago, M. & St. P. R. Co.*, 80 Iowa 586, 46 N. W. Rep. 741.

43. Substituted service—Service out of the jurisdiction.—Substituted service of process on a corporation must show the facts which confer jurisdiction. *Caro v. Oregon & C. R. Co.*, 10 Oreg. 510.

An order allowing service upon a foreign corporation out of the jurisdiction should be of a notice, not a copy, of the writ. A writ for service in Manitoba may be issued concurrently with one for service upon an alien out of the jurisdiction. *Crotty v. Oregon & T. R. Co.*, 3 Man. 182.

44. Proof of service, generally.—Where process against a corporation is returned as served upon its president, it is necessary that proof of his official character should be made to the court, and so appear on the record, to sustain a judgment by default. *Wetumpka & C. R. Co. v. Cole*, 6 Ala. 655.

To sustain a judgment by default against a corporation, it is requisite that it should appear otherwise than by the sheriff's return, or the clerk's statement, that the person upon whom the summons and complaint were served occupied such relation to defendant that defendant could legally be made a party by service on such person. Ala. Rev. Code, § 2569, does not authorize proof, either by plaintiff's affidavit, or by the clerk's statement, that the person served occupied the relation above described. *Southern Exp. Co. v. Carroll*, 42 Ala. 437.

Under Tex. Rev. St. art. 1223, service may be made on the local agent of a railroad company representing it in the county where the suit is brought, but where a petition alleges that the company has a lo-

cal agent in the county, but does not state his name, and the citation requires the officer to summon the defendant, but does not specify on whom service shall be had, and it is served on the local agent, proof must be made before other proceedings are taken that it was served on such local agent. The return of the officer is not conclusive as to who is the local agent, but that fact may be put in issue by a sworn plea. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568.—QUOTING *Mineral Point R. Co. v. Keep*, 22 Ill. 16.

45. Sufficiency of officer's return of service.—(1) *General requirements.*—Where suit is brought in a state court, but removed to a federal court, after such removal the sheriff cannot amend his return. *Tallman v. Baltimore & O. R. Co.*, 45 Fed. Rep. 156.

Under a statute providing that a summons against a corporation may be served on the "president, chairman of the board of trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent," when the service is not upon the chief officer, the return must show that he could not be found in the county, also upon whom the summons was served, naming the person and his office. *Cairo & F. R. Co. v. Trout*, 32 Ark. 17.

Under Illinois Act of 1853, in relation to service of process upon incorporated companies, in order that a return upon an agent may be held good, the return must show that the president of the company did not reside in, or was absent from, the county. *St. Louis, A. & T. H. R. Co. v. Dorsey*, 47 Ill. 288.—QUOTED IN *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App. 118.

Where the return of the officer states that he read the process to a station agent of defendant, the president and secretary not being residents of the county, it is defective, both because it shows attempted service by reading instead of by copy, and because it does not show that the president could not be found in the county, as required by Ill. Practice Act of July 1, 1872. *Cairo & V. R. Co. v. Joiner*, 72 Ill. 520.

Mississippi Act of March 4, 1873, only authorizes service of process against express, railroad, and telegraph companies to be made upon local agents, "if the president or other principal officers of such corporation cannot be found in the county in

which suit is brought." So to authorize judgment by default against an express company by service on a local agent the return must show that the president or other principal officers could not be found in the county. *Southern Exp. Co. v. Hunt*, 54 Miss. 664.

Where process against a corporation is served by leaving a copy at the business office of the corporation with the person having charge thereof, to be valid, under *Wagn. Mo. St.* 294, §§ 26, 27, the return must recite that the chief officer is absent from, or cannot be found in, the county. It is not sufficient merely to recite that he was absent. *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561.—QUOTING *Dixon v. Hannibal & St. J. R. Co.*, 31 Mo. 409.

Under *Mo. Rev. St.* 1879, § 2521, providing that "notice may be served on railroad companies by delivering the same, or a copy thereof, to the nearest station or freight agent of such corporation in the county in which the cause of action is pending," a return must show to whom it was delivered. A return simply describing the person as the "nearest agent" is not sufficient. *Haley v. Hannibal & St. J. R. Co.*, 80 Mo. 112.—FOLLOWED IN *Farmer v. Missouri Pac. R. Co.*, 19 Mo. App. 250. REVIEWED IN *Masterson v. Missouri Pac. R. Co.*, 20 Mo. App. 653.

Under *Mo. Rev. St.* § 2865, jurisdiction of a railroad company can only be acquired by service upon its station agent in the township where the justice resides, or if there be none, then upon the "nearest station agent," and the return of the constable that service was had upon "E. E. Dunnaway, agent at Estill depot in Howard county," is not sufficient. *Heath v. Missouri, K. & T. R. Co.*, 83 Mo. 617.

Where a non-resident corporation is served with process, under *Mo. Rev. St.* § 3489, which provides that where the defendant is a foreign corporation, service may be made by delivering a copy of the writ and petition to any officer or agent of the corporation in charge of any office or place of business of the defendant, the return must show that the person upon whom service is made is an officer or agent in charge of an office or place of business. *Kinsfoks v. Merchants' Dispatch Transp. Co.*, 3 *McCrary (U. S.)* 547.

Where a justice of the peace issues a summons against a railroad company, the offi-

cer's return should show how it was served, so that the justice may be able to determine whether it was served on the proper officer. *Sherwood v. Saratoga & W. R. Co.*, 15 *Barb. (N. Y.)* 650.

Service in an action before a justice against a domestic railroad corporation upon its president must be in the county in which he resides, and the return must show that fact, else it is invalid. A judgment based on a service not showing that fact, there being no appearance, is void. *Taylor v. Ohio River R. Co.*, 35 *W. Va.* 328, 13 *S. E. Rep.* 1009.

(2) *Illustrations.*—Where a return shows upon its face that the president was not served, and does not show that he was a non-resident, plaintiff is not entitled to judgment against the corporation for failing to answer the garnishment. *Steiner v. Central R. Co.*, 60 *Ga.* 552.

A return was, "Served the within-named railroad company, by reading the same and delivering a copy thereof to I. G. Ogden, Jr., cashier of said railroad company, this 24th day of March, 1875. The president of said company could not be found in my county, this 5th April, 1875." *Held*, that the last date is evidently the date of the return of the writ, and that the return shows that, on the 24th of March, the day the writ was served, the president could not be found. The service and return were sufficient, and in strict conformity to the statute. *Chicago & P. R. Co. v. Kahler*, 79 *Ill.* 354.

A sheriff's return of service of summons against a railway was, "Sept. 4, 1872, served by reading to and delivering a true copy to C. D., a director of the defendant, the president of the defendant not residing or being found in my county." *Held*, that the return was sufficient and gave the court jurisdiction. *Cairo & St. L. R. Co. v. Holbrook*, 92 *Ill.* 297.

In an action against a company to recover for stock killed, a return, "Served by reading to" A., "who is the local freight agent of said defendant, at the city of," etc., does not show good service under *Ind. Code*, § 30. *Toledo, W. & W. R. Co. v. Owen*, 43 *Ind.* 405.

A return upon a summons against a railroad company that it was "served by delivering a copy thereof, with the indorsements thereon duly certified, to Mr. Fish, agent of the within railroad company," is of

itself no sufficient evidence of service, as it contains no description or hint of the character of his agency. *Dickerson v. Burlington & M. R. R. Co.*, 44 Am. & Eng. R. Cas. 465, 43 Kan. 702, 23 Pac. Rep. 936.—FOLLOWING Union Pac. R. Co. v. Pillsbury, 29 Kan. 652.

Under How. Mich. St. § 8147, as amended by Act 207 of 1885, authorizing the service of papers on the station or ticket agent of a railroad company, a return of service on Wm. H. Knight, its commercial agent, does not show a sufficient service. *Detroit v. Wabash, St. L. & P. R. Co.*, 63 Mich. 712, 30 N. W. Rep. 321.

A return of an officer that he served a summons on a railroad company by handing a copy to the station agent at a designated station is sufficient, and implies that the station agent was the agent of the defendant. *Talbot v. Minneapolis, St. P. & S. St. M. R. Co.*, 82 Mich. 66, 45 N. W. Rep. 1113.

A constable's return of service on a corporation is sufficient which recites that he left a copy "with W. G. Dilts, the bookkeeper and agent of the within-named defendant at and in the only office of said company in the county of Iron; said Dilts being in charge of defendant's said office on October 17, 1882, neither the president nor other chief officer of said defendant corporation being found in said county and state." *Hill v. St. Louis O. & S. Co.*, 90 Mo. 103, 2 S. W. Rep. 289.

A return of service of garnishment, which shows that the writ was read to an agent of the railroad company, but which fails to show the delivery of a copy of it to the nearest station or freight agent, is insufficient. *Masterson v. Missouri Pac. R. Co.*, 20 Mo. App. 653.—REVIEWING *Haley v. Hannibal & St. J. R. Co.*, 80 Mo. 112.

Under Ohio Rev. St. § 5044, providing that process against a railroad company may be served upon "any regular ticket or freight agent," a return is not good which merely shows that it was served on a ticket agent. It must show that he was a "regular" ticket agent. *Tallman v. Baltimore & O. R. Co.*, 45 Fed. Rep. 156.

A return of a sheriff was, "Served the within-named" railroad company "by delivering a true copy hereof to H. F. Heckert, the general freight agent of said company, personally, at the usual business office of said company, no other chief officer being

present." *Held*, that the amendment to Ohio Code, § 66, does not repeal section 68, and that under section 68 this service is sufficient. *Wheeling, P. & C. Transp. Co. v. Baltimore & O. R. Co.*, 1 Cin. Super. Ct. 311.

In an action against a foreign corporation, a return is sufficient which is, "Served by leaving a true and attested copy of the within writ with an agent of the defendants, Dec. 22, etc., and leaving a certified copy in the office attached to the depot, Jan. 7, 1850." *Kennard v. New Jersey R. & T. Co.*, 1 Phila. (Pa.) 41.—REVIEWING *Kleckner v. Lehigh County*, 6 Whart. 66; *Combs v. Bank of Ky.*, 3 Pa. L. J. 58.

A return of service on a defendant corporation by giving a copy of the writ to one K., agent of the company, is good. *Kalbach v. New York, L. E. & W. R. Co.*, 15 Phila. (Pa.) 168.

Where one person acts as agent for two different corporations, and two separate citations are issued against them, different in wording, but both directed to him as agent, it cannot be presumed from a return of the officer upon each citation that he had delivered a copy of "this writ" that he delivered but one copy to the agent. *Central & M. R. Co. v. Morris*, 28 Am. & Eng. R. Cas. 50, 68 Tex. 49, 3 S. W. Rep. 457.

A sheriff's return to process against a railroad company recited that he executed it on a certain day by delivering to defendant in person, "by and through H. B. Andrews, the vice-president thereof, a true copy." *Held*, that this would indicate that the vice-president, not the sheriff, delivered the copy to the company; therefore, it was fatally defective. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. Rep. 918.

The true name of defendant as shown by a certiorari and citation from a justice of the peace was "The Texas & St. Louis Railway Company." The return of the officer was "executed by delivering a true copy of the within citation to E. C. Williams, treasurer of the St. Louis & Texas R. Co." *Held*, that the service was insufficient to warrant a judgment by default. *Texas & St. L. R. Co. v. Ballouf*, 1 Tex. App. (Civ. Cas.) 277.

46. Conclusiveness of the return.—The truth of an officer's return of service of a summons cannot be questioned in the action nor in proceedings by certiorari to

review it. The remedy is against the officer for a false return. *Ex parte St. Louis, I. M. & S. R. Co.*, 16 *Am. & Eng. R. Cas.* 547, 40 *Ark.* 141.

The official return of a sheriff upon legal process cannot be contradicted, as between the parties to the action, as to matters in which the officer must necessarily certify to facts from his own personal knowledge; but it may be contradicted as to matters in which he is dependent upon information obtained by inquiry; e. g., the fact as to whether a person was or was not an agent of a corporation; but such question must be raised by a special plea to the jurisdiction. *Forrest v. Union Pac. R. Co.*, 47 *Fed. Rep.* 1.

Where service against a railroad is served on its agents, the officer's return is not conclusive of the question as to whether they are agents, but the question can only be raised by plea in abatement, and not on a plea to the merits of the action. *Mineral Point R. Co. v. Kepp*, 22 *Ill.* 9.

On a rule to set aside such a return, the court will not hear despositions as to whether the person served was really an agent of the defendant. *Kalbach v. New York, L. E. & W. R. Co.*, 15 *Phila. (Pa.)* 168.

On a motion to set aside the service of a writ, the court will consider the face of the return alone, and will not regard extraneous evidence. *Kennard v. New Jersey R. & T. Co.*, 1 *Phila. (Pa.)* 41.

47. Relief against irregular service.—Service upon a railroad company having its principal office out of the state, in an action before a justice for killing stock, had been made ten days, and nothing appeared showing the justice that the case was not ready for judgment, and judgment was rendered upon such insufficient notice. *Held*: (1) that defendant might have the judgment opened, on application, in ten days, or it might have it vacated in a direct proceeding at any time after ten days and before payment, or it might appeal; (2) that the case cannot be dismissed on appeal, because the insufficient service was not ground of dismissal, but only of a continuance. *Michigan S. & N. I. R. Co. v. Shannon*, 13 *Ind.* 171.—FOLLOWED IN *Ohio & M. R. Co. v. Quier*, 16 *Ind.* 440; *Toledo & W. R. Co. v. Talbert*, 23 *Ind.* 438.

An application may be made to set aside the service of a writ upon the ground that it was not served upon the proper officer of

a corporation. It is not necessary to await the result of a motion to homologate the service or of leave to proceed. *Crotty v. Oregon & T. R. Co.*, 3 *Man.* 182.

48. Waiver of defective service by appearance or otherwise.—A statute permitted service of process against a railroad company to be made upon any director. The officer's return recited that he served the process upon a certain individual, who was "reputed" to be a director. The record showed that he was a director some time before. *Held*, that, in the absence of proof to the contrary, it will be presumed that the relation continued to the time when the summons was served. *Washington, A. & G. R. Co. v. Brown*, 17 *Wall. (U. S.)* 445, 3 *Am. Ry. Rep.* 413.

In garnishee process against a non-resident railroad construction company, the court acquired jurisdiction, by proper service, over the property; but the service on defendant was defective. Defendant appeared and first denied the power of the court to proceed at all, which being overruled, it joined issue and went to trial on the merits. *Held*, that, as the court had jurisdiction of the subject-matter, this was a waiver of personal service. *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 *U. S.* 98, 11 *Sup. Ct. Rep.* 36.

Where an action is commenced in a state court, and the defendant appears and petitions for a removal to a federal court, such petition amounts to a general appearance, and he cannot object after the removal to the service of the summons. *Tallman v. Baltimore & O. R. Co.*, 45 *Fed. Rep.* 156.—DISTINGUISHING *Hendrickson v. Chicago, R. I. & P. R. Co.*, 22 *Fed. Rep.* 569; *Kauffman v. Kennedy*, 25 *Fed. Rep.* 785.

Where a railway company is sued by a wrong name, and served with process, and fails to plead the misnomer in abatement, it is bound by the judgment. *Bloomfield R. Co. v. Burress*, 82 *Ind.* 83.

Where the declaration, summons, judgment by default and execution were against "Alabama & V. Railroad Co.," "The Alabama & V. Railway Co.," the real corporation, whose station agent was served with summons, having failed to appear at the return term and object to the misnomer, is bound by the judgment. *Alabama & V. R. Co. v. Bolding*, 69 *Miss.* 255, 13 *So. Rep.* 844.

A voluntary appearance of a railroad company, defendant, is equivalent to per-

sonal service. *Carpenter v. New York & N. H. R. Co.*, 11 *How. Pr.* (N. Y.) 481.

An objection that service of a summons against a corporation was not made in accordance with the statute must be made before service of the answer. *Ahner v. New York, N. H. & H. R. Co.*, 39 *N. Y. S. R.* 196, 14 *N. Y. Supp.* 365, 20 *Civ. Pro.* 318.

An appearance to object to a constructive service does not waive the right to claim that the suit should be prosecuted in the proper court. *St. Louis, A. & T. R. Co. v. Whitley*, 77 *Tex.* 126, 13 *S. W. Rep.* 833.

A writ, in form for service in Manitoba, against a foreign corporation having no agent in the province, is not a nullity, and, *it seems*, the irregularity will be waived by appearance. *Crotty v. Oregon & T. R. Co.*, 3 *Man.* 182.

A company having its head office in Montreal does not reside or carry on business in this province, within the meaning of *Ont. Rev. St. c. 47, § 62*; and service of the writ on the station master of the defendant at Bowmanville is void, but defendant having appeared at the trial, and after objection to the jurisdiction had been overruled, having proceeded with the defense, it thereby precluded itself from objecting to the jurisdiction. *Guy v. Grand Trunk R. Co.*, 10 *Ont. Pr.* 372.—QUOTING Mackereth *v. Glasgow & S. W. R. Co.*, *L. R.* 8 *Ex.* 149.

PRODUCTION.

Of books and papers, see *DISCOVERY, ETC.*, 7.
— tickets, see *TICKETS AND FARES*, 33-39.

PROFANITY.

Expulsion of passenger for, see *EJECTION OF PASSENGERS*, 44.

PROFILES.

Use of, in condemnation proceedings, see *EMINENT DOMAIN*, 332-340.

PROFITS.

Damages for loss of, see *CARRIAGE OF MERCHANDISE*, 783.

— — — — future, see *DAMAGES*, 49.

Guaranty of payment of, see *GUARANTY*, 5.

Loss of, as an element of land damages, see *EMINENT DOMAIN*, 709.

Loss of, as damages, see *DAMAGES*, 11.

— — — the measure of damages, see *EMINENT DOMAIN*, 1238.

— — by tenant as an element of damages, see *STREETS AND HIGHWAYS*, 280.

— — evidence of, on assessment of land damages, see *EMINENT DOMAIN*, 609.

Measure of damages for loss of, see *EMINENT DOMAIN*, 1194.

Proof of probable and reasonable, see *STREETS AND HIGHWAYS*, 269.

Sufficiency of evidence to show, see *EVIDENCE*, 274.

Taxation of undivided, see *TAXATION*, 106.

When recoverable as damages in actions on construction contracts, see *CONSTRUCTION OF RAILWAYS*, 120.

PROHIBITION, WRIT OF.

Review of condemnation proceedings by, see *EMINENT DOMAIN*, 967.

When lies for wrongful interference with property, see *EMINENT DOMAIN*, 1053, 1054.

1. When the writ will lie.—Prohibition will lie against the railway commissioners if they act beyond their powers. *South Eastern R. Co. v. Railway Com'rs*, *L. R.* 6 *Q. B. D.* 586, 50 *L. J. Q. B. D.* 201, 44 *L. T.* 203, 45 *J. P.* 388; *reversing L. R.* 5 *Q. B. D.* 217, 49 *L. J. Q. B. D.* 273, 41 *L. T.* 760, 28 *W. R.* 464, 44 *J. P.* 362.

Prohibition will lie to restrain proceedings under a judgment delivered without the notice required by section 144 of the Division Courts Act, *Ont. Rev. St. c. 51*. *Forbes v. Michigan C. R. Co.*, 20 *Ont. App.* 584.

The rule is well established that where the inferior court has original jurisdiction of the cause the writ of prohibition will lie only where such court, during the proceedings or in the conduct of the trial, clearly exceeds its legitimate powers in some collateral matter arising in the cause over which it has no authority; but unless it has so exceeded its authority, on an application for such writ the court above will not inquire whether it has decided correctly or not. *McConiha v. Guthrie*, 17 *Am. & Eng. R. Cas.* 1, 21 *W. Va.* 134.

The inferior court having general jurisdiction of the subject-matter, it has the right and authority to determine whether or not it has acquired jurisdiction of the particular case by a sufficient service of

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process or notice upon the defendant. And any error committed in that regard will not be an excess or abuse of its jurisdiction, but an error in adjudicating a matter within its legitimate authority, and the remedy for such error is by writ of error or certiorari and not by writ of prohibition. *McConiha v. Guthrie*, 17 Am. & Eng. R. Cas. 1, 21 W. Va. 134.

2. Parties.—Where taxpayers of a county file a petition for a writ of prohibition to prevent a county court from reducing the valuation and taxes on railroad property in the county, the railroad company is a necessary party; and the petition is demurrable, unless it is made a defendant. *Armstrong v. Taylor County Court*, 15 W. Va. 190.

PROMISE.

By employer to remedy defects, effect of, see EMPLOYÉS, INJURIES TO, 250-259.
 Of vice-principal, liability of company because of, see FELLOW-SERVANTS, 81.
 To pay for stock subscribed, see SUBSCRIPTIONS TO STOCK, 37-39.

PROMISSORY NOTES.

See BILLS, NOTES, AND CHECKS.

PROMOTERS.

Effect of consolidation on rights of, see CONSOLIDATION, 31.
 Rights and liabilities of, see INCORPORATION, ETC., 6.

PROOF.

Amendment of pleadings to conform to, see PLEADING, 150, 151.
 Of acceptance of dedication, see STREETS AND HIGHWAYS, 10.
 — attorney's authority, see ATTORNEYS, 11.
 — compromise, see COMPROMISES, 7.
 — consolidation of roads, see CONSOLIDATION, 20.
 — customs and usages, see CUSTOMS, 4.
 — dedication of streets, see STREETS AND HIGHWAYS, 6-11.
 — giving notice of election in railway aid cases, see MUNICIPAL AND LOCAL AID, 110.
 — inability to agree with landowner in condemnation proceedings, see EMINENT DOMAIN, 278.
 — incorporation, see CORPORATIONS, 20; INCORPORATION, ETC., 12.
 — law of foreign state, see DEATH BY WRONGFUL ACT, 113.
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Of service of process, see PROCESS, 44-46.
 — signature to petition in aid of railway, see MUNICIPAL AND LOCAL AID, 86.
 — taxpayers' assent to railway aid, see MUNICIPAL AND LOCAL AID, 105.
 Variance between indictment and, in prosecutions for causing death, see DEATH BY WRONGFUL ACT, 448.

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PROPERTY.

Assumption of risk to save, when contributory negligence, see EMPLOYÉS, INJURIES TO, 334.
 Description of, in mortgage, see MORTGAGES, 78.
 For what trover lies, see TROVER, 6.
 Liability for loss of, by passenger, see SLEEPING, ETC., COMPANIES, 24-35.
 Power to mortgage, and what may be mortgaged, see MORTGAGES, 1-60.
 Questions of fact in actions for injuries to, see TRIAL, 112.
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 What covered by fire risk, see FIRE INSURANCE, 5.
 — is deemed to be baggage, see BAGGAGE, 20-46.
 — — exempt from taxation, see TAXATION, 159-184.
 — may be reached in attachment, see ATTACHMENT, ETC., 20-39.
 — — — taken in condemnation proceedings, see EMINENT DOMAIN, 91-127.
 — subject to execution, see EXECUTION, 1-13.
 — — — laborers' lien, see LIENS, 47, 48.
 — — — mechanics' liens, see LIENS, 22-27.
 — — — taxation, see STREET RAILWAYS, 283; TAXATION, 75-136.
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PROPERTY RIGHTS.

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PROSECUTION.

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 For wrongful expulsion of passenger, see EJECTION OF PASSENGERS, 73.

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To abutters, see STREETS AND HIGHWAYS, 294.

When recoverable in action for causing death, see DEATH BY WRONGFUL ACT, 415-417.

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Of bona fide purchasers of stock, see STOCK, 74-77.

— prior liens, see MORTGAGES, 87-106.

— property by sheriff, liability of company for, see STRIKES, 7.

— purchaser at receiver's sale, see RECEIVERS, 113.

What is accorded to bona fide purchasers, see BONDS, 47.

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PROVOCATION.

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PROXIES.

To vote at stockholders' meeting, see STOCKHOLDERS, 18.

PROXIMATE CAUSE.

Admissibility of showing evidence of, see FIRES, 208.

As to spread of fire, see FIRES, 81-98.

Burden of proof to show disobedience of order was not, see EMPLOYÉS, INJURIES TO, 598.

Complaint must allege that negligence was, see FIRES, 185.

Contributory negligence must be, see CONTRIBUTORY NEGLIGENCE, 11-17; EMPLOYÉS, INJURIES TO, 301-303; TRIPASSERS, INJURIES TO, 93.

— of passenger must be, see CARRIAGE OF PASSENGERS, 416.

— — plaintiff must have been, see FIRES, 106.

Failure to adopt rules, when must be, see EMPLOYÉS, INJURIES TO, 22.

— — signal must be, see ANIMALS, INJURIES TO, 194.

— — warn or instruct employee must be, see EMPLOYÉS, INJURIES TO, 36.

Incompetency of fellow-servant must be, see FELLOW-SERVANTS, 143.

In stock-killing cases, see ANIMALS, INJURIES TO, 34-36.

Liability for killing stock as dependent on, see ANIMALS, INJURIES TO, 277-279.

Must be act or default of defendant, see DEATH BY WRONGFUL ACT, 74.

Negligence of carrier must be, see CARRIAGE OF PASSENGERS, 128.

Of damage, delay of carrier must be, see CARRIAGE OF MERCHANDISE, 781.

— death by accident, see ACCIDENT INSURANCE, 3.

— employee's injuries, company's negligence must be, see EMPLOYÉS, INJURIES TO, 15-17.

— fire, whether a question of law or fact, see FIRES, 320.

— goods lost prior to transit, see CARRIAGE OF MERCHANDISE, 97.

— injury by collision, see COLLISIONS, 8, 9.

— — — obstruction or encroachment in highway, see STREETS AND HIGHWAYS, 407.

— — — disobedience of rule as, see EMPLOYÉS, INJURIES TO, 429.

— — in street or highway, see STREETS AND HIGHWAYS, 374.

— — negligence of fellow-servants must be, see FELLOW-SERVANTS, 48.

— — plaintiff's contributory negligence must be, see DEATH BY WRONGFUL ACT, 179.

— — to children at turntable, see CHILDREN, INJURIES TO, 28.

— — — parents' negligence must be, to bar recovery, see CHILDREN, INJURIES TO, 117, 133.

— — — employee, company's negligence must be, see COLLISIONS, 31.

— — — passenger at station, see CARRIAGE OF PASSENGERS, 267.

— — — killing stock, failure to fence must be, see ANIMALS, INJURIES TO, 136, 137.

— — — loss, act of God must be, see CARRIAGE OF MERCHANDISE, 20-22.

— — — by fire, when carrier's negligence is, see CARRIAGE OF MERCHANDISE, 155.

Passenger's contributory negligence must be, see CARRIAGE OF PASSENGERS, 344.

Proof that company's negligence was, see DEATH BY WRONGFUL ACT, 259.

Requests to charge as to, see TRIAL, 171.

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Weight of evidence to show company's negligence to be, see FIRES, 251.

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 — — of fact, see ANIMALS, INJURIES TO, 547 ; TRIAL, 104.
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 — contributory negligence was, a question for jury, see CONTRIBUTORY NEGLIGENCE, 92.

PROXIMATE DAMAGES.

- Generally, see DAMAGES, 7-9.
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 — — for flowing lands, see FLOODING LANDS, 87.
 — — — injuries caused by fire, see FIRES, 333.
 — stock-killing cases, see ANIMALS, INJURIES TO, 581.

PUBLIC AGENT.

- Liability of, as garnishee, see ATTACHMENT, ETC., 17.
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- Notice by, of condemnation proceedings, see EMINENT DOMAIN, 297, 298.
 Of company's rules for government of employes, see EMPLOYÉS, INJURIES TO, 425.
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 — ordinances, see MUNICIPAL CORPORATIONS, 11 ; STREETS AND HIGHWAYS, 82.
 — rates by commissioners, see RAILWAY COMMISSIONERS, 14.
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 — — process by, see PROCESS, 42.
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- Act of, when excuses carrier of passengers, see CARRIAGE OF PASSENGERS, 177.
 — — — non-delivery by carrier, see CARRIAGE OF MERCHANDISE, 289.
 Carriers insurers except as to, see CARRIAGE OF MERCHANDISE, 12.
 What is an act of the, see CARRIAGE OF MERCHANDISE, 16, 17.

PUBLIC EXCITEMENT.

- As ground for change of venue, see TRIAL, 15.

PUBLIC GROUND.

- Obstructions in, when deemed nuisances, see NUISANCE, 10.

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PUBLIC LANDS.

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I. THE LAND DEPARTMENT.

1. Authority of officers of—Interference by courts.—Act of Congress of March 3, 1887, by merely providing that suits may be brought against the United States, does not confer upon the federal courts power to control the officers of the land department in the exercise of their judgment in determining whether certain lands are open to settlement, and whether certain individuals have met the requirements of the laws providing for the entry of lands. *Sioux City & St. P. R. Co. v. United States*, 34 Fed. Rep. 835.

And the fact that injury may result to complainant, a railroad company, which claims the lands under a grant, and also to settlers upon the lands, and to the region in which the lands are situated, by throwing them open to settlement while the title thereto is in dispute, cannot be considered in determining the question of interference by the courts. *Sioux City & St. P. R. Co. v. United States*, 34 Fed. Rep. 835.

2. Conclusiveness of their decisions.—The decision of the secretary of the interior in deciding that a railroad company is entitled to a right of way over the public lands, under the Act of Congress of March 3, 1875, cannot be revoked by his successor in office, after the company's title has attached to the land. If it be made to appear that the right of way was obtained by fraud, a bill might lie by the United States for the cancellation and annulment of the approval. *Noble v. Union River L. R. Co.*, 147 U. S. 165, 13 Sup. Ct. Rep. 271.

And whether the company obtaining the right of way is such a company as is entitled to a right of way is a *quasi* judicial question, and when the secretary of the interior has once determined the question, it is final as to the executive department of the government. *Noble v. Union River L. R. Co.*, 147 U. S. 165, 13 Sup. Ct. Rep. 271.

The decision of the land department in awarding certain lands to an individual, which was claimed under a railroad grant, is not conclusive on the state courts, when the decision grew out of a mistake as to the law. *Emslie v. Young*, 5 Am. & Eng. R. Cas. 422, 24 Kan. 732.

II. HOMESTEADS.

3. Arkansas.—A homesteader of government land may, after making his entry thereon, and settling there with his family, and before perfecting his title, unite with another as a partner, and build a mill on the land, giving to such partner an interest therein and in its profits for his advances; and no violation of the homestead statute of congress is thereby made; and the two may jointly sue a railroad company for obstructing the mill-race. *Hot Springs R. Co. v. Tyler*, 10 Am. & Eng. R. Cas. 145, 36 Ark. 205.

4. Florida.—Where a railroad company fails to comply with the laws granting a right of way through the public lands of the United States, the company has no right to

run its road through the land of a homesteader who has complied with the homestead law, although he has not at the time received his patent for his homestead claim. Under such circumstances his claim is superior to that of the company, and he may recover damages from the company for constructing its road on his land. *Savannah, F. & W. R. Co. v. Davis*, 43 Am. & Eng. R. Cas. 542, 25 Fla. 917, 7 So. Rep. 29.—EXPLAINING *Van Wyck v. Knevals*, 106 U. S. 360.

A railroad company that has not complied with the terms of the act of congress granting to railroad companies rights of way through the public lands of the United States is not in a position to assail the title of a homesteader found in possession of the land through which the company desires to run its road. *Savannah, F. & W. R. Co. v. Davis*, 43 Am. & Eng. R. Cas. 542, 25 Fla. 917, 7 So. Rep. 29.

5. Iowa.—Plaintiff company claimed certain lands, as indemnity, under an act of congress in making a grant. Defendant claimed the lands by a patent under the homestead laws, on an application made after the grant to plaintiff, he being in actual possession and having made valuable improvements. *Held*, that plaintiff could not, in equity, reach the lands, if there was enough of other lands of the government to make up the indemnity; and the burden was upon plaintiff to show that there was not enough of other lands. *Cedar Rapids & M. R. R. Co. v. Jewell*, 12 Am. & Eng. R. Cas. 277, 61 Iowa 410, 16 N. W. Rep. 344.—FOLLOWING *Cedar Rapids & M. R. R. Co. v. Herring*, 52 Iowa 687.

6. Kansas.—The initial or inceptive right of a homestead settlement, under the acts of congress, dates from the entry of the land at the local land office; that is, from the time of making application to the government through the local land officers for the benefit of taking a homestead for actual settlement and cultivation; therefore the possession and settlement of public land, prior to the application and entry, give a party no vested right to said land as a homestead in opposition to a railroad company deriving title under the Act of Congress of March 3, 1863, granting lands to the state of Kansas to aid in the construction of railroads and telegraphs, when the line or route of said road is definitely fixed before such entry as a homestead. *Atchison, T.*

S. F. R. Co. v. Mecklin, 23 Kan. 167.—DISTINGUISHED IN *Fearns v. Atchison*, T. & S. F. R. Co., 33 Kan. 275. FOLLOWED IN *Atchison, T. & S. F. R. Co. v. Keller*, 31 Kan. 439. RECONCILED IN *East Ala. R. Co. v. Tennessee & C. R. R. Co.*, 29 Am. & Eng. R. Cas. 363, 78 Ala. 274.

The Act of Congress of July 3, 1866, relating to plaintiff company, provided for the filing of a map of the general line of its road, and that "upon the filing of said map * * * the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale, by order of the secretary of the interior." Held, that the lands along the line of the road were not withdrawn from sale until the order of the secretary of the interior was made, so as to cut off a homestead entry made between the time of the filing of such map and the time of such order. *Kansas Pac. R. Co. v. Dunmeyer*, 5 Am. & Eng. R. Cas. 417, 24 Kan. 725; former appeal 19 Kan. 539.

Under the Act of Congress of March 3, 1863, making a grant of lands to the state of Kansas to aid in the construction of railroads and telegraphs therein, plaintiff company, which was a recipient of said lands, did not obtain title to specific lands until the line of its road was definitely located; and any lands within the ten-mile limit which had been pre-empted or homesteaded prior to such definite location were not to be considered as granted. *Atchison, T. & S. F. R. Co. v. Pracht*, 12 Am. & Eng. R. Cas. 267, 30 Kan. 66, 1 Pac. Rep. 319.

A settler making a homestead entry on public lands of the United States, and continuing to reside thereon, and making improvements according to the requirement of the land laws, has the exclusive right to his possession, though he may never acquire a legal title. *Burlington, K. & S. W. R. Co. v. Johnson*, 33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125.

A homestead settler on lands of the United States may sell and transfer a portion of his homestead for a right of way for a railroad, or his interest therein may be condemned and appropriated for such purpose upon adversary proceedings, and by paying full compensation to the settler therefor. *Burlington, K. & S. W. R. Co. v. Johnson*, 33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125.

A homesteader who has entered, and is proceeding lawfully to perfect his title to

the land entered, suffers an injury by the building of a railroad over his homestead, which differs only in degree from that sustained from the same cause by one who has the complete title. *Burlington, K. & S. W. R. Co. v. Johnson*, 33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125.

A homestead entry, made before the definite location of the railroad, but which had been voluntarily abandoned before such definite location, although the filing thereof was not canceled until after the location, did not operate to except the land from the grant to the railroad company, under the provisions of the Act of Congress of March 3, 1863, donating to the state of Kansas lands to aid in the construction of certain railroads and telegraphs. *Young v. Goss*, 40 Am. & Eng. R. Cas. 435, 42 Kan. 502, 22 Pac. Rep. 572.—DISTINGUISHING *Kansas Pac. R. Co. v. Dunmeyer*, 113 U. S. 629. QUOTING *Emslie v. Young*, 24 Kan. 732.

7. Michigan.—A right of way perfected by a railway company under U. S. Rev. St. § 2477 cannot be defeated by mere relation back from a homesteader's subsequent patent to the time of his antecedent entry on the land. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420.

There is nothing in the Michigan Act of June 9, 1879, for the protection of *bona fide* settlers and purchasers from the trustee of railroad lands, which dispenses with the title from such trustee, which would be good if he owned the land. *Paine v. State Land Office Com'r*, 66 Mich. 245, 9 West. Rep. 855, 33 N. W. Rep. 491.

8. Minnesota.—A settler who has entered public land of the United States under the homestead law, although no patent has been issued, has an inchoate, vested title which can only be defeated by his own failure to comply with the conditions of the law. If he complies with these conditions, he becomes invested with full ownership, and the absolute right to a patent. Under the act of May 14, 1880 (21 U. S. St. 140), his right relates back to the date of his settlement. *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. Rep. 229.—DISTINGUISHING *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426; *Frisbie v. Whitney*, 9 Wall. 187; *Yosemite Valley Case*, 15 Wall. 77. NOT FOLLOWING *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420.—QUOTED IN *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393.

As against such homesteader a railroad company has not, under the Act of Congress of March 3, 1875, a right of way over the land, unless such right was acquired by compliance with the provisions of the act before the date of his settlement. *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. Rep. 229.

An existing homestead entry of particular land at the time of the filing in the general land office of a map of the definite location of a land-grant railroad, under the act of March 3, 1857, excepts such land from the operation of the railroad grant, although the land is found to be within the limits of the grant. *Winona & St. P. Land Co. v. Ebelcor*, 52 Minn. 312, 54 N. W. Rep. 91.

But a certificate of such land to the state under the law of July 13, 1866, as being included in the grant, is effectual as a patent evidencing a transfer of the title. It is voidable, but not void, and cannot be collaterally assailed by one who has no legal title to the land. *Winona & St. P. Land Co. v. Ebelcor*, 52 Minn. 312, 54 N. W. Rep. 91.

9. Oklahoma.—An employé of a railroad residing in the territory before, up to, and on April 22, 1889, when the lands of said territory were opened for settlement, was disabled from making a homestead entry on the land on which he resided. *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. Rep. 634.

10. Oregon.—When a homestead claimant settles on the public lands of the United States, and in due time files his claim, as required by the act of congress, said homestead claim thus becomes separated from the public domain and ceases to be public lands of the United States, and thereafter a railroad company, by complying with the act of March 3, 1875, does not acquire a right of way through such homestead claim. The Act of Congress of March 3, 1875, does not purport to grant a right of way through the claim of those who had, prior to the time such right attached, acquired possessory rights in such public lands, and by the third section of the act such rights are only to be taken by condemnation. *Larsen v. Oregon R. & N. Co.*, 44 Am. & Eng. R. Cas. 92, 19 Oreg. 240, 23 Pac. Rep. 974.—DISTINGUISHING *United States v. Taylor*, 35 Fed. Rep. 486; *United States v. Stores*, 14 Fed. Rep. 824; *United States v. Smith*, 11 Fed. Rep. 487; *United States v. Cook*, 19 Wall. 591.

III. INDIAN LANDS

11. In general.—Under its authority to regulate commerce among the several states and with the Indian tribes, congress has power to grant to a railway company a right of way through the Indian Territory. *Cherokee Nation v. Southern Kan. R. Co.*, 44 Am. & Eng. R. Cas. 26, 135 U. S. 641, 10 Sup. Ct. Rep. 965; reversing 33 Fed. Rep. 900.

In the absence of treaty or express exclusion, the different Indian reservations become a part of the territory where situate, and subject to territorial legislative jurisdiction, subject, however, to the power of the general government to make regulations respecting the Indians, etc. *Maricopa County Delinquents v. Territory*, (Ariz.) 48 Am. & Eng. R. Cas. 620, 26 Pac. Rep. 310.—FOLLOWING *Langford v. Monteith*, 102 U. S. 145. QUOTING *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 529.

12. Cherokees.—The Cherokee Nation holds the fee to all the lands to which it has title. Individual citizens of the nation have a right of perpetual occupancy in lands improved and occupied by them under the laws of the Cherokee Nation. By this right of occupancy the individual Indian citizen can hold and occupy the lands forever, and fully enjoy all profits arising from them, and their right of occupancy may be transferred by a grant to another citizen of the nation, or it may descend by inheritance. Practically they get all of the productions of the land, and are entitled to its increased or peculiar value as though they held it in fee. *Payne v. Kansas & A. V. R. Co.*, 47 Am. & Eng. R. Cas. 228, 46 Fed. Rep. 546.

13. Delawares.—In February, 1867, the Missouri River railroad company had no such interest in the lands known as the "Delaware Diminished Reserve" as that it could convey the same by deed; and such a deed without consideration, and induced by vicious causes, cannot be set up as an equitable defense to a suit for the recovery of the lands, as such a deed has no equity, and will not be enforced. *Simpson v. Greeley*, 8 Kan. 586.

A citizen of the United States emigrated from Kentucky to the territory of Kansas, in 1853, and married a Delaware woman, a member of the Delaware tribe of Indians, but was not himself adopted into the tribe. In 1854 he established his residence on the

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Delaware reservation and has since lived there. On July 15, 1872, he brought an action against a railway company, charging it with breaking and entering his close. The land which he claimed had been allotted to his wife and children in severalty, under the provisions of the Delaware treaty of May 30, 1860, and he had no other claim or title to it. *Held*, that he was not entitled to damages, notwithstanding defendant entered and constructed its road over the land without paying compensation. *Grinter v. Kansas Pac. R. Co., 23 Kan. 642.—FOLLOWED IN Grinter v. Kansas Pac. R. Co., 23 Kan. 659.*

In 1862 congress had the exclusive right and dominion over the Delaware reservation in Kansas, and had full power to permit the construction of a railroad over such reservation either with or without compensation to be paid by the company. *Grinter v. Kansas Pac. R. Co., 23 Kan. 642.—FOLLOWED IN Grinter v. Kansas Pac. R. Co., 23 Kan. 659.*

Under the Act of Congress of July 1, 1862, making a grant to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, there was granted to what is now the Union Pacific railway, Kansas division, a right of way through the public lands, with an agreement to extinguish, as rapidly as possible, the Indian title thereto which included the Delaware reservation in Kansas. *Held*, that the company had authority, in Nov., 1863, under the treaty of May 30, 1860, to enter upon the reservation for the purpose of locating its road, without compensation to the Indians. *Grinter v. Kansas Pac. R. Co., 23 Kan. 642.—FOLLOWED IN Grinter v. Kansas Pac. R. Co., 23 Kan. 659.*

14. Flatheads.—By the treaty of 1855 with the Flathead Indians it was provided that the lands in the Bitter-root valley, Mont., above the Lo Lo Fork, should be surveyed and set apart as a separate reservation for the tribe, if in the judgment of the president they should be better adapted to the wants of the Indians, and in the meantime they should not be open to settlement. Such decision of the president was not made until 1871. *Held*, that they were not "public lands," such as could pass to the Northern Pacific railroad by the grant of July 2, 1864. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

By the Act of Congress of June 5, 1872, the above lands were reserved for a special purpose, including the right of pre-emption

to Indians occupying and cultivating them, and a sale of others for the benefit of the Indians. *Held*, that this was sufficient to prevent the lands from passing to the railroad company under the above grant of 1864. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

The grant to the railroad company only attached upon the definite location of the road, and to such lands as the United States had "full title, not reserved, sold, granted, or otherwise appropriated"; therefore the exclusion of the above lands from the grant was no violation of the contract between the general government and the company. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

The provision of section 6 of the act of 1864 making a grant of the odd sections for forty miles on each side of the road, and requiring the president to have the lands surveyed, after the general route of the road should be fixed, and declaring that such lands should not be liable to "sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act," did not prevent the government from making other disposition of the lands, before the filing of the map of the definite location of the road. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

But as the reservation under section 6 was only from "sale, or entry, or pre-emption," this could not prevent such a disposition of the lands as was made under the act of 1872, as the disposition then made was neither a sale, entry, nor pre-emption. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

And the fact that congress in 1874 passed an act which extended to settlers on the land the privileges of the homestead law would not restore such lands to the public mass so as to take them out of the special appropriation made under the act of 1872, or allow them to pass under the grant to the company in 1864. *Northern Pac. R. Co. v. Hinchman, 53 Fed. Rep. 523.*

15. Kickapoo.—Under the Kickapoo treaty of 1862 (13 U. S. St. at L. 623) a railroad company purchased from the United States all the surplus lands belonging to the Kickapoo Indian reservation, and obtained certificates of purchase from the secretary of the interior. Before the company obtained patents for said land the president and attorney in fact for the company, duly au-

thorized, did, by an assignment written and printed on the same piece of paper on which one of said certificates of purchase was written and printed, transfer and assign to an individual all the right, title, and interest of the company to a certain quarter section of said land, and required the issue of a patent to him as assignee of said company, in accordance with the terms of said certificate. He afterwards took possession of said land under said certificate, and the assignment, and made valuable improvements thereon; and afterwards the company caused the patent to be issued to itself, and refused to transfer the legal title to such person. *Held*, that the company might be compelled to transfer the same by deed. *Central Branch U. P. R. Co. v. Wilcox*, 14 Kan. 259.

1st. Osages.—Act of Congress of July 26, 1866 (14 U. S. St. 289), gave a right of way over the Osage ceded lands reserved by the United States for the Great and Little Osage Indians, but such right of way extended over such lands only as had not previously been disposed of by the government. *Roberts v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 532, 43 Kan. 102, 22 Pac. Rep. 1006.—QUOTING *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733.

The third section of the act of admission of the state of Kansas into the Union irrevocably granted to the state, for the use of schools, the sixteenth and thirty-sixth sections of the public lands; and that grant embraced those sections of Indian lands within the state in which the Indians had a right of possession only. *Roberts v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 532, 43 Kan. 102, 22 Pac. Rep. 1006.—QUOTING *Beecher v. Wetherby*, 95 U. S. 517; *Cooper v. Roberts*, 18 How. (U. S.) 173.

IV. PRE-EMPTION; RIGHTS OF SETTLERS.

17. Pre-emption, generally.—It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry. Congress did not intend to change this system in the new policy adopted by it to aid states by grants of lands to build railroads. *Eldred v. Sexton*, 19 Wall. (U. S.) 189.

Lands having been set apart to aid a railroad, and absolutely and unconditionally withdrawn from pre-emption, no pre-emption right could be acquired in them while so situated, even if the grantee at the time was unauthorized under the state law to take a perfect title. *Southern Pac. R. Co. v. Orton*, 6 Sawy. (U. S.) 157.

A person who enters upon the land of the United States without any purpose of obtaining title in accordance with the federal laws has no lawful right there, and is a trespasser as against the government. So the mere fact that land is in the possession of a settler at the time that it is granted to a railroad company does not prevent it from passing under the grant. *Cahalan v. McGugue*, 46 Fed. Rep. 251.

Alternate sections granted to the state by Act of Congress of Sept. 20, 1850, for the construction of a railroad from Chicago to Mobile are not subject to pre-emption. *Walker v. Hedrick*, 18 Ill. 570.

In 1870 a railroad pre-emption claim to land could not be acknowledged before a notary, especially one residing in a different county. *Cravens v. Moore*, 61 Mo. 178.

Absence from land for eight years will not be construed as necessarily amounting to an abandonment of a railroad pre-emption claim thereto. *Cravens v. Moore*, 61 Mo. 178.

The even-numbered sections along the line of the Union Pacific railroad and its branches may be settled upon and entered under the provisions of the pre-emption and homestead laws, but are not subject to private entry. *Stalnaker v. Morrison*, 6 Neb. 363.

When lands have been offered at public sale and thereby become subject to private entry, if they are afterwards included within the boundaries of a grant to a railroad company, and are thereby withdrawn from private entry, and subject to settlement and entry under the pre-emption and homestead laws exclusively, they are to be treated in all respects like unoffered lands. *Stalnaker v. Morrison*, 6 Neb. 363.

A party pre-empting any portion of such lands has thirty months after the date of filing his declaratory statement in which to make final proof and pay for the same. *Stalnaker v. Morrison*, 6 Neb. 363.

Lands within a railroad grant are not subject to private entry, and in regard to settlement and entry under the homestead

and pre-emption laws are to be regarded as unoffered lands. *Stark v. Baldwin*, 7 Neb. 114.

18. Nature and extent of the right acquired.—A claimant of public land, within the meaning of the Act of Congress of July 2, 1864, § 3 (13 St. at L. 356), granting a right of way over the public lands to the Union and Central Pacific railroad companies, is one who has an interest in the land recognized by the laws of the United States. One who is a pre-emptioner, but has not paid for the land, is not such claimant. *Western Pac. R. Co. v. Tevis*, 41 Cal. 489, 3 Am. Ry. Rep. 50.

Defendant entered upon land within the exterior limits of a Mexican grant, with the intention of securing a pre-emption right, but subsequently abandoned his location, under the mistaken supposition that such land was *sub judice*, and located elsewhere. Four years afterwards, and eighteen months subsequently to the filing of complainant's map, he returned to his original location. *Held*, that such return did not connect itself with his former residence, and continue or reinstate the right first initiated, and that the right of complainant having attached, it was too late to acquire a new right of pre-emption; and a patent issued to him, based upon such subsequent location, was either void, or the title vested under it is held in trust for complainant, and the patentee could convey no better title to a purchaser for value without actual notice, in fact, of complainant's title. *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 506, 22 Fed. Rep. 489.

A person who, on Dec. 7, 1853, settled upon vacant land did not thereby acquire any pre-emption rights under the act of Feb. 7, 1853, supplementary to "An act granting to settlers on public domain pre-emption privileges." The privilege accorded by the act was limited to such persons as were settlers on the public land at the date of its enactment; and such person took no title as against a patentee who had made a location subsequent to March 1, 1857, when the Mississippi & Pacific railroad reservation was open to location. *Woods v. Durrett*, 28 Tex. 429.

The proviso to the act of August 15, 1856, § 3 (Paschal's Dig. art. 4351, note 985), excluding from the relief granted by that act such persons as had, subsequent to December 21, 1853, settled as pre-emptioners within the Pacific railroad reservation, is not to be

construed as relieving from disabilities all persons who had, previous to that date, settled as pre-emptioners within the reservation. The proviso conferred no rights upon any settlers not comprised within the class comprehended by the enacting clauses of the act. *Woods v. Durrett*, 28 Tex. 429.

The act of Aug. 26, 1856 (Paschal's Dig. art. 4348), repealed the pre-emption law of Feb. 13, 1854, and on the same day the act "to authorize the location and settlement of the Mississippi and Pacific railroad reserve" was passed, by section 2 of which persons settled upon any portion of said reserve at the date of said law were authorized to purchase not more than 160 acres at the price of fifty cents per acre. This act, with direct reference to the subject-matter, sustains the construction already given to the act of Aug. 15, 1856. *Woods v. Durrett*, 28 Tex. 429.

The rights of a pre-emption claimant to public land of the United States are reserved by the Act of Congress of March 3, 1875, entitled "An act granting to railroads a right of way through the public lands of the United States;" and where a railroad appropriates public lands upon which a pre-emption entry has been properly made prior to the filing of a profile of the road in the office of the secretary of the interior the railroad is liable for damages. *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. Rep. 966.—QUOTING *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95.—FOLLOWED IN *Reidt v. Spokane Falls & N. R. Co.*, 6 Wash. 623.

10. Rights of settlers, generally.*

—(1) *Federal decisions.*—Under the treaty relating to "the ceded, neutral lands in Kansas," an actual settler whose improvements were wholly upon the west half of a quarter section of land is not entitled to buy the quarter section on which the improvements are. Under article 17 of the treaty, any actual settler who had made improvements of the value of \$50, and occupied the land for agricultural purposes at the date of the treaty, might buy at the ap-

* Preference as between actual settlers and applicants who purchase or apply for lands of a railroad company in response to circulars sent out soliciting purchasers and applications, see 24 AM. & ENG. R. CAS. 135, *abstr.*

Rights of settlers on lands granted to railroad company. Effect of withdrawal of lands from entry, see 46 AM. & ENG. R. CAS. 445, *abstr.*

praised value "the smallest quantity of land in legal subdivision which would include his improvements." *Armsworthy v. Missouri River, Ft. S. & G. R. Co.*, 5 Dill. (U. S.) 491. — FOLLOWING *Stroud v. Missouri River, Ft. S. & G. R. Co.*, 4 Dill. 396.

The various acts of congress and of the state of Minnesota relating to the grants made to plaintiff company, and the rights of settlers, construed, and held, that as they were all passed after the time given for the completion of the road, when there had been a non-performance of the conditions of the grant, and when there existed the right of absolute forfeiture, and of resumption and transfer by the state to another beneficiary, it was intended both by congress and the state to give actual *bona fide* settlers priority over the railroad company. *St. Paul, M. & M. R. Co. v. Greenhalgh*, 26 Fed. Rep. 563. — FOLLOWING *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334; *Winona & St. P. R. Co. v. Barney*, 113 U. S. 618, 5 Sup. Ct. Rep. 606.

Act of Congress of Feb. 25, 1885, provides that all inclosures of public lands entered by any person or corporation without claim or color of title to said lands acquired in good faith shall be unlawful. Defendant, as licensee of the Southern Pacific railroad company, had inclosed certain lands of the land grant of the company. The lands had, on filing the plat of the proposed road by the company, been withdrawn from settlement by the United States, though they had not been earned yet by the company. Held, that such inclosures of land did not fall within those prohibited by the act of congress. *United States v. Bransteer*, 13 Sawy. (U. S.) 64, 32 Fed. Rep. 738. — APPROVING *United States v. Childers*, 8 Sawy. 171; *United States v. Ordway*, 30 Fed. Rep. 58.

(2) *State decisions.* — A settler on public lands which had been withdrawn from sale under an act of congress to aid the construction of a railroad acquires no rights by his settlement as against the railroad company, to which a patent was subsequently issued. *Southern Pac. R. Co. v. Garcia*, 64 Cal. 515, 2 Pac. Rep. 397.

By Act of Congress of June 3, 1856, certain lands were granted to the state of Louisiana to aid in the construction of railroads. Held, that no conveyance to a railroad company in violation of the terms of this act

could vest title to the lands in the company. It was a condition precedent to the conveyance of any section of the land that the road should be first constructed in sections of twenty miles each before the company could acquire title to the lands contiguous to such section. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. Rep. 725.

But where the legislature authorizes the road to mortgage the lands above mentioned, and the mortgage is executed to secure the company's bonds, the state cannot subsequently abridge the rights of third parties acquired under the mortgage. Parties who have acquired title to the road by a foreclosure sale have the legal title to such lands as against a party who claims no title, except by mere possession, and who went on the lands expecting that they would be thrown open to sale and entry. Under such circumstances the state is estopped, and the general government is the only party who can contest the title to such lands. *Vicksburg, S. & P. R. Co. v. Sledge*, 41 La. Ann. 896, 6 So. Rep. 725.

(3) *Canadian decisions.* — A company constructed its road over certain government lands held by her majesty's officers for ordinance purposes. Afterwards a question was raised as to the right of the company to construct its road over the lands, but by negotiations it was agreed that the road was rightfully constructed, and all that the ordinance department could require was compensation for the land. Subsequently all these lands were ceded by the imperial government to the government of Canada. It was ascertained that the government had a lien on the road for £600,000, which, by act of the legislature, was compromised and discharged by payment of £100,000. Held, that the company and its lessee had acquired the absolute title to the land, and might enjoin another company from constructing a road thereon. *Grand Trunk R. Co. v. Credit Valley R. Co.*, 27 Grant's Ch. (U. C.) 232.

Plaintiffs who held timber licenses for certain years over public lands sued in trespass for timber cut by defendant on the line and within the six-rod belts mentioned in the Railway Act of Canada concerning railway rights of way. Held (per Hagarty, C.J.O., and Osler, J.A.), that the damage to the timber was damage "sustained by reason of the railway," within the meaning of R. S. C. 109, § 27, and that that section was

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Held (per Burton, J.A., and MacLennan, J.A.), that the section was *ultra vires* the Dominion parliament as being an unnecessary interference with property and civil rights within the province, but that even if valid it would not avail for the protection of defendants, as they were mere trespassers. *McArthur v. Northern & P. J. R. Co.*, 17 Ont. App. 86; *dismissing appeal from 15 Ont.* 733. —REVIEWING *Kelly v. Ottawa St. R. Co.*, 3 Ont. App. 616; *Garton v. Great Western R. Co.*, El. Bl. & El. 837; *Follis v. Port Hope & L. R. Co.*, 9 U. C. C. P. 50.

The Canada Central railway acquired under its charter (19 & 20 Vict. c. 112, and subsequent acts relating thereto passed prior to confederation) the right, which was preserved by the B. N. A. Act, § 109, to enter on the crown lands in the province of Ontario on the line of the railway included in a subsequent timber license granted to plaintiff, and to cut the timber within six rods of each side thereof, without any restriction as to obtaining the consent of the lieutenant-governor in council. *Booth v. McIntyre*, 31 U. C. C. P. 183.

By 19 & 20 Vict. c. 112, § 4, the clauses, amongst others, of the Railways Clauses Consolidation Act (14 & 15 Vict. c. 31), relating to lands were incorporated therewith, whereby the company was empowered to enter upon the crown lands on the line of its railway and to fell and remove the trees standing thereon. By 16 Vict. c. 169, § 8, possession of such lands was not to be taken without the consent of the governor in council, but it was expressly provided that this was not to limit or affect the powers given by the special act. *Held*, that the last-named proviso showed that said section 8 was not to apply to this company. *Booth v. McIntyre*, 31 U. C. C. P. 183.

20. Settlers making improvements.—In view of the policy of the general government and of the state in regard to the public lands, settlers who have no

rights, except from occupancy, cannot be treated as naked wrong-doers, having no equitable rights in their improvements, as against persons claiming a simple privilege, such as the right to take the land for railroad purposes. *California Northern R. Co. v. Gould*, 21 Cal. 254. —DISTINGUISHED IN *Doran v. Central Pac. R. Co.*, 24 Cal. 245.

Where a person, eligible to procure a homestead under the United States laws, settles upon, occupies, and makes valuable and lasting improvements on government land, and attempts to make a homestead entry thereof, but through mistake makes an entry of another piece of land, he has obtained such an interest in the land that he may have his entry so corrected as to make it an entry of the land which he had intended to enter. *Fearns v. Atchison, T. & S. F. R. Co.*, 33 Kan. 275, 6 Pac. Rep. 237. —DISTINGUISHING *Atchison, T. & S. F. R. Co. v. Mecklim*, 23 Kan. 167.

And in such a case, where a railroad company which would be entitled to the land upon definitely locating its railroad, provided the same were still government land and not affected by any homestead or preemption claim, definitely locates its road opposite the land after the attempted entry thereof, but before the entry is corrected, it obtains no interest in the land. *Fearns v. Atchison, T. & S. F. R. Co.*, 33 Kan. 275, 6 Pac. Rep. 237.

Where a person who has settled upon and attempted to make a homestead entry of a piece of government land is in the open, notorious, and exclusive possession thereof, claiming the same as his homestead, such possession is sufficient to put all persons upon inquiry, and all persons are bound to take notice of his rights and interests in and to the property. *Fearns v. Atchison, T. & S. F. R. Co.*, 33 Kan. 275, 6 Pac. Rep. 237.

V. TIMBER ON THE PUBLIC LANDS.

21. Title to—Cutting timber, generally.—By the Act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad," the timber growing on the odd-numbered sections of public mineral land of the United States was granted to the Central Pacific railroad company of California; and under the term timber is included all trees and wood. *Held*, accordingly, that a subsequent patentee of such

lands took no title to the timber. *Carr v. Central Pac. R. Co.*, 55 Cal. 192.

The United States cannot maintain an action for an accounting against the Northern Pacific railroad company for cutting timber on unsurveyed land, every alternate section of which had been conveyed to the latter, as they were not tenants in common therein and under the circumstances it was impossible to tell upon whose land the timber had been cut. *United States v. Northern Pac. R. Co.*, 6 Mont. 351, 12 Pac. Rep. 769.

The United States and the Northern Pacific railroad company are not tenants in common of unsurveyed lands, every alternate section of which had been conveyed to the latter by an act of congress. *United States v. Northern Pac. R. Co.*, 6 Mont. 351, 12 Pac. Rep. 769.—REVIEWING *Northern Pac. R. Co. v. Majors*, 5 Mont. 145.

22. Purchase of wood cut.—Defendant, a railroad corporation, purchased for use upon its locomotives and cars wood severed from public mineral lands. *Held*, that such purchase and use were unlawful, and that the United States could recover from defendant the value of the wood. *United States v. Eureka & P. R. Co.*, 14 Sawy. (U. S.) 334, 40 Fed. Rep. 419.

23. Taking timber adjacent to right of way.—The provision in the Act of Congress of 1864 that the Northern Pacific railroad company should have the right "to take from the public lands adjacent to the line of said road, material of earth, stone, timber, etc., for construction thereof," is not limited to public lands which are contiguous to or adjoining the track. *United States v. Lynde*, 47 Fed. Rep. 297.—QUOTING *United States v. Northern Pac. R. Co.*, 29 Alb. L. J. 24; *United States v. Denver & R. G. R. Co.*, 31 Fed. Rep. 886. REVIEWING *Denver & R. G. R. Co. v. United States*, 34 Fed. Rep. 838.

The Act of Congress of March 3, 1875, grants the right of way to certain railway companies over the public lands, and authorizes any of such companies "to take" the material necessary for the construction of its road from the public lands "adjacent" to the line thereof. *Held*, that the act is a license to the company "to take" the material necessary for the construction of its road without application to or consent of any officer of the land department; and that such department has no authority to

make any regulations on the subject of such license. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890.

If the company takes such material from the public lands not adjacent to the line of its road or takes more than is permitted by the statute, it is liable to the United States as a wrong-doer. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890.

Any person who has a contract with a company to build its road or any part thereof, or to furnish material therefor, is, without any special agreement to that effect, authorized to take the necessary material from the public land the same as the company might do. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890.

If a person not in the employment of the company and having no contract therewith, cuts timber on the lands adjacent to the line of its road, and the company acquires the same for the purpose of its road and so uses it, neither such person nor the company is liable therefor as a wrong-doer. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890.

The license to take material for the construction of the road includes the right to take material for the construction of station buildings, depots, machine shops, side tracks, turnouts and water stations, and the like. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890. *Denver & R. G. R. Co. v. United States*, 36 Am. & Eng. R. Cas. 429, 34 Fed. Rep. 838; *affirmed* in 150 U. S. 1, 16, 14 Sup. Ct. Rep. 11, 16.

Land is "adjacent" to the line of the road within the purpose and intent of the act, when by reason of its proximity thereto, it is directly and materially benefited by the construction thereof. *United States v. Chaplin*, 12 Sawy. (U. S.) 604, 31 Fed. Rep. 890.

Under the Act of Congress of March 3, 1875, entitled "An act granting railroads the right of way through the public lands of the United States," and allowing the taking of timber or other material from adjacent lands necessary for the construction of the road, a company is authorized to use timber or material so taken at a place remote from the place from which it is taken. *United States v. Denver & R. G. R. Co.*, 150 U. S. 1, 14 Sup. Ct. Rep. 11; *affirming* 36 Am. & Eng. R. Cas. 429, 34 Fed. Rep. 838, which modified 31 Fed. Rep. 886.—

FOLLOWED IN *United States v. Denver & R. G. R. Co.*, 150 U. S. 16.—*United States v. Lynde*, 47 Fed. Rep. 297.

The Denver & Rio Grande railroad company was entitled to claim the benefit of the Act of Congress of March 3, 1875, after the expiration of the time limited by the act of June 8, 1872, for the completion of its road as far as Santa Fé. *United States v. Denver & R. G. R. Co.*, 150 U. S. 1, 14 Sup. Ct. Rep. 11; affirming 36 Am. & Eng. R. Cas. 429, 34 Fed. Rep. 838, which modified 31 Fed. Rep. 886.—FOLLOWED IN *United States v. Denver & R. G. R. Co.*, 150 U. S. 16.

24. Timber-culture claims.—Where a railroad company by condemnation proceedings procures a right of way over land occupied by a person who holds the same as a timber-culture claim under the laws of the United States, the title thereto being still in the United States, the occupant of the land can recover damages from the railroad company only for the diminished value of his interest in the land, and not for the diminished value of the land itself. *Chicago, K. & W. R. Co. v. Hurst*, 39 Am. & Eng. R. Cas. 127, 41 Kan. 740, 21 Pac. Rep. 781.

One who enters land under the "Timber-Culture Act," and who has complied with its conditions, is, during the time required to perfect his right to a patent, the owner of hay made from grass which he cuts on the land, and he may recover from a wrongdoer who destroys trees standing on the land their value as standing trees; that is, the value they add to the value of the land. *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 375, 45 N. W. Rep. 713.—DISTINGUISHING *Lindsay v. Winona & St. P. R. Co.*, 29 Minn. 411, 13 N. W. Rep. 191.

The fact that after the destruction of trees upon a timber claim by a railroad company the claimant surrendered his claim does not affect his right to recover damages for their destruction. *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn. 375, 45 N. W. Rep. 713.

A person having been in possession of a timber-culture claim for less than ten years, whose possession is not injured or disturbed, cannot maintain an action for damages to the land itself caused by the construction of a railroad on a public road which passes along one side of such claim. *Hastings & G. I. R. Co. v. Ingalls*, 20 Am. & Eng. R. Cas. 60, 15 Neb. 123, 16 N. W. Rep. 762.—

APPLIED IN *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240.

VI. SURVEYS.

25. Validity.—On Aug. 26, 1856, a statute was passed authorizing the location, sale, and settlement of the Mississippi & Pacific railroad reservation. Held, that a survey made in 1855 within the reserve, and while it was subsisting, was contrary to law and void, and did not sever the land from the mass of the public domain. *Wright v. Hawkins*, 28 Tex. 452.

26. Finality—When has effect of patent.—Under the Act of Congress of June 14, 1860, proceedings for the confirmation of a Mexican grant are in the nature of proceedings *in rem*; under such act the location of a Mexican grant becomes final, after the publication by the surveyor-general of the notice provided for therein, in the absence of any application to have the plat and survey returned to the district court for examination. A survey so made final by publication has the same effect as a patent, and thereafter is in no sense *sub judice*; the jurisdiction of the commissioner of the general land office is thereupon exhausted as to everything but the ministerial duty of issuing a patent, and any further acts of his, such as ordering a resurvey, are void. All lands outside of the survey, thus made final, become public lands of the United States, and subject to any other disposition under the law. *Southern Pac. R. Co. v. Dull*, 10 Sawy. (U. S.) 506, 22 Fed. Rep. 489.

27. Priority—Junior and senior surveys.—In 1876 a railway company had a block of surveys made by the surveyor of a land district. The block extended into Kinney county, then organized. The field notes with certificates were returned to the land office. In 1877 defendant located upon the land in Kinney county. A survey was made and patent issued October, 1878. The patent was issued in 1887, upon the survey for the railway company. In a contest between the two titles—held, that the junior survey made in Kinney county with patent conveyed the land, unaffected by the survey in the land district; and this although the line between Kinney county and the land district had not been established. It did not appear that the survey for the railway company was made by mistake. *Gulf, W.*

T. & P. R. Co. v. Cornell, 84 Tex. 541, 19 S. W. Rep. 703.

company for injury done to the same in constructing the road over the land. *Butterfield v. Central Pac. R. Co.*, 31 Cal. 264.

VII. LAND WARRANTS.

28. Priority among holders.—As between the holders of general or common land warrants, there is no priority of right to locate. The warrant is a mere authority to the surveyor or proper officer to make the survey, and the certificate is the inception of title, to which the patent, when issued, relates. The title remains in the state until the warrant is located, and will pass under a junior warrant, if first executed. But it is not so with an act of incorporation, which when accepted amounts to a grant, and the right conferred, a vested franchise, existing independent of any act of location or survey, which the state cannot reassert, nor grant to any other. It is a prior right to which all subsequent grants must yield. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

A chartered company may lose its prior right by acquiescing in other works, inconsistent with such rights. *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

29. Replacing lost warrant.—A party, by his authorized agent, presented a land warrant at the office of the register and received a register's certificate of location, and in the presence of the agent the proper entry was made upon the plat book. The warrant failed to reach the general land office, and the land was subsequently included in a railway land grant. The department of the interior, reversing the decision of the general land office, directed that the lost warrant be replaced with a duplicate by one claiming title under the original entry. Held, that the party making the entry acquired an equitable interest in the land which upon compliance with the condition imposed by the department ripened into the legal title thereto. *Harmon v. Clayton*, 51 Iowa 36.

30. Military land warrants.—A location of a military land warrant on public land made before the passage of the Act of Congress of July 1, 1862, granting to the Central Pacific railroad company alternate odd sections on each side of the road, gave the locator or his grantee such an interest in the land as, coupled with possession, enables him to maintain trespass against the

VIII. MILITARY RESERVATIONS.

31. At Harper's Ferry.—Under the act of March 3, 1819, authorizing the secretary of war to sell "such military sites belonging to the United States as may have been found or become useless for military purposes," and the act of April 28, 1828, authorizing the president to "sell forts, arsenals, dockyards, lighthouses, or any property held by the United States for like purposes," the secretary of war has authority to execute the agreement it made with the Baltimore & Ohio railroad company on Nov. 5, 1838, conceding to the company "authority to construct its railroad along and over their property" at Harper's Ferry. *United States v. Baltimore & O. R. Co.*, 1 Hughes (U. S.) 138.

32. At Rock Island.—The reserve on Rock Island, though surveyed, never having been offered for sale at public auction, does not come technically within the act of 1852, authorizing railroad companies to locate their roads through the lands of the United States. The act of 1819 authorizing the sale of military reserves, etc., which had become useless embraced only those lands which had been reserved and become useless at the time the above act was passed. The power given to the defendant to construct the road and build a bridge across the Mississippi is not controverted. *United States v. Railroad Bridge Co.*, 6 McLean (U. S.) 517.

IX. PATENTS.

33. What passes by—Boundaries.—A patent issued by the United States for land, whether conclusive or not, is at least *prima facie* valid, and is presumptive evidence that all preliminary conditions have been fulfilled. So held, where a railroad company was sued in ejectment for land, and exhibited in defense a patent for the land, in pursuance of a legislative grant. *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. Rep. 886.

A railroad company obtained title to a fractional section of land which bordered for the most part upon a bay, but there extended beyond the line a ledge or narrow strip. An individual claimed the ledge as

assignee, but it appeared that at the time the railroad obtained title his assignor had no right thereto, except the privilege of burning a coal pit, and was afterwards employed by the railroad company to live on it and hold possession for the company. *Held*, that the ledge was included as part of the fractional section, as shown by the government survey, and was conveyed by the government patent; and that the company had the title thereto. *Ex parte Davidson*, 57 *Fed. Rep.* 883.

But even if it be admitted that the title to such land did not pass by the government patent, it remained in the United States, and the company obtained the right to it when it obtained possession and located its track thereon, and secured the approval of the secretary of the interior, under the Act of Congress of March 3, 1875, granting railroads a right of way over the public lands. *Ex parte Davidson*, 57 *Fed. Rep.* 883.

The appropriation of the above land for railroad purposes took it out of the body of the public domain; therefore, an objection that the land is not surveyed, and that the company cannot perfect its title by filing a map within twelve months after the survey, as required by the above act, section 4, is unavailing, as the land cannot be appropriated for other purposes. *Ex parte Davidson*, 57 *Fed. Rep.* 883.

Patents by the general government of public lands bordering on streams are not limited by the meander lines. Such patents of public lands bordering on streams navigable in fact, issued under the acts of congress providing for the survey and sale of the public lands, do not take to the middle line of the stream, but stop at the stream. *St. Paul, S. & T. F. R. Co. v. First Div. St. P. & P. R. Co.*, 26 *Minn.* 31, 1 *N. W. Rep.* 580.—FOLLOWING *Schurmeier v. St. Paul & P. R. Co.*, 10 *Minn.* 59; *St. Paul & P. R. Co. v. Schurmeier*, 7 *Wall. (U. S.)* 272.

Under the act to incorporate the Pacific railroad, sections 14, 19, the lands embraced in the reservation granted were during its continuance reserved from individual appropriation, and locations within its limits were void, and patents stood upon no higher ground. *Sherwood v. Fleming*, 25 *Tex. [Supp.]* 408.

34. Exception of mineral lands.—A patent to a railroad company which excepts "all mineral lands, should any be

found to exist in the tracts described," does not convey lands which are mineral. *McLaughlin v. Powell*, 50 *Cal.* 64.

A patent issued by the United States to the Central Pacific railroad company, for land included within the boundaries of the grant made to it by the Act of Congress of July 1, 1862, and the amendatory act of July 2, 1864, is not conclusive evidence that the land covered by the patent is non-mineral in character; and a person claiming the land under a subsequent mining patent, in an action by him to quiet his title against a grantee of the railroad company, may show that the land is mineral, and therefore excepted from the operation of the grant to the company, and upon such showing is entitled to have his title quieted. *Chicago Quartz Min. Co. v. Oliver*, 75 *Cal.* 194, 16 *Pac. Rep.* 780.

35. — of lands covered by Mexican grants.—A patent issued to a railroad company, under the act of July 2, 1864, for land within the limits of a Mexican grant *sub judice* at the date of the withdrawal of the lands is void, and may be attacked collaterally. *Carr v. Quigley*, 57 *Cal.* 394.—FOLLOWING *Doll v. Meador*, 16 *Cal.* 295.—FOLLOWED IN *Foss v. Hinkell*, 78 *Cal.* 158; *Carr v. Quigley*, 79 *Cal.* 130, 21 *Pac. Rep.* 607.—*Foss v. Hinkell*, 78 *Cal.* 158, 20 *Pac. Rep.* 393.—FOLLOWING *Carr v. Quigley*, 57 *Cal.* 395; *McLaughlin v. Heid*, 63 *Cal.* 210.

36. Confirmation—Priority.—Tex. Act of January 10, 1860, confirming certain patents in the Mississippi & P. railroad reservation, validates such patents as between the patentees and government, where two of them were in conflict, and enables either party to withdraw his location, but does not give precedence to their claims from the legally acquired rights of others. *Sherwood v. Fleming*, 25 *Tex. [Supp.]* 408.

A county court issued a certificate in 1855 to a colonist of what is known as "Peters' Colony," and the same was located and the land surveyed within the reserve of the lands made to the Mississippi & Pacific railroad company, and a patent issued the following year. Plaintiff claimed under a location and survey made in 1871. In 1860 an act was passed to confirm certain patents and to validate surveys made within the railroad reservation. *Held*: (1) that objections to the validity of the patent were obviated by the act of 1860; (2) that the act of Feb. 4, 1858, entitled "An act to ascertain

what land certificates have been issued by the county courts of counties in Peters' Colony," did not affect the case, as the certificate had already merged into a patent. *Hendricks v. Wilson*, 53 Tex. 463.

37. Cancellation or vacation in equity.—A bill in equity will lie, at the suit of the United States, to cancel patents issued to a railroad company, by mistake, for lands not included in a grant, where the patents would prejudice the interests of the United States, or interfere with their issuing patents to others. *United States v. Missouri, K. & T. R. Co.*, 51 Am. & Eng. R. Cas. 305, 141 U. S. 358, 12 Sup. Ct. Rep. 13.

The owners of the land at the time of filing a bill in equity to vacate a patent of the United States are indispensable parties; and when the bill is against the patentee alone, after he has conveyed the land and ceased to have any interest in it, it will be dismissed for want of necessary parties. *United States v. Central Pac. R. Co.*, 8 Sawy. (U. S.) 81, 11 Fed. Rep. 449.

X. RIGHT OF WAY OVER PUBLIC LANDS.

38. Construction of statutory grants, generally.—Grants of rights of way to railroads by congress cannot be construed to include routes not contemplated by the charters of the companies at the time of the grant. *Jackson v. Dines*, 13 Colo. 90, 21 Pac. Rep. 918.—QUOTING *Denver & R. G. R. Co. v. Alling*, 99 U. S. 474; *St. Joseph & D. C. R. Co. v. Baldwin*, 103 U. S. 426.

The Act of Congress of March 3, 1875, granting rights of way through public lands to certain railroads, applies only to railroads which are common carriers; and whenever application is made to the secretary of the interior by a railroad company for his approval of its map locating the proposed line of road, it is the duty of the secretary to ascertain whether the railroad is for public or private use. *Union River L. R. Co. v. Noble*, 9 Mackey (D. C.) 555.—QUOTING *Steel v. St. Louis S. & R. Co.*, 106 U. S. 447; *Johnson v. Towsley*, 13 Wall. 73.

When the secretary has approved the location of the route, and the company, acting upon that authority, has expended money in the construction of its road, the legal title to the right of way becomes vested in the company, and the title so vested, even if improperly acquired, cannot be divested by any action on the part of the

secretary, or his successors, but only by due process of law. *Union River L. R. Co. v. Noble*, 9 Mackey (D. C.) 555.

The above act did not convey a present right of way to all railroad companies that might thereafter be organized over the public lands then belonging to the United States, but such grant took effect only on the approval of the location of the road by the secretary of the interior. *Chicago, K. & N. R. Co. v. Van Cleave*, 57 Am. & Eng. R. Cas. 522, 52 Kan. 665, 33 Pac. Rep. 472.

Under the above act a company obtains no right to grounds for station buildings until it has complied with section 4 of the act, requiring it to file with the register of the land office for the district where such land is located a profile of its road. *Litten-thal v. Southern Cal. R. Co.*, 56 Fed. Rep. 701.

39. How far railroads are "highways" as that term is used in the statute.—Under U. S. Rev. St. § 2477, declaring that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," the word "highway" includes railroads. *Tennessee & C. R. Co. v. Taylor*, 57 Am. & Eng. R. Cas. 296, 102 Ala. 224, 14 So. Rep. 379.

Railways, though not strictly "highways," like plank and macadamized roads, are highways within the meaning of the above statute. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420.

The construction of its road by a railway company under a public act granting the right of way across the public lands would be both a sufficient and an equitable consideration for the right of way. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420.

The Act of Congress of July 26, 1866, which declares that "the right of way for the construction of highways over public lands not reserved for public uses is hereby granted," does not include railroads. *Burlington, K. & S. W. R. Co. v. Johnson*, 33 Am. & Eng. R. Cas. 215, 38 Kan. 142, 16 Pac. Rep. 125.

40. Priority of grantees over other conveyances, possessory titles, etc.—The grant by the U. S. of a right of way to the Central Pacific R. Co. over public lands vests in the company full 400 feet for railroad purposes, and one in possession without title cannot prevent the company entering on the same, nor recover damages for

so doing. *Doran v. Central Pac. R. Co.*, 24 Cal. 245.—QUOTED IN *Bybee v. Oregon & C. R. Co.*, 24 Am. & Eng. R. Cas. 127, 26 Fed. Rep. 586.

As against one holding title under a patent of the United States, which contains no reservation of right of way to the railroad company, the right of way granted to the Northern Pacific railroad company by the Act of Congress of July 2, 1864, did not attach to a tract of land 200 feet in width on each side of the railroad as actually constructed, where the railroad as constructed crossed the land in question, but the line of its "definite location" shown on its map, filed with the secretary of the interior, and accepted by him, did not cross such land, but passed it at a distance of two miles. By filing its map of "definite location" the company exhausted its right of selection, and anchored the land grant to this fixed line so that it could not thereafter change or vary it, without legislative consent, so as to affect titles accruing thereunder or in any way affected thereby. *Smith v. Northern Pac. R. Co.*, 57 Am. & Eng. R. Cas. 345, 58 Fed. Rep. 513.

The decision of the commission appointed under section 4 of the said act to determine whether or not the railroad and telegraph lines were constructed in a substantial and workmanlike manner, which decision was approved by the president, could have no effect upon the rights of the said grantee, holding under a patent issued by the United States without any reservation, when the public record made by the company of the definite location of its line two miles from the land in question remained unchanged and without amendment. *Smith v. Northern Pac. R. Co.*, 57 Am. & Eng. R. Cas. 345, 58 Fed. Rep. 513.

The Act of Congress of March 3, 1855, extending the provision of the act of Aug. 4, 1852, granting a right of way to all rail and plank roads over the public lands, simply extended the act of 1852 with its provisions, exceptions, and restrictions, so as to operate in the territories the same as in the states. *Simonson v. Thompson*, 25 Minn. 450.

Under the Act of Congress of March 3, 1857, making a grant of land to the territory of Minnesota for the construction of railroads, and the act of such territory of May 22, 1857, to execute the trust created by the act of congress, the Minnesota & Pacific

railroad company was authorized to appropriate a right of way over the public lands of the United States, except where the Indian title might still exist, and except, probably, lands otherwise appropriated by the general government; and one who purchased after the location of the road took subject to the right of way. *Simonson v. Thompson*, 25 Minn. 450.—FOLLOWED IN *Coleman v. St. Paul, M. & M. R. Co.*, 38 Minn. 260, 36 N. W. Rep. 638.

The act of congress granting lands to the Northern Pacific railroad gave that company the right of way over mineral lands of the United States; and if at the time such right attached to them certain of said lands were unoccupied, any patents thereto, issued afterwards to locators, would be inferior to such right of way, and would have to yield to it without a resort to a court of equity. *Wilkinson v. Northern Pac. R. Co.*, 20 Am. & Eng. R. Cas. 320, 5 Mont. 538, 6 Pac. Rep. 349.

A company, chartered by state law, laid its track across a tract of land which belonged to the United States, without objection, but without condemning the same. After five years the United States sold the land by metes and bounds, without reserving the roadbed, to an individual who had knowledge of the existence of the railroad, and who afterwards sued to recover the strip used as a right of way. *Held*, that the land was "public land" within the meaning of the Act of Congress of 1866, which granted the right to construct highways over public lands, and that plaintiff was not entitled to recover. *Verdier v. Port Royal R. Co.*, 10 Am. & Eng. R. Cas. 677, 15 So. Car. 476.

41. Securing the right of way, generally.—Under the acts of congress prescribing the mode in which a railroad company may secure the right of way through the public lands it is the duty of the company, and not the contractor building the road, to do the things required by the act to secure the right of way. *Fitzgerald v. Missouri Pac. R. Co.*, 50 Am. & Eng. R. Cas. 622, 45 Fed. Rep. 812.

42. Filing maps, plats, etc.—The Act of Congress of August 4, 1852, which grants to railroad companies the right of way over the public lands in the states where such lands lie, ceases to operate on said lands after they have been entered and purchased by a citizen, unless the railroad

company claiming such right of way has located its roadway and filed a plat of the location of the same with the commissioner of the general land office of the United States, in the manner required by said act of congress, before said entry is made. *Alabama & F. R. Co. v. Burkett*, 46 Ala. 569.—DISTINGUISHED IN *Swann v. Lindsey*, 14 Am. & Eng. R. Cas. 504, 70 Ala. 507.

The right of way granted to the Central Pacific railroad company of California, over the public lands of the United States, for its road, became perfect upon the filing of the plat of the location of the railroad in the proper land office, as against pre-emptioners who had not perfected their pre-emption right by payment of the price of the land. *Western Pac. R. Co. v. Travis*, 41 Cal. 489, 3 Am. Ry. Rep. 50.

Under the Act of Congress of March 3, 1875, before a railroad company can acquire a right of way over public lands, or lands for station purposes, it must file with the register of the land office for the district a profile of its road, as required by section 4 of the act; therefore, where a company files a map of land it desires for station purposes before it files a profile of its road, but an individual files his declaratory statement and settles on the land before such profile is filed, a patent issued to him is good as against the claim of the road. *Lilienthal v. Southern Cal. R. Co.*, 56 Fed. Rep. 701.

43. Filing articles of association, proof of organization, etc.—The Act of Congress of March 3, 1875, which grants a right of way over the public lands, provides that such right of way shall extend to any "duly organized" railroad company, and which has filed with the secretary of the interior "due proof" of its organization. *Held*, that both due organization and due proof thereof were conditions precedent to acquiring a right of way. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765. *Larsen v. Oregon R. & N. Co.*, 44 Am. & Eng. R. Cas. 92, 19 Oreg. 240, 23 Pac. Rep. 974.

Where a company is organized under a territorial statute, and subsequently changes its route by filing supplemental articles, it is "organized" within the meaning of the above statute only from the time of filing the supplemental articles, and must furnish "due proof" of such organization. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765.

As due proof of organization a company filed a copy of a communication from its president to the secretary of the interior, stating that the company thereby transmitted the necessary documents, and which was indorsed that it was received on a certain date. *Held*, that the date of such indorsement was the earliest time at which the company could acquire a right of way. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765.

Where a territorial statute provides that the due incorporation of a railroad company shall operate as an organization without further proof, the filing with the secretary of the interior of articles of incorporation and a copy of the statute is sufficient proof of organization under the above statute, and the company obtains a right of way over the public lands from the date of such filing. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765.

The fact that one railroad company has made a survey over public lands, but has not complied with all the conditions of the act of 1875, will not give it a right of way, as against another company, which has made no survey but has complied with all the conditions of the statute. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765.

Section 4 of the act of 1875 provides that a profile of a road over public lands shall be filed within twelve months. Defendant road surveyed three routes over public lands, but by mistake filed a plat of the wrong route. Plaintiff company had previously made an unauthorized survey, but took no further steps until defendant's road was completed and in operation. *Held*, that defendant was not required to file a plat, as the other road was not misled by the error in filing a plat of the wrong route. *Washington & I. R. Co. v. Cœur d'Alene R. & N. Co.*, 52 Fed. Rep. 765.

44. Location of intersecting road.—An Act of congress made a grant of lands to aid in the construction of a railroad to the intersection of another road, in a certain county, which was not yet built; and the act required the secretary of the interior to withdraw the lands from market as soon as a map of the route of the road should be filed. A map was filed showing an intersection with the other road; but the line of the other road was subsequently changed,

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so as to require a change in the line of the road in question, and the change was made and a new map filed, which was approved by the secretary of the interior. *Held*, that the first location was not conclusive as to the land included in the grant; that the secretary of the interior was authorized, without a further act of congress, to withdraw from sale the lands within the place limits of the new location. *Western Land Co. v. Hamblin*, 79 Iowa 539, 44 N. W. Rep. 807.

45. Effect of repeal of statutory grant.—Where a right of way is given to a railroad over certain lands by an act of the legislature, and afterwards, and before the location and construction of the road, the act is repealed, the company secures no right of way by the construction of its road after the repealing of the act granting such right of way. *Roberts v. Missouri, K. & T. R. Co.*, 43 Am. & Eng. R. Cas. 532, 43 Kan. 102, 22 Pac. Rep. 1006.

46. Condemnation of right of way.—The Act of Congress of Aug. 1852, which gives a right of way over the public lands, does not give the right to enter upon premises in the actual occupancy of a settler without paying him damages. The act only relinquishes the right of the United States to demand compensation, and only refers to such lands as are vacant. *California Northern R. Co. v. Gould*, 21 Cal. 254.—*REVIEWING* *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636.

When the entry of a pre-emption claimant has been suspended, and proceedings to condemn a right of way through the land for a railroad have been instituted, the claim of the railway company for a continuance of the latter proceedings pending the determination of the suspended entry by the department of the general land office appeals strongly to the discretion of the court. *Colorado Midland R. Co. v. Bowles*, 14 Colo. 85, 23 Pac. Rep. 467.

New York constitution of 1841, providing that the salt lands near the city of Syracuse, and those contiguous thereto, shall not be sold, does not extend to the taking of such lands for highways and railroads. *Parmelee v. Oswego & S. R. Co.*, 7 Barb. (N. Y.) 599; *affirmed* in 6 N. Y. 74.

It was not the intention of the framers of the constitution, when they forbade the sale of lands contiguous to the salt springs, to prohibit the appropriation of such parts of them as might be necessary for public

highways, canals, or railroads. An act, therefore, which provides for the taking of such portions of those lands as may be necessary for the construction of a railroad, upon the appraisal and payment of the damages to the state occasioned thereby, is not in conflict with the constitutional prohibition of the sale of such lands. Such an appropriation of the lands is not a sale, within the letter or spirit of the constitution. *Parmelee v. Oswego & S. R. Co.*, 7 Barb. (N. Y.) 599; *affirmed* in 6 N. Y. 74.

A company constructed its road over lands acquired by the United States, under the provisions of the direct tax act of 1863 (12 U. S. St. 422), without objection by the government, or claim to a right of notice or demand for the appointment of commissioners to assess compensation; after five years' use by the company the United States sold the land by metes and bounds, without reservation of the roadbed, to plaintiff, who had knowledge of its possession and use by the railroad company. He afterwards brought suit for the recovery of the strip of this land used by the railroad company, and for damages, and proved his title deed from the United States. *Held*, that he was properly nonsuited. *Verdier v. Port Royal R. Co.*, 10 Am. & Eng. R. Cas. 677, 15 So. Car. 476.—*REVIEWED* IN *Tompkins v. Augusta & K. R. Co.*, 21 So. Car. 420.

Where the legislature grants a charter to a corporation to construct a railroad through vacant and unappropriated lands of the state, and the road is constructed accordingly, any person who afterwards enters the land takes the fee-simple title subject to the right of way granted to the company, and is not entitled to damages for the land taken. *Davis v. East Tenn. & G. R. Co.*, 1 Sneed (Tenn.) 94.

PUBLIC OFFICERS.

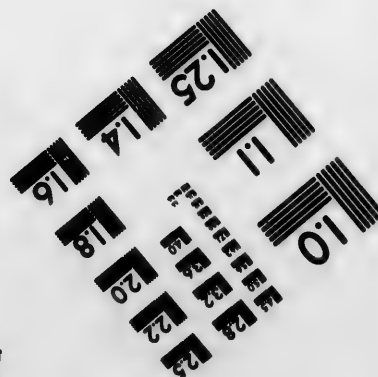
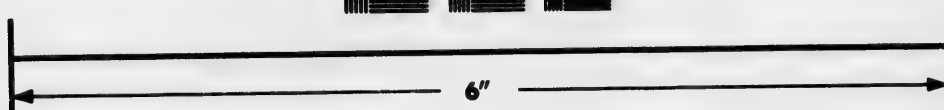
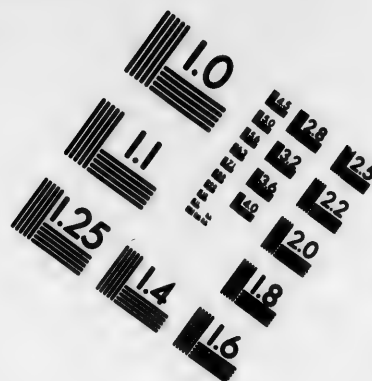
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— taken, setting forth, in report of commissioners, see EMINENT DOMAIN, 790.

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1. Right of state to enforce quarantine laws.—There is nothing in any existing treaty with Norway and Sweden in conflict with the institution and enforcement by any one or more of the states of the Union of quarantine regulations. *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

A federal court will not issue an injunc-

tion to restrain the enforcement of a state quarantine law, although the immigrants detained thereby have been examined and passed by federal health officers. *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

2. Detention and disinfection of immigrants.—The detention of immigrants by a state board of health, for the purpose of preventing the spread of disease, is not a regulation of foreign commerce by the state, and is, therefore, not in violation of the Federal Constitution, art. 1, § 8. *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.—FOLLOWING *Brown v. Warland*, 12 Wheat. (U. S.) 419. REVIEWING License Cases, 5 How. (U. S.) 504; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851.

Though immigrants come from a country where there is no infectious disease, still they may be detained under state quarantine regulations, where they have traveled with other persons who come from an infected country. *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

3. Imposing costs and charges.—The costs of enforcing a state quarantine law against immigrants may be imposed upon the carrier that brings the suspected persons into the country. *Minneapolis, St. P. & S. St. M. R. Co. v. Milner*, 57 Fed. Rep. 276.

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— — passenger in boarding train, when a, see CARRIAGE OF PASSENGERS, 376, 390.

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 — in failing to construct culvert, question for jury, see CULVERTS, 9.
 — — management of turntable, when question of fact, see CHILDREN, INJURIES TO, 33.
 — of company where employee is injured by collision, see COLLISIONS, 32.
 — — street-car company as to child in street, see CHILDREN, INJURIES TO, 66.
 — — — — towards children, see CHILDREN, INJURIES TO, 48, 49.
 — — — — trespassing child, see CHILDREN, INJURIES TO, 55.
 — when for the jury, see CARRIAGE OF MERCHANDISE, 154, 185.
 Obligation to fence a question of law, see FENCES, 68.
 On assessment of land damages by jury, see EMINENT DOMAIN, 576.
 — trial generally, see TRIAL, 95-115.
 Parents' negligence in actions for injuries to children, see CHILDREN, INJURIES TO, 141-146.
 Presence or absence of contributory negligence, see CONTRIBUTORY NEGLIGENCE, 82-95.
 Proximate cause of injury by collision, see COLLISIONS, 9.
 Questions for jury in ejectment by landowner, see EMINENT DOMAIN, 1028.
 — of negligence, see NEGLIGENCE, 71-78.

Reasonableness of rules, see CARRIAGE OF PASSENGERS, 62-64.
 Reasonable time for removal of goods, see CARRIAGE OF MERCHANDISE, 84, 85, 343.
 — — to call for baggage, see BAGGAGE, 70.
 Sufficiency of delivery of goods by carrier, see CARRIAGE OF MERCHANDISE, 268.
 What are, in actions for killing stock, see ANIMALS, INJURIES TO, 532-554.
 — is baggage, when a question for the jury, see BAGGAGE, 30.
 When negligence is for the jury, see CARRIAGE OF LIVE STOCK, 44.
 Whether contract of shipment is for through shipment, when for jury, see CARRIAGE OF MERCHANDISE, 611.
 — contractor is an independent one or servant, see INDEPENDENT CONTRACTORS, 4.
 — getting off moving cars is negligence, see CARRIAGE OF PASSENGERS, 419, 420.
 — person is an employee, see EMPLOYÉS, 6.
 Who is a bona fide holder a question of fact, see BILLS OF LADING, 117.

QUIETING TITLE.

To land granted, see LAND GRANTS, 60.
 See also CLOUD ON TITLE.

QUORUM.

At directors' meetings, see DIRECTORS, ETC., 20.
 — stockholders' meetings, see STOCKHOLDERS, 11.

QUOTIENT VERDICT.

Validity of, see TRIAL, 188.

QUO WARRANTO.

Proceedings in, see ESCHEAT, 3.
 Removal of proceedings for, to federal court, see REMOVAL OF CAUSES, 19.
 To compel surrender of charter, see STREET RAILWAYS, 37.
 — contest election of directors, see DIRECTORS, ETC., 13.
 1. General nature of the remedy.*—
 A suit in the name of a state, on the relation of individuals, in the nature of a *quo warranto* to try the title of defendants to the office of directors of a railroad, is not within

* Proceedings to declare franchise forfeited, see note, 9 L. R. A. 273.

As a rule, forfeiture of charter must be adjudged in direct proceeding by state, see full collection of authorities in note, 8 AM. ST. REP. 193.

the meaning of the Act of Congress of June 30, 1870, providing that suits wherein a state is a party shall have priority over other civil causes. *Miller v. New York*, 12 Wall. (U. S.) 159.

A *quo warranto* by the commonwealth against a corporation puts in issue the existence of the corporation, and not mere irregularities in its organization, which are not fatal to its existence. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

An attempt to declare and enforce a forfeiture of a franchise should be in a direct proceeding by *quo warranto* under Ill. St., ch. 112. *Citizens' Horse R. Co. v. Belleville*, 47 Ill. App. 388.—APPROVING *State ex rel. v. Madison St. R. Co.*, 72 Wis. 612.

When the rights of a corporation come into inquiry in a collateral proceeding, the case is to be treated as if no ground of forfeiture existed, unless there has been a judgment so declaring in a direct action by the state. *Galveston, H. & S. A. R. Co. v. State*, 51 Am. & Eng. R. Cas. 287, 81 Tex. 572, 17 S. W. Rep. 67.

2. Jurisdiction.*—An information, in the nature of a *quo warranto*, should be filed and entered at the law term. *State v. Portland & O. R. Co.*, 58 N. H. 113.

The judges of the supreme court of Ohio in their private capacity have no power to direct proceedings in the nature of a *quo warranto*. *Ohio R. Co. v. State*, 10 Ohio 360.

The Ohio supreme court has jurisdiction to inquire into and correct the misuse of a franchise, though the corporation may be engaged in interstate commerce, and the misuser or usurpation to be corrected relates to and concerns that traffic. *State ex rel. v. Cincinnati, N. O. & T. P. R. Co.*, 42 Am. & Eng. R. Cas. 330, 47 Ohio St. 130, 7 L. R. A. 319, 23 N. E. Rep. 928.

Informations in the nature of *quo warranto* are not prohibited by N. J. Const. art 1, § 9. *Attorney-general v. Delaware & B. B. R. Co.*, 38 N. J. L. 282.

The common pleas of Dauphin county has jurisdiction of a *quo warranto* against a corporation by the commonwealth averring that it was exercising its franchises without

authority of law, although it did not exercise its franchises nor transact any business in Dauphin county. *Com. v. Pennsylvania, S. & N. E. R. Co.*, 16 Phila. (Pa.) 596.—REVIEWING *Heydon's Case*, 3 Coke 7.

The supreme court of Wisconsin has original jurisdiction of an information in the nature of *quo warranto*, filed by the attorney-general in behalf of the state, by leave of the court, to annul a railroad charter. *State v. West Wis. R. Co.*, 34 Wis. 197.

The right of the supreme court of Vermont to issue the writ of *quo warranto* is recognized in general terms by the statutes of the state; but the occasions are left to be determined by the common law rules. By those rules the writ is the appropriate mode in which to try any alleged usurpation of offices or franchises inconsistent with the state sovereignty. *State v. Boston, C. & M. R. Co.*, 25 Vt. 433.—QUOTING *Lumbard v. Aldrich*, 8 N. H. 31.—QUOTED IN *McGregor v. Erie R. Co.*, 35 N. J. L. 89.—*State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

3. When it lies.*—The charter of a railroad company is the law of the contract between the corporation and a subscriber to its capital stock; and any material departure from the points designated in the charter for the location of the road is a violation of the charter, for which the franchise of the corporation may be seized upon *quo warranto*, unless the legislature has waived the right of the state to seize the franchise, by acts legalizing the violation of the charter. *Mississippi, O. & R. R. Co. v. Cross*, 20 Ark. 443.—FOLLOWED IN *Mississippi, O. & R. R. Co. v. Gaster*, 24 Ark. 96.

The state is not estopped from maintaining an action to have it determined that a corporation never acquired the franchise to build and operate a street railroad within the limits of a municipal corporation from the mere fact that in a prior action brought against the corporation as such, in which the existence of the corporation was not put in issue, it obtained a judgment requiring the corporation to abate a portion of its road on the ground that it was a public nuisance. *People ex rel. v. Stanford*, 77 Cal. 360.

The attorney-general filed an information in chancery against two railway companies,

* Court of equity cannot decree forfeiture of charter, see note, 8 AM. ST. REP. 200.

Courts proceed with caution in proceedings to declare forfeitures of corporate franchises, see note, 8 AM. ST. REP. 181.

* *Quo warranto* for illegal exercise of corporate franchise, see note, 7 L. R. A. 319.

to restrain them from building and operating their road within a city, alleging various grounds for the relief sought. The bill, on a hearing after answer, was dismissed, the court in its decree finding in favor of the rights claimed by the companies. *Held*, that such decree was conclusive upon the people on an application in behalf of the people to file an information in the nature of a *quo warranto*, seeking to call in question the right of one of the same companies to exercise the same franchises and perform the same acts as were attempted to be enjoined in the prior suit. *Attorney-General v. Chicago & E. R. Co.*, 26 Am. & Eng. R. Cas. 428, 112 Ill. 520.—DISTINGUISHED IN *Chicago D. & C. Co. v. Garrity*, 115 Ill. 155. QUOTED IN *Hunt v. Chicago & D. R. Co.*, 20 Ill. App. 282.

If a railroad company is wholly unable to discharge the duties it owes to the public, and which the law has imposed upon it, a proceeding in the nature of a *quo warranto* is the proper remedy, and not mandamus. *Ohio & M. R. Co. v. People ex rel.*, 30 Am. & Eng. R. Cas. 509, 120 Ill. 200, 11 N. E. Rep. 347, 9 West. Rep. 167.

Where a railroad company has a *de facto* organization, the question of whether it is a *de jure* corporation can only be determined on *quo warranto*. It cannot be inquired into in a proceeding to condemn land. *Brown v. Calumet River R. Co.*, 125 Ill. 600, 15 West. Rep. 556, 18 N. E. Rep. 283; *affirming* 37 Ill. App. 113.—DISTINGUISHING *South Chicago R. Co. v. Dix*, 109 Ill. 237; *Chicago & E. I. R. Co. v. Wiltse*, 116 Ill. 449.

An information in the nature of a *quo warranto*, under Ind. Code, § 749, will not lie against a number of persons incorporated as a railroad company, on the grounds that they do not intend to construct the whole of their road according to its description in the articles of association, and that they intend to make use of their organization for the purpose of condemning and appropriating private property over which to construct their railroad. *State ex rel. v. Kingan*, 51 Ind. 142.

A proceeding by an information in the nature of a *quo warranto* is authorized by 2 Ind. Rev. St. of 1876, § 749, clause 3, "where any association or number of persons shall act within this state as a corporation, without being legally incorporated." *Lawrence County Com'rs v. Hall*, 70 Ind. 469.

The fact that a street-railway company has constructed and is operating its road, within the term of its corporate life, upon a township highway, without objection from the township or any of its inhabitants, under and in full compliance with a perpetual grant of the right so to do, made by the township under How. Mich. St., § 3548, does not establish a case of such public interest as to justify the institution of a proceeding by *quo warranto* against the company to test the validity of such grant. *Attorney-General v. Detroit Suburban R. Co.*, 96 Mich. 65, 55 N. W. Rep. 562.—QUOTING *People ex rel. v. Mutual Gas Light Co.*, 38 Mich. 154; *People ex rel. v. Ft. Wayne & E. R. Co.*, 92 Mich. 522.

Where the legislature reserves the right to repeal a charter to a limited extent, leaving power to the corporation to wind up its affairs, the right to proceed against it by *quo warranto* is not in any way impaired, if the legislature fails to proceed under the right reserved. *Grand Gulf R. & B. Co. v. State*, 18 Miss. 428.

A *de facto* consolidation of two railroad companies having been effected by the filing of a certificate in the secretary of state's office, pursuant to N. J. Act 1881, p. 222, and an organization of a new company thereunder having been made, and considerable money expended in the construction of the railroads included in the consolidation—*held*, that the holder of income bonds of one of the companies could not have an information in the nature of a *quo warranto* to determine the validity of the consolidation. *Terhune v. Potts*, 23 Am. & Eng. R. Cas. 754, 47 N. J. L. 218.

An action in the nature of a *quo warranto* will not lie to oust an individual from the office of secretary and treasurer of a railroad company, when he holds his office at the will of its directors. *People v. Hills*, 1 Lans. (N. Y.) 202.

Exemption from taxation is not a franchise or corporate right or privilege within the meaning of a statute authorizing the institution of proceedings by *quo warranto* "in case any person shall usurp, intrude into, or unlawfully hold * * * any office or franchise, * * * or any incorporation does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation." *International & G. N. R. Co. v. State*, 41 Am. & Eng. R. Cas. 611, 75 Tex. 356, 12 S. W. Rep. 685.—

QUOTED IN Sulphur Springs & M. P. R. Co. v. St. Louis, A. & T. R. Co., 2 Tex. Civ. App. 650.

The immunity from taxation granted by a charter, which for good consideration declares that the railroad and other property "which is now or hereafter may be owned or possessed by said company or its successors," is exempted from taxation, adheres to property exempted, and cannot in *quo warranto* proceedings be declared forfeited for a failure to exercise corporate privileges. *International & G. N. R. Co. v. State*, 41 Am. & Eng. R. Cas. 611, 75 Tex. 356, 12 S. W. Rep. 685.

4. Who may file an information.*

—An information in the nature of a *quo warranto*, under Mass. St. of 1852, ch. 312, § 42, will not lie against a railroad company in behalf of a stockholder, merely because the corporation issued stock below the par value, and began to construct its road before the requisite amount of stock was subscribed, it not appearing that the petitioner's private right or interest was thereby put in hazard. *Hastings v. Amherst & B. R. Co.*, 9 Cush. (Mass.) 596.

A stranger, who has no other interest in a corporation except that which is common to every citizen, is not entitled to a judgment of ouster in a writ of *quo warranto*. *Com. ex rel. v. Philadelphia, G. & N. R. Co.*, 20 Pa. St. 518.—FOLLOWING *Murphy v. Farmers' Bank*, 20 Pa. St. 415.

Texas statute of 1857, fixing the venue of certain proceedings against railroad companies, does not prevent a district attorney from filing an information in the nature of *quo warranto* to have a railroad charter declared forfeited. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

Persons injured by the alleged misconduct of a company in specific instances, stated in the information, need not be joined as plaintiffs nor made relators in this action. *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

5. When state or attorney-general must sue.—

An information in the nature of a *quo warranto* against a railroad for usurpation of authority must be in the name of the people, under a provision of the Ill. constitution declaring that "all

prosecutions" shall run in the name of the people. *People ex rel. v. Mississippi & A. R. Co.*, 13 Ill. 66.—FOLLOWING *Donnelly v. People*, 11 Ill. 552.

Under N. Y. Code of Civ. Pro., § 1798, it is made the duty of the attorney-general to determine whether the public interests will be served by instituting a suit to vacate a charter; and the court will not determine the merits of the controversy upon an appeal from an order granting him leave to institute the proceeding. *In re Attorney-General*, 50 Hun 511, 20 N. Y. S. R. 383, 3 N. Y. Supp. 464; *affirming* 2 N. Y. Supp. 684, 18 N. Y. S. R. 122.—FOLLOWING *People v. Boston, H. T. & W. R. Co.*, 27 Hun 528.

Where a state declares through its legislature that certain acts of a corporation shall incur a forfeiture of its charter, the attorney-general may proceed by *quo warranto* without more express authority. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

The right of the attorney-general to sue a railway company for breach of its powers is not taken away by 7 & 8 Vict. c. 85. *Attorney-General v. Great Northern R. Co.*, 29 L. J. Ch. 794, 6 Jur. N. S. 1006.

The provincial attorney-general is the proper person to file an information in respect of a nuisance caused by interference with a railway by another corporation. *Attorney-General v. Niagara Falls Int. Bridge Co.*, 20 Grant's Ch. (U. C.) 34.

The provincial attorney-general, and not the attorney-general of the Dominion, is the proper party to file an information at the relation of a railroad when the complaint is not of an injury to property vested in the crown as representing the government of the Dominion, but a violation of the right of the public of Ontario. *Attorney-General v. Niagara Falls Int. Bridge Co.*, 20 Grant's Ch. (U. C.) 34.

6. Leave to sue.—The court does not abuse its discretion in refusing to grant an information in the nature of a *quo warranto* at the instance of a stockholder who knew of, and was a party to, the transactions connected with the organization of a railroad which are alleged to be illegal. *Cole v. Dyer*, 29 Ga. 434.

Where the facts relied upon in an answer to a petition for leave to file an information in the nature of a *quo warranto* are disputed, or new and doubtful questions of law are involved, requiring time for a satisfactory solution, it is the duty of the court

* Who may be relator in information in nature of *quo warranto* to determine validity of charter, see note, 23 AM. & ENG. R. CAS. 757.

to make the rule for an information absolute, to enable a full investigation; otherwise the court, on motion, may discharge the rule and dismiss the petition. *Attorney-General v. Chicago & E. R. Co.*, 26 Am. & Eng. R. Cas. 428, 112 Ill. 520.

Whether a private right or interest injured or put in hazard by the exercise, by any private corporation, of a franchise or privilege not conferred by law must be a right or interest for an injury to which some remedy previously existed in law or equity, in order to authorize an application to this court under Mass. St., 1852, ch. 312, § 42, for leave to file an information in the nature of a *quo warranto*, *quære*. *Boston & P. R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340.

Where the matter complained of is that the lessee of a railroad has discontinued a part of the route, leave to file a *quo warranto* to forfeit the company's charter should be refused, as that would be no redress of the grievance complained of. (Sherwood, J., dissenting.) *Attorney-General v. Erie & K. R. Co.*, 16 Am. & Eng. R. Cas. 652, 55 Mich. 15, 20 N. W. Rep. 696.

When the attorney-general, *ex officio*, files an information in the nature of a *quo warranto*, no leave of court is requisite. *Attorney-General v. Delaware & B. B. R. Co.*, 38 N. J. L. 282.

7. Parties defendant.—In an action under the Code to have it determined that certain persons are unlawfully claiming to be and are exercising the functions of a private corporation which never had an existence, the persons usurping the franchise are the only proper defendants. If the corporation be made a defendant as such, its corporate existence is admitted. *People ex rel. v. Stanford*, 77 Cal. 360.

In a proceeding by *quo warranto* against a corporation to forfeit its franchises and oust it from the same for misuser thereof, the corporation is the only necessary party defendant. In case of forfeiture the court will take the necessary steps to protect the rights of other parties in the premises. *State ex rel. v. Atchison & N. R. Co.*, 32 Am. & Eng. R. Cas. 388, 24 Neb. 143, 38 N. W. Rep. 43.

Where the attorney-general brings an action to vacate the charter of a railroad company, and it appears that a part of its road is leased, the lessee company, on application, is entitled, under N. Y. Code of

Civ. Pro., § 452, to be made a defendant. *People v. Albany & V. R. Co.*, 77 N. Y. 232; reversing 15 Hun 126.—FOLLOWED IN *Troy & H. R. Co. v. Boston, H. T. & W. R. Co.*, 7 Am. & Eng. R. Cas. 49, 86 N. Y. 107.

8. The information or petition.—In an action to enforce the forfeiture of a corporate franchise on account of non-user and misuser, the complaint must specifically allege that defendant has a legal existence as a corporation. *People ex rel. v. Stanford*, 77 Cal. 360.

Where the alleged usurpation of the franchise is claimed to result from the fact that the corporation, having once existed, has ceased to exist, it is not sufficient to allege in the complaint that it has ceased to exist, but the facts showing the termination of its existence must be set forth. *People ex rel. v. Stanford*, 77 Cal. 360.

An information under Ind. Code, § 749, against a number of persons who claim to be, but are not legally, an incorporated company, must state that they have acted within this state as a corporation. *State ex rel. v. Kingan*, 51 Ind. 142.

Where an information in the nature of a *quo warranto* against the incorporators of a railroad company sets out several alleged illegal acts in the same paragraph, these several acts must be construed, not as separate paragraphs, but as parts of one paragraph; and if the allegations contradict each other as to material facts, the paragraph is bad. *State ex rel. v. Foulkes*, 20 Am. & Eng. R. Cas. 538, 94 Ind. 493.

So long as the charter of a company continues in existence, its property cannot be taken from it upon the allegation that it was acquired by abuse of its chartered privileges. *Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107.

In an information in the nature of a *quo warranto*, it is not necessary to set forth the franchises and privileges alleged to be usurped, except in general terms. It is always the right of the government to call upon those who assume corporate powers to show by what warrant they do so; and when the defendant sets forth its claim by plea, the attorney-general may reply and show the special grounds he relies on. *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389.—APPLYING *People v. Bank of Niagara*, 6 Cow. (N. Y.) 196; *People v. Bank of Hudson*, 6 Cow. 217; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358

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Where it is sought to have a railroad charter forfeited on the ground that the state made a loan to the company to aid in the construction of its road which was not so used, the information should set out specifically the misappropriation. It is not sufficient to state generally that there has been a misappropriation, which is more of an opinion than a fact, while the facts constituting the misappropriation are kept back. *Harris v. Mississippi V. & S. I. R. Co.*, 51 Miss. 602.

The attorney-general, in behalf of the people, cannot allege that an act of incorporation granted by the state is contrary to the United States constitution and acts of congress. *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113.

An information to have the charter of a corporation declared forfeited must set forth a substantial cause of forfeiture. *Attorney-General v. Petersburg & R. R. Co.*, 6 Ired. (N. Car.) 456.

An information in the nature of a quo warranto, filed in Wisconsin, showed that the principal office of defendant company was in the city of New York, where its books and records had always been kept, and that none of its principal officers resided in Wisconsin, so that, under the laws of that state, it would be impossible to enforce an attachment against the shares of stock. Held, to show a sufficient ground for a forfeiture of the company's charter. *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.—QUOTING *Marshall v. Baltimore & O. R. Co.*, 16 How. (U. S.) 314; *Land Grant R. & T. Co. v. Coffey County Com'rs*, 6 Kan. 245; *Thorn v. Central R. Co.*, 26 N. J. L. 121; *Baltimore & O. R. Co. v. Harris*, 12 Wall. (U. S.) 65. REVIEWING *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497.

The several particulars of defendant's abuse of its franchises alleged in the information (its having its principal office in another state, its keeping its records there, and the fact that its officers reside there) are not distinct causes of action; but even the joinder of distinct grounds of forfeiture in such an information would not be demurrable. *State ex rel. v. Milwaukee, L. S. & W. R. Co.*, 45 Wis. 579.

A count in a petition alleging, as ground of forfeiture of the charter, a sale of the road under a deed of trust, to secure the payment of its debts, is insufficient if it does not show that the company executed the

deed of trust in any manner binding on them, or what were the terms of the deed. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

Where a petition seeking to have a corporate franchise declared forfeited is filed in the name of a state, it should set forth specifically the facts and data upon which it is founded. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

9. Matters of defense and how pleaded.—The response to a writ of quo warranto against a corporation properly recites the several acts of the legislature constituting defendants a corporation. *State v. Mississippi, O. & R. R. Co.*, 20 Ark. 495.

An answer which denies that the individual defendants are claiming or exercising the corporate franchise states a complete defense as to them. *People ex rel. v. Stanford*, 77 Cal. 360.

Certain named persons, and others said to be too numerous to be brought upon the record, were charged with usurping the franchise of being a railroad corporation. The defendants named pleaded that they were the directors of the corporation, without denying that they were corporators, and averred the legal existence of the corporation. Held, that in the absence of allegations or proof to the contrary, defendants were to be regarded as claiming to be members of the corporation. *State v. Sherman*, 22 Ohio St. 411.

In a proceeding in the name of the commonwealth against a company for a violation of its charter in the wrongful location of its road, the court will not consider the fact that the authorities of a city, and the people of the neighborhood, induced the company so to locate the road and expend large sums in building it. *Com. v. Erie & N. E. R. Co.*, 27 Pa. St. 339.—REVIEWED IN *Re Bronson*, 1 Ont. 415.

A plea to a quo warranto involving the existence of a corporation that had organized under a charter purchased at a judicial sale need not set forth the names of the persons for whom the purchase was made, nor the amount of the capital stock, and the amount held by each stockholder. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

The commonwealth filed an information against several defendants to inquire by what right they claimed to be a corporation. A plea was filed setting out that one of defendants had bought certain corporate prop-

erty and a franchise, by which he became a corporation, and that he organized the defendant company. *Held*, that the plea was good; that it mattered not whether the individual purchaser became a corporation, or acted in the purchase as the agent of the stockholders of the company subsequently formed. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

In a *quo warranto* at the suit of the state against a company formed by consolidation under the laws of Pennsylvania, "*nul tiel record*" is well replied to a plea that the company became a corporation by contract of consolidation. *Com. ex rel. v. Atlantic & G. W. R. Co.*, 53 Pa. St. 9.—REVIEWED IN *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. 130.

Where an action is instituted to forfeit a charter, the defendant should be allowed to plead, by way of supplemental answer, a law passed after issue was joined, and certain proceedings of the railroad commissioners thereunder, which, it is claimed, amount to a waiver of the forfeiture. *People v. Ulster & D. R. Co.*, 28 N. Y. S. R. 19, 54 Hun 639, 5 Silt. Sup. Ct. 32, 8 N. Y. Supp. 149.

10. Jury trial.—An action in the nature of a *quo warranto*, brought by the attorney-general in the name of the people under N. Y. Code, §§ 432, 440, to try the title to a corporate office to which there are several claimants, is one of legal, not equitable, cognizance, and the issues therein are strictly legal ones. *People v. Albany & S. R. Co.*, 57 N. Y. 161, 6 Am. Ry. Rep. 73; reversing 55 Barb. 344, 2 Lans. 459, 7 Abb. Pr. N. S. 265, 5 Lans. 25, 1 Lans. 308, 38 How. Pr. 228, 57 Barb. 204, 8 Abb. Pr. N. S. 122, 39 How. Pr. 49.

The trial of such issues by a jury is, therefore, the constitutional right of the parties. If other equitable causes of action are united, all must be tried by a jury, unless a jury trial is waived. *People v. Albany & S. R. Co.*, 57 N. Y. 161, 6 Am. Ry. Rep. 73; reversing 55 Barb. 344, 2 Lans. 459, 7 Abb. Pr. N. S. 265, 5 Lans. 25, 1 Lans. 308, 38 How. Pr. 228, 57 Barb. 204, 8 Abb. Pr. N. S. 122, 39 How. Pr. 49.

11. Evidence.—An information filed under the revised statutes against a corporation by its corporate name admits the existence of the corporation, or that it once had a legal existence. *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113.

In a suit to forfeit the charter of a company which was chartered before the adoption of the present constitution, when the answer admits that the corporation is "subject to the constitution and general laws now in force," it is unnecessary for the state to prove that the company had taken the benefit of legislation subsequent to the adoption of the constitution, and thus became subject to all its provisions. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.

12. Judgment or decree.—In an action to have it determined that certain persons are unlawfully claiming to be, and are exercising the functions of, a private corporation which never had an existence, a judgment decreeing that plaintiff recover the powers and franchise exercised and claimed by defendants, and enjoining them from exercising the same, will be reversed, where the question of the non-existence of the corporation is left wholly undetermined. *People ex rel. v. Stanford*, 77 Cal. 360.

A judgment finding that persons claiming to be directors of a railway company were not legally elected, and ousting them from such office, is conclusive on defendants. *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 29 N. E. Rep. 689.

In a direct proceeding by the state against individuals who assume to act as a railroad corporation, requiring them to show cause for so acting, a showing by the defendants of the filing of articles of association and a subscription of the minimum amount of stock required by law is not conclusive upon the state. Where it is established that the subscribers to a large part of the stock are insolvent, and were so at the time they subscribed, with no expectation of ability to pay, a forfeiture will be declared. *Holman v. State ex rel.*, 24 Am. & Eng. R. Cas. 6, 105 Ind. 569, 5 N. E. Rep. 702.

Under Pa. Act of April 8, 1861, providing for judicial sales of corporate property and franchises, the purchasers become, by operation of law, a corporation; therefore, in a *quo warranto* by the state, it is error to decree that the franchise has no existence. *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

Sayles' Tex. Civ. St., art. 4098i, §§ 1, 6, in proceedings by the state against a corporation, upon the court finding that the corporation has been guilty of acts which require a forfeiture of its privileges as a corpora-

tion, requires that "a judgment of ouster from the franchise shall be entered and that costs shall be adjudged." This does not deprive the district court of the power to

enter any order necessary to give effect to the general judgment required in such cases. *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. Rep. 199.

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RACE TRACK.

Injury to, as an element of land damages, see EMINENT DOMAIN, 710.

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See MUNICIPAL AND LOCAL AID.

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Carriage of passengers under provisions of, see CARRIAGE OF PASSENGERS, 522.

Liability of carrier of merchandise under provision of, see CARRIAGE OF MERCHANDISE, 529-532.

Passengers' fares under provisions of, see TICKETS AND FARES, 138.

Powers and duties of commissioners under, see RAILWAY COMMISSIONERS, 6.

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RAILWAY COMMISSIONERS.

Authority of, to establish stations, see STATIONS AND DEPOTS, 14.

Duty of, as regards flagmen at crossings, see CROSSINGS, INJURIES, ETC., AT, 71.

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I. LAWS CREATING—CONSTITUTIONALITY OF.

1. In general.—A state has general power to regulate the fares and freights which may be charged and received by railroads within the state, and to create a commission and delegate to it authority to prescribe reasonable rates and regulations for the management of such roads. *Reagan v. Farmers' L. & T. Co.*, 58 Am. & Eng. R. Cas. 670, 154 U. S. 362, 14 Sup. Ct. Rep. 1047.

The provision in Iowa Railroad Commission Act that car-load lots shall be transferred without unloading, unless done without charge to the shipper or receiver of such shipments, being in accord with the course of business long practised by railroad companies, and it being the duty of the commissioners to aid railroad companies in this matter by the making and enforcement of proper rules for compensation to the companies for the use of the cars so transferred, and for their ultimate return, the duty thus imposed cannot be regarded as interfering with the constitutional guaranties for the protection of the rights and property of such companies. *Burlington, C. R. & N. R. Co. v. Dey*, 45 Am. & Eng. R. Cas. 391, 82 Iowa 312, 48 N. W. Rep. 98.

Mississippi Statute of March 11, 1884, creating a railroad commission, is not so inconsistent and uncertain as necessarily to render the entire act void on its face. *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307, 6 Sup. Ct.

Rep. 334, 388, 1191.—DISTINGUISHING Louisville & N. R. Co. v. Tennessee R. Com., 19 Fed. Rep. 679.

A legislative enactment creating a railroad commission and empowering it to supervise railroads is not violative of the fourteenth amendment to the constitution of the United States, nor of any provision of the constitution of Mississippi. *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.—FOLLOWED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307.

The legislature of Nebraska has no power under the constitution to create railroad commissioners. The supervision of railroads by a commission would be proper, but the power must be conferred on executive officers already existing. *In re Railroad Com'rs*, 20 Am. & Eng. R. Cas. 507, 15 Neb. 679, 50 N. W. Rep. 276.

Tennessee Act of March 30, 1883, attempting to establish a railroad commission, is invalid, both because its provisions are too vague and indefinite to be enforced, and because it leaves it to the jury to say whether a difference in rates amounts to discrimination, or whether charges are unjust and unreasonable. *Louisville & N. R. Co. v. Tennessee R. Com.*, 19 Fed. Rep. 679.

2. Delegation of legislative power.—A statute conferring on a commission authority to regulate the charges of railroads for transportation of passengers and freights is not a delegation of legislative power. *McWhorter v. Pensacola & A. R. Co.*, 37 Am. & Eng. R. Cas. 566, 24 Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129. *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. Rep. 226.—QUOTING *Georgia R. & B. Co. v. Smith*, 128 U. S. 174; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155. —*Georgia R. & B. Co. v. Smith*, 9 Am. & Eng. R. Cas. 385, 70 Ga. 694.—DISTINGUISHED IN *Richmond & D. R. Co. v. Trammel*, 53 Fed. Rep. 196.—*Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 55 Am. & Eng. R. Cas. 498, 111 N. Car. 463, 16 S. E. Rep. 393.

The authority given to the Minnesota railroad commission, by the act of 1887, ch. 10, to determine what are equal and reasonable rates, is not a delegation of legislative power. *State v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. Rep. 782.—QUOTED IN *State v. St. Paul, M. & M. R. Co.*, 40 Minn. 353, 42 N. W. Rep. 21.

II. APPOINTMENT AND REMOVAL.

3. Appointment.—The validity of the appointment of one who holds a commission as commissioner to supervise certain work, under Mass. St., 1856, ch. 296, "to promote the public safety and convenience, by a bridge at the intersection of the Boston and Lowell, the Fitchburg, and Grand Junction railroads, in Somerville," and to apportion the cost thereof between the Fitchburg railroad company and the Grand Junction railroad and depot company, in such proportion as should by him be deemed equitable, cannot be inquired into in an action brought under that statute by the Fitchburg railroad company against the Grand Junction railroad and depot company to recover a fair and just proportion of the cost incurred in doing the work. *Fitchburg R. Co. v. Grand Junction R. & D. Co.*, 1 Allen (Mass.) 552.

Mass. St. of 1869, ch. 408, § 5, vesting in railroad commissioners the powers and duties of commissioners appointed by the supreme court under the Gen. St. ch. 63, § 117, takes away the jurisdiction of that court, and of commissioners appointed by it, over proceedings pending before those commissioners at the time of its passage. *New London Northern R. Co. v. Boston & A. R. Co.*, 102 Mass. 386.—REVIEWING *Springfield v. Connecticut River R. Co.*, 4 Cush. 63.—QUOTED IN *Re Petition of Northampton*, 158 Mass. 299.

4. Removal.—Under N. Y. Act of 1859, ch. 384, creating town railroad commissioners, and declaring that the office of any commissioner shall become vacant if he should refuse or wilfully neglect to perform his duties, and authorizing the county judge to appoint some one else to fill the vacancy, a new appointment should only be made in case the commissioner is guilty of nonfeasance. *People ex rel. v. Burnside*, 3 Lans. (N. Y.) 74. *People ex rel. v. Eddy*, 3 Lans. (N. Y.) 80, 57 Barb. 593.

So where the county judge declares the office vacant because the commissioner has sold railroad stock of his town on a credit when he should have sold for cash, there is no nonfeasance, and the order of the judge is unauthorized. *People ex rel. v. Burnside*, 3 Lans. (N. Y.) 74.

But where the county judge finds that such commissioner has refused and wilfully neglected to sell for cash, and has disposed

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of the stock on a credit, there is something more than an error of judgment, and his order in removing the commissioner should be affirmed. *People ex rel. v. Eddy*, 3 Lans. (N. Y.) 80, 57 Barb. 593.

Where an application for the removal of such commissioner is dismissed, it is no bar to its renewal where there was in fact no ground for its dismissal. *People ex rel. v. Eddy*, 3 Lans. (N. Y.) 80, 57 Barb. 593.

III. POWERS AND DUTIES.

1. Generally.

5. In United States.*—Cal. Const., art. 12, § 22, providing for a railroad commission, to control "railroad corporations and transportation companies," extends to all persons engaged in transportation, whether they act as a corporation, joint stock company, partnership, or individuals. *Moran v. Ross*, 39 Am. & Eng. R. Cas. 1, 79 Cal. 159, 21 Pac. Rep. 547.—DISTINGUISHING *Mahoney v. Spring Valley Water Works Co.*, 52 Cal. 161; *Southern Pac. R. Co. v. Raymond*, 53 Cal. 223.

Under the Iowa statutes, the commissioners may, without any complaint by the party aggrieved, enter upon an investigation of a subject-matter, power over which has been conferred upon them by the legislature; and if a complaint before the commissioners is insufficient on its face, the board may, before proceeding in the matter, require the complainant to perfect the same, or may itself amend the complaint if cognizant of the facts necessary to present a proper case. *State v. Chicago, M. & St. P. R. Co.*, 55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323.

The jurisdiction of the railroad commissioners being given by statute, and the petition presented to them being the foundation of their action, they obtain jurisdiction only when the petition presents a case within the provisions of the statute. *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26.

Railroad commissioners have authority, on the petition of railroad companies, to condemn land for the specific purposes mentioned in the statute only, and not for the general purposes of the corporation, and their certificate should state the special purposes for which such land is needed.

* State railway commissions, power and jurisdiction of, see notes, 2 L. R. A. 195; 9 Id. 755.

Neal v. Railroad Com'rs, 85 Me. 62, 26 Atl. Rep. 994.—FOLLOWING *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26.

Where railroad commissioners act judicially, as in distributing stock, all must be present, though a majority may decide. Otherwise, where they act ministerially, as in taking subscriptions to stock. *Crocker v. Crane*, 21 Wend. (N. Y.) 211.

A power conferred by the legislature upon a board of commissioners, required to be exercised with reference to the affairs of certain corporations, will not be extended by implication; and the acts which the board attempts to do under the power will not be upheld, unless the authority to do them is affirmatively shown to be included in it. *Railroad Com'rs v. Oregon R. & N. Co.*, 35 Am. & Eng. R. Cas. 542, 17 Ore. 65, 19 Pac. Rep. 702, 2 L. R. A. 195.

Congress cannot empower a commission to investigate the private affairs, books, and papers of the officers and employes of corporations indebted to the government as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employes are willing to submit the same for inspection; and the investigation of the Pacific railway commission into the affairs of officers and employes of the Pacific railway companies, under the act of March 3, 1887, is limited to that extent. *In re Pacific R. Com.*, 31 Am. & Eng. R. Cas. 598, 12 Sawy. (U. S.) 559, 32 Fed. Rep. 241.

6. In England.—The railway commissioners will entertain an application in a matter within their jurisdiction, notwithstanding that a suit directed to the same end is in litigation in the ordinary courts. *Portpatrick R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 189.

The commissioners will not make an order on a complaint of diversion of traffic where the number of instances of diversion is so small, in proportion to the amount of traffic not diverted, as to show that the traffic was miscarried merely by inadvertence or mistake. *Hammans v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 181.

And they will not rehear a matter when they are asked to review, rescind, or vary an order as to costs by a party who does not desire to disturb their judgment on the merits. *Hammans v. Great Western R. Co.*, 4 Ry. & C. T. Cas. 181.

On the hearing of an application under the

Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), § 15, the commissioners have power to state a special case for the opinion of the high court. *Hall v. London, B. & S. C. R. Co.*, 22 *Am. & Eng. R. Cas.* 446, *L. R. 15 Q. B. D.* 505, 53 *L. T.* 345.

The commissioners have no jurisdiction under the Regulation of Railways Act, 1873, § 28, to order a defendant, in whose favor they have decided, to pay costs to the unsuccessful applicant. *Foster v. Great Western R. Co.*, *L. R. 8 Q. B. D.* 515, 51 *L. J. Q. B. D.* 233, 4 *Ry. & C. T. Cas.* 58; reversing *L. R. 8 Q. B. D.* 25, 51 *L. J. Q. B. D.* 51.

The discretion as to costs given to the commissioners under section 28 is not greater than that given to the high court under Order 55, rule 1, of the supreme court. *Foster v. Great Western R. Co.*, *L. R. 8 Q. B. D.* 515, 51 *L. J. Q. B. D.* 233, 4 *Ry. & C. T. Cas.* 58; reversing *L. R. 8 Q. B. D.* 25, 51 *L. J. Q. B. D.* 51.

The commissioners, in dismissing an application, ordered defendants to pay half the costs of the applicants, on the ground that defendants were responsible for the litigation because they had not given public notice that they had ceased to be owners or managers of a certain canal. *Held*, that the commissioners in making such an order had exceeded the jurisdiction as to costs given to them by section 28 of the Regulation of Railways Act, 1873. *Foster v. Great Western R. Co.*, *L. R. 8 Q. B. D.* 515, 51 *L. J. Q. B. D.* 233, 4 *Ry. & C. T. Cas.* 58; reversing *L. R. 8 Q. B. D.* 25, 51 *L. J. Q. B. D.* 51.

Upon the argument of a case stated by the railway commissioners under section 26 of the Regulation of Railways Act, 1873, the counsel for the party seeking to alter the *status in quo* has the right to begin. *Watkinson v. Wrexham, M. & C. Q. R. Co.*, 3 *Ry. & C. T. Cas.* 164.

The commissioners have no power to make an order on two railway companies to act jointly in doing what neither company has power to do separately, and where such an order has been made, a prohibition may issue from the high court of justice against the commissioners. *Toomer v. London, C. & D. R. Co.*, 3 *Ry. & C. T. Cas.* 79.

Under an agreement on the part of two respondent companies with the applicant company, whereby the former agreed to operate and use the road of the latter as soon as it was completed and open for traffic, there being a stipulation that all differ-

ences between the companies should be submitted to arbitration, a difference arising as to the proper completion of the road, it was held that the commissioners had no jurisdiction with respect to the differences, under section 8 of the Regulation of Railways Act, even though this agreement was embodied in the private act passed, incorporating the applicant company. *Halesowen R. Co. v. Great Western R. Co.*, 4 *Ry. & C. T. Cas.* 224.

The Regulation of Railways Act, 1873, § 8, enacts that "where any difference between companies is, under the provisions of any general or special act, required or authorized to be referred to arbitration, such difference shall, at the instance of any company party to the difference, and with the consent of the commissioners, be referred to them for their decision, in lieu of being referred to arbitration." Two companies agreed to refer all differences that should arise between them respecting the purchase of the railway of the former by the latter company to arbitration, in accordance with the Railway Companies Arbitration Act, 1859. A difference afterwards arose between them and the selling company applied to the commissioners to decide it. It was objected by the purchasing company that they had no jurisdiction, since the difference was not required or authorized to be referred to arbitration under the general or special act. *Held*, that by the companies' adoption of the act of 1859, the difference, when it arose, was authorized by that act to be referred to arbitration within the meaning of the act of 1873, § 8, and therefore the commissioners had jurisdiction. *Stokes Bay R. & P. Co. v. London & S. W. R. Co.*, 2 *Ry. & C. T. Cas.* 143.

But they have no power to deal with anything done by railway companies contrary to the provisions of their special acts, unless it also contravenes the provisions of the general acts which the commissioners have to carry out. *Uckfield Local Board v. London, B. & S. C. R. Co.*, 2 *Ry. & C. T. Cas.* 214.

They will, in their discretion, refuse to give an imperfect relief to applicants when there is an immediate prospect of statutory powers which will give a better relief than the order the commissioners have jurisdiction to issue. *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 *Ry. & C. T. Cas.* 173.

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amended, and will exercise such powers liberally, so as to give effect to the provisions of the Regulation of Railways Act, 1873. *Mayor, etc., of Dover v. South Eastern R. Co.*, 1 Ry. & C. T. Cas. 349.

Under the Railway and Canal Traffic Act, 1854, the commissioners have jurisdiction to hear and determine complaints against a company of not affording reasonable facilities for receiving, forwarding, and delivering traffic at its stations, and this jurisdiction extends to the ordering of such facilities even if by so doing there is necessitated the making by the company of some structural alteration of its stations. *South Eastern R. Co. v. Railway Com'rs*, L. R. 6 Q. B. D. 586, 50 L. J. Q. B. 201, 44 L. T. 203, 45 J. P. 388; reversing L. R. 5 Q. B. D. 217, 49 L. J. Q. B. 273, 41 L. T. 760, 28 W. R. 464, 44 J. P. 362.

The commissioners have no power, under 36 & 37 Vict. c. 48, to require two companies to act jointly in affording facilities to each other, even assuming that they have jurisdiction to require each company separately to give facilities according to its powers. *Toomer v. London, C. & D. R. Co.*, L. R. 2 Ex. D. 450, 26 W. R. 31, 37 L. T. 161.

2. To Fix Rates.

7. In general.*—The Nebraska board of transportation has authority to determine, in the first instance, what are just and reasonable charges for services rendered, or to be rendered, on railways in the state. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.

The power to determine what is an unjust rate and charge, and the extent of the same, and to prevent unjust discrimination, carries with it the power to decide what is a just rate and charge, and authorizes the board to fix just and reasonable rates and charges. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.

A provision in a railroad charter that in fixing rates there shall be no discrimination in favor of any other road does not bring into that charter rates fixed in other char-

* Power of Nebraska board of transportation to fix rates, see note, 32 AM. & ENG. R. CAS. 437.

Power of commissioners to fix charges on railroads crossing and recrossing state lines, see 55 AM. & ENG. R. CAS. 547, *abstr.*

ters subsequently granted, fixing maximum rates, so as to exempt the company from the operation of a state railroad commission. *Stone v. New Orleans & N. E. R. Co.*, 23 Am. & Eng. R. Cas. 606, 116 U. S. 352, 6 Sup. Ct. Rep. 349, 391.

For proceedings not sufficiently regular and formal, and an order not sufficiently explicit to be made a foundation for the recovery of the penalties prescribed by Mass. Pub. St., ch. 112, § 194, on an application to fix rates on milk, see *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. Rep. 859.

To induce the commissioners to impose a through rate there must be evidence that it is required by the public interest. *Belfast C. R. Co. v. Great Northern R. Co.*, 4 Ry. & C. T. Cas. 159.

The commissioners have jurisdiction to compel carriers to conform to every portion of the Railway and Canal Traffic Act, 1854, § 2, and so to conduct their business as to give to the public all reasonable facilities. *Innes v. London, B. & S. C. R. Co.*, 2 Ry. & C. T. Cas. 155.

8. Regulation of fares.—The regulations of the commissioners fixing the rates of fare for passengers who obtain tickets from agents at depots, as well as for those who do not, and prescribing the manner in which ticket offices shall be kept open before and at the arrival of trains, do not apply to freight trains, but only to regular passenger trains. *Partee v. Georgia R. Co.*, 27 Am. & Eng. R. Cas. 12, 72 Ga. 347.

9. Regulation of traffic over connecting lines.—An allegation to the effect that the rates fixed by the commissioners for one road are unjust and unreasonable when compared with the rates permitted on other roads in the state operating under the same conditions does not overthrow the reasonableness or justice of the rate complained of, as a rate reasonable and just in itself for one road may not be so for another, though they connect with each other. *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. Rep. 226.

It is no objection to an award of commissioners under Mass. Acts of 1845, ch. 191, and 1857, ch. 291, establishing the compensation to be paid by each of two railroad corporations to the other for drawing passengers and freight over its railroad, that the award gives to either corporation different amounts for carrying passengers and freight to the point of connection from the

same station upon its road, where they are to be carried to different stations upon the other road. *Boston & W. R. Corp. v. Western R. Corp.*, 14 Gray (Mass.) 253.

Commissioners appointed to determine the terms upon which connecting railroad corporations shall transport the passengers and freight and perform the business of each other cannot, under the above acts, include in their award any time before the filing of the petition for their appointment. *Boston & W. R. Corp. v. Western R. Corp.*, 14 Gray (Mass.) 253.

And it is no objection to such an order that it assumes the number of passengers each month holding different kinds of tickets to be in proportion to the number of the ordinary independent and connected trains; or that it makes the compensation to depend upon the number of passengers and amount of merchandise, and upon the classes of tickets held by the passengers. *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266.

Mass. Act of 1845, ch. 191, which provides for the appointment of commissioners to fix the compensation which shall be paid by one railroad company for the drawing of its passengers, merchandise, and cars over the railroad of another company, does not infringe upon any rights which the latter company may have under its charter to regulate tolls on its own road; neither is it a valid objection to the appointment of such commissioners, in any instance, that the parties agree as to the compensation to be paid for the carriage of passengers, and the petition asks for a commission merely to fix the rate for freight. *Vermont & M. R. Co. v. Fitchburg R. Co.*, 9 Cush. (Mass.) 369.

10. Regulation of terminal charges.

—Under the Regulation of Railways Act, 1873, § 15, the commissioners have to say whether any given service performed by a railway is one for which a terminal charge can be made, and if they think such service is incidental to conveyance and covered, therefore, by the mileage rate, or is not a service of the kind to which the power of the company to make a terminal charge applies, they are authorized to decide that the rate for conveyance cannot be increased by the addition of a terminal charge. *Neston Colliery Co. v. London & N. W. R. Co.*, 4 Ry. & C. T. Cas. 257.

11. Authority to fix telegraphic charges.—Under the authority given to

the N. Car. railroad commission "to make rates for the transmission of messages by any telegraph line or lines doing business in the state," the commission has the power, subject to the right of appeal, to ascertain what particular corporation is in the control of or operates any of such lines in the state, in order that the commission may exercise its authority to fix rates, as well as to know against whom to proceed for a violation of its regulations. *State ex rel. v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. Rep. 389.

Telegraphic messages transmitted by a company from and to points in the state, although traversing another state in the route, do not constitute interstate commerce, and are subject to the regulation of the commission. *State ex rel. v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. Rep. 389.—APPROVING *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192. DISTINGUISHING *State v. Chicago, St. P., M. & O. R. Co.*, 40 Minn. 267; *Sternberger v. Cape Fear & Y. V. R. Co.*, 29 So. Car. 510; *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.*, 2 Int. Com. Com. 386.

Under N. Car. Act of 1891, ch. 320, establishing the railroad commission, no authority is given them to direct a telegraph company to open, for commercial messages, offices at which only its own business, or that of a railroad company with which it has intimate relations, is transacted. Whether it is the duty of such company to take such messages may be tested in a civil action after the tender of a message. *State ex rel. v. Western Union Tel. Co.*, 113 N. Car. 213, 18 S. E. Rep. 389.

12. Jurisdiction to investigate complaints of unjust preference.

—Oreg. Act of 1891, which requires railroad companies to furnish the commissioners with a schedule of transportation charges, makes it the duty and authority of the commissioners to revise such schedule and to determine whether or not charges are just and reasonable, and whether any unjust discrimination is made against any person, locality, or corporation, and to increase or reduce the said rates according as experience and business operations may show to be just. *Held*, that such act repeals by implication those portions of the former statute which provide that no railroad company shall charge any greater compensation for a shorter than for a longer distance in the same

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1891, ch. 320, es- mission, no au- direct a telegraph merical messages, own business, or ny with which it is transacted. such company to e tested in a civil a message. *State Tel. Co., 113 N.*

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direction, leaving the carrier at liberty to fix the transportation charges, subject to the provisions of the statute, at such rates as it may deem advisable, since the two acts cover the same ground, and are antagonistic in theory and opposed in practice. *State v. Rogers, 55 Am. & Eng. R. Cas. 530, 22 Oreg. 348, 30 Pac. Rep. 74.*

Where the case, as presented by the complainants to the commissioners, is not such as to call for an exercise of their powers, it does not involve a public right, and therefore should not be prosecuted either by them or by the state. *State v. Chicago, M. & St. P. R. Co., 55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323.*

Where a party is prejudiced within the meaning of 17 & 18 Vict. c. 31, § 2, by a preference given to some other person, his only remedy is by complaint to the railway commissioners. *Hole v. Digby, 3 Ry. & C. T. Cas. xvii, 27 W. R. 884.*

The commissioners have jurisdiction to inquire into a complaint of undue preference to one town or place over another town or place. *Mayor, etc., of Dover v. South Eastern R. Co., 1 Ry. & C. T. Cas. 349.*

But to justify interference by the commissioners it is not sufficient merely that a distinction in the fare of different lines, even of the same company, exists, unless it creates an undue preference or prejudice. *Innes v. London, B. & S. C. R. Co., 2 Ry. & C. T. Cas. 155.*

13. Power to compel reduction of charges to schedule rate.—The board of railway commissioners of Iowa have power under the acts of 22d Gen. Assembly, ch. 28, § 16, to compel a company to reduce its charges to the schedule prepared by the board. *Campbell v. Chicago, M. & St. P. R. Co., 86 Iowa 587, 53 N. W. Rep. 351.*

Where a company demurs to an alternative writ requiring it to reduce its rates and charges to conform to an order of the board of transportation, and denies the power of the board to reduce such rates and charges, the court will determine the question of the power of the board to make the order in question before entering upon an examination of the facts, and therefore will not permit the demurrer to be withdrawn. *State ex rel. v. Fremont, E. & M. V. R. Co., 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.*

In Neb. act to regulate railroads, prevent

unjust discriminations, and provide for a board of transportation, section 1 requires all charges made for any service rendered or to be rendered in the transportation of property to be reasonable and just, and prohibits every unjust and unreasonable charge, and declares it to be unlawful. Therefore, where the board of transportation finds that the charges of a railroad are not reasonable and just, and orders a reduction of such rates 33½ per cent., such board cannot enter into a compromise with the companies by which the charges within the state shall be in excess of the rates found to be reasonable and just in consideration of certain reductions in rates on in-and-out freight to and from Chicago and other common points. *State ex rel. v. Fremont, E. & M. V. R. Co., 32 Am. & Eng. R. Cas. 442, 23 Neb. 117.*—FOLLOWED IN *State ex rel. v. Missouri Pac. R. Co., 29 Neb. 550.*

14. Publication of rates by commissioners.—Railroad commissioners had published a notice that a schedule of rates which they had prepared would go into effect on a certain day, and this publication had been made for the time required by law; but the secretary received a telegram from certain roads asking an extension of time, which he granted, and published notice thereof, and a railroad company sought to restrain the publication. *Held*, that the commissioners could not urge that the publication was complete, and the extension of time unauthorized. *Chicago & N. W. R. Co. v. Dey, 35 Fed. Rep. 866, 1 L. R. A. 744, 2 Int. Com. Rep. 325.*

The Illinois statute provides that the railroad commissioners shall make for each company doing business in the state a schedule of maximum rates, and cause the same to be published for three weeks in some newspaper published at the state capital. *Held*, that the classification of freights made is a part of the schedule, and must be published the same as the schedule. *St. Louis & C. R. Co. v. Blackwood, 14 Ill. App. 503.*

15. To hear complaints and recommend changes in rates.—Where the legislature passes an act creating a board of railroad commissioners, empowering it to examine into the affairs of railroad corporations doing business in the state, and requires it to make a biennial report, with such suggestions "as to what changes in the classification of freights, or what

changes in the rate of freights or fares are advisable for the public welfare," but confers no express authority upon the board to regulate the price of freight, or to determine when freight charges are unreasonable, the board has no jurisdiction to require a railroad company to refund to a shipper money alleged to have been exacted from him in excess of a reasonable charge. *Railroad Com'rs v. Oregon R. & N. Co.*, 35 Am. & Eng. R. Cas. 542, 17 Oreg. 65, 19 Pac. Rep. 702, 2 L. R. A. 195.

Where such act directs the board to examine into such affairs, and especially requires it to report the result of its investigation concerning certain specific matters to the legislature, evidently for the purpose of its action thereon, it will not be presumed that the act intended to give the board authority to adjust these matters, although it is empowered to hear complaints by persons against railroad companies on account of acts in general done or omitted to be done by them. *Railroad Com'rs v. Oregon R. & N. Co.*, 35 Am. & Eng. R. Cas. 542, 17 Oreg. 65, 19 Pac. Rep. 702, 2 L. R. A. 195.

16. Where company has charter right to regulate charges.—Where a charter authorizes the company to "fix, regulate, and receive tolls and charges for transportation of persons and property," there is annexed to such grant the implied condition that the tolls and charges fixed shall be reasonable, and the legislature retains the power to secure, through a commission, conformity by the company to the standard of reasonableness in its rates. *Stone v. Natches, J. & C. R. Co.*, 21 Am. & Eng. R. Cas. 17, 62 Miss. 646.—FOLLOWED IN *Stone v. Farmers' L. & T. Co.*, 23 Am. & Eng. R. Cas. 577, 116 U. S. 307.—*Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.

The final test of the reasonableness of charges is not with the commission, but with the judiciary. The fixing of rates by the commission is not conclusively, but only *prima facie*, correct. *Stone v. Natches, J. & C. R. Co.*, 21 Am. & Eng. R. Cas. 17, 62 Miss. 646.

Though a company's right to regulate its charges be protected by its charter, still the legislature may require it to submit to a supervisory commission its tariff of charges, in order that the latter may see whether it conforms to the limits fixed by

its charter, and may authorize such commission to prevent unjust discrimination or partiality not authorized by the company's charter, and to hear complaints in respect thereto, and may require the company to give notice to the commission of any accident to a train attended with serious personal injury, and may require the company to keep suitable reception rooms at each depot, and to have bulletin boards denoting the arrival and departure of trains. *Stone v. Yazoo & M. V. R. Co.*, 21 Am. & Eng. R. Cas. 6, 62 Miss. 607, 52 Am. Rep. 193.—FOLLOWED IN *Stone v. Natches, J. & C. R. Co.*, 62 Miss. 646.

17. Due process of law—Opportunity to be heard.—In a proceeding before the commissioners to fix rates the road must have notice of the petition, and an opportunity of being heard; and the court cannot go outside of the record before it to ascertain if notice was given. An order is invalid for want of a notice to the defendant. *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1, 32 N. E. Rep. 859.

The provisions in the Texas Railroad Commission Act of 1891, § 4, relative to notice to the railroad companies of the time and place for fixing rates, and opportunity for hearing, and the proceedings of the commission thereunder for fixing rates, do not constitute "due process of law," within the meaning of the federal constitution, or "an investigation by judicial machinery," within the meaning of the decisions of the supreme court, and are unconstitutional and invalid. *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529.

Said act contains provisions which tend to enforce a compliance with the rates fixed by the commission whether they be reasonable or not, and provisions tending to embarrass, or enabling the commissioners to embarrass, such roads as may chance to invoke the protection of the constitution against the taking of their property without due process of law, or denying them the equal protection of the laws, and is, therefore, unconstitutional and invalid. *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 Am. & Eng. R. Cas. 559, 51 Fed. Rep. 529.

Georgia Act of 1879, creating a railroad commission, and authorizing the commissioners to make a schedule of maximum rates, is not in violation of either the constitution of the United States or of the

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5 Fed. Rep. 641, 4 Woods (U. S.) 427.

The question of a reasonable rate or charge is a question for judicial investigation, and the Ga. Act of Oct. 14, 1879, which gives the railroad commissioners power to establish just and reasonable rates, and provides that the schedule of rates established by the commission shall be "sufficient evidence" that the rates therein fixed are just and reasonable, is repugnant to the constitution of the United States, as depriving the company of its property without due process of law. *Richmond & D. R. Co. v. Trammel*, 55 Am. & Eng. R. Cas. 520, 53 Fed. Rep. 196.

The words "sufficient evidence," as used in the statute, are defined by the code to mean "that which is satisfactory for the purpose" and the state courts will not necessarily hold the words to mean "conclusive evidence." Therefore, in the absence of any judicial construction of the statute, a railroad company will not be granted an injunction to restrain the railroad commissioners from instituting suits to collect penalties for violations of the rates fixed in the schedule prepared by them. *Richmond & D. R. Co. v. Trammel*, 55 Am. & Eng. R. Cas. 520, 53 Fed. Rep. 196.

3. To Regulate Depots, Side Tracks, etc.

18. Depots and terminal facilities.*—Under Conn. Act of 1866, ch. 67, the railroad commissioners may discontinue any railroad station, but they have no powers of arbitration. They act in a judicial capacity, and their findings must be definite, and not depend on any conditions to be performed by either party. *Chester v. Connecticut Valley R. Co.*, 41 Conn. 348.

It is the duty of the railroad commissioners to approve or disapprove of the location of a new site for a depot. *State ex rel. v. Railroad Com'rs*, 36 Am. & Eng. R. Cas. 510, 56 Conn. 308, 15 Atl. Rep. 756.

An award of railroad commissioners clearly imposing on one of two railroads conducted under a joint management the customary service of furnishing terminal facilities and providing depot accommodations in consideration of the other company collecting the scattered traffic is not limited

by a clause stating that by the understanding of parties the question of terminal freight charges was not considered or included. *Boston & L. R. Corp. v. Nashua & L. R. Corp.*, 157 Mass. 258, 31 N. E. Rep. 1067.

Nebraska Act of June 6, 1885, gives the state railroad commission general supervision of all railroads in the state, with the right to investigate the necessity of any addition or change of station houses or stations. *Held*, that the court would not grant a mandamus to compel a relocation of a station until after the complaining party had applied to the commission. *State ex rel. v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, 27 N. W. Rep. 434.—DISTINGUISHING *State v. Republican Valley R. Co.*, 17 Neb. 647.

The Railway and Canal Traffic Act, 1854, § 2, does not compel a railway company to find reasonable accommodation for the public further than as it is in the interests of railway traffic that it should be found, and an application to the commissioners to order a company to construct a foot bridge over its railway in a station for the more convenient ingress and egress of foot passengers was refused, on the ground that such a bridge was not a due and reasonable facility under the circumstances. *Holyhead Local Board v. London & N. W. R. Co.*, 4 Ky. & C. T. Cas. 37.

19. Side tracks and switches.—An order of the railroad commissioners required a company to transport, as a switching service, and at switching rates, cars loaded with oil to a point half a mile outside of its yard limits and not on the company's main line, a part of the service only being over the main line of the company, the cars being run under orders from a dispatcher, and not under orders from the yard master. *Held*, that, although the service was rendered by the switching crew, it was a train and not a switching service, and the order of the commissioners would not be enforced. *State v. Chicago, M. & St. P. R. Co.*, 55 Am. & Eng. R. Cas. 515, 88 Iowa 445, 55 N. W. Rep. 331.

The Me. statute gives the commissioners jurisdiction only in case of disagreement between the parties as to the necessity and extent of the real estate to be taken for side tracks, depots, wood sheds, repair shops, and car, engine, and freight houses; and they have power only to determine the

* Compulsory location of depots by the courts or railroad commissioners, see 22 AM. & ENG. R. CAS. 509, *abstr.*

necessity and extent of the real estate to be taken for these purposes, having in view the reasonable accommodation of the traffic and appropriate business of the corporation. *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26.—FOLLOWED IN *Neal v. Mortland*, 85 Me. 62.

The commissioners adjudged and determined that so much of said real estate as is first described in their return is necessary for the use of a railroad company "for necessary tracks, side tracks, depot, wood sheds, repair shops, and car, engine, and freight houses, and for the reasonable accommodation of the traffic and appropriate business of said corporation." *Held*, that they exceeded their powers under the statute; that they had no power to adjudge the estate necessary, and condemn it, for tracks as distinguished from side tracks, nor for the general uses of the corporation in addition to the uses specified in the statute. *Spofford v. Bucksport & B. R. Co.*, 66 Me. 26.

Where it is doubtful whether a junction which is sought by applicants as a reasonable facility would be allowed by the board of trade to be used, if ordered by the commissioners and constructed by the company, and where the mode of working such junction would be unsatisfactory and obstructive to the other traffic on the main line, such a junction is not a due facility within the meaning of section 2 of the Railway and Canal Traffic Act, 1854. *Dublin Whiskey Distillery Co. v. Midland G. W. of I. Co., & Ry. & C. T. Cas.* 32.

4. To Regulate Highway and Railway Crossings.

20. In general.—Mass. Act of 1871, ch. 343, providing for the construction of a viaduct and union depot in the city of Worcester, to be used by the several roads entering the city, designates very fully the manner of its construction, and provides what streets it shall pass over, and then provides that they shall be "constructed and arranged in such manner and form as the board of railroad commissioners determines and directs." *Held*, that this left no authority in the court to pass upon the comparative convenience of the location and grade of the viaduct, where there is a dispute between the city authorities and the railroad commissioners. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

The above act merely recognizes the city authorities as parties in interest, to whom notice is to be given according to section 11 of the act, but they are to be heard as interested parties, and not as a tribunal which is to adjudicate the measure. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

Section 11 of the above statute simply provides for the building and maintaining of a viaduct according to the directions of the railroad commissioners, and it does not require or authorize the commissioners or the railroad companies to raise or lower, alter the course of, or otherwise change, either of the three streets named therein, or any other street or way in the city. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

An order of the railroad commissioners which determines the course and grade of the tracks and bridges of the viaduct, and the manner of building the abutments, and the construction of the work generally, is not invalid, either for the reason that the bridges are not suitable, or because the consent of the mayor and aldermen has not been given to their location, arrangement, or construction. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

Section 18 of the above act expressly makes "the general laws in like cases" applicable to the rights of all parties sustaining damages, "except as herein otherwise provided." *Held*, that damages occasioned by laying out and maintaining the joint road for the different companies by means of the viaduct might be assessed by the county commissioners, or in case of dissatisfaction with their estimate, by a jury, under Mass. Gen. St., ch. 63. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

But it being admitted that the road, where it crosses the streets, will cause obstructions thereto, the railroad companies cannot proceed to construct the viaduct until the county commissioners, upon the application of the railroad companies, or of the mayor and aldermen, shall have made a decree prescribing what alterations shall be made in the streets, and what structures at the crossing, and requiring of the companies satisfactory security for compliance with the lawful requirements of the county commissioners, and for the indemnity of the city, under Mass. Gen. St., ch. 63, §§ 48, 49.

Mayor, etc., of Worcester v. Railroad Com'rs, 113 Mass. 161.

For the damages caused to the estates of third persons by such alterations the railroad companies are liable; and if they do not comply with such requirements they may be compelled to do so by the supreme court sitting in equity, or may be liable to indictment. *Mayor, etc., of Worcester v. Railroad Com'rs*, 113 Mass. 161.

21. To regulate or abolish highway crossings at grade.—Conn. Act of 1884, ch. 100, provides that the railroad commissioners, when public safety requires an alteration of any highway crossed at grade by a railroad, "may order such alterations in such highway as they shall deem best." Two converging highways crossed a railroad at grade at points half a mile apart and united just beyond the road. *Held*, that the commissioners had power to join the two highways before reaching the railroad and make a single crossing, although the distance by one highway was increased thirty rods and by the other fifteen rods. *Suffield v. New Haven & N. Co.*, 53 Conn. 367, 5 Atl. Rep. 366.

Conn. Gen. St., § 3489, provides that upon the petition of any town, city, borough, or railroad company, the railway commissioners may discontinue any grade crossing of highway by railway, and determine at whose expense the change shall be made. Section 3491 allows an appeal to the superior court. A railroad company petitioned for the abolishment of all grade crossings on its line in the town of Fairfield. One of these crossings is at a point one fourth of a mile from a station where the public crosses at its pleasure as at a public way. The commissioners ordered the abolishment of both of these crossings, treating them as if they were both highway crossings, and ordered the substitution of a new one between the two points. *Held*, that the commissioners had exceeded their powers in assuming that there was a crossing in existence at the station for the purpose of determining what should be done in reference to the regular highway crossing. *Fairfield's Appeal*, 39 Am. & Eng. R. Cas. 689, 57 Conn. 167, 17 Atl. Rep. 764.

Railroad commissioners have no jurisdiction to regulate the crossing of railroad tracks and public ways, unless the former are laid under charter authority so as to be maintained in the exercise of eminent do-

main, and become a railroad for public use, because when not so laid they are a mere convenience to be used or disused at pleasure, to be maintained or removed at the will of their owner; they are private property, subject to be taken in the exercise of eminent domain by the laying out of a public way, and are protected by the same rights of compensation. *In re Railroad Com'rs*, 83 Me. 273, 22 Atl. Rep. 168.

The railroad commissioner has power to interfere when a crossing shall have become dangerous by reason of the frequency of travel along the highway, and to order the erection of a safety gate or the employment of a watchman. *Com'rs of Parks, etc. v. Chicago, D. & C. G. T. J. R. Co.*, 91 Mich. 291, 51 N. W. Rep. 934.

22. To compel the elevation of tracks crossing public streets.—The action of the Conn. legislature in providing for the removal of grade crossings was an exercise of the police power of the state. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17. — QUOTING *Woodruff v. Catlin*, 54 Conn. 295.

The states are intrusted with the duty of maintaining all the internal regulations necessary for the protection of the lives, health, and comfort of their people and for the security of their rights. The general government cannot exercise this power except in cases in which the power is given to it expressly or by necessary implication. No such power is given to it here. There was therefore no error in denying a motion to remove a case under such statute to the United States court, the matter being one of which that court would not have cognizance. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

It is no objection to the validity of the action of the commission that one of its members is a citizen and taxpayer of the city where the grade crossing is sought to be removed, and one a representative and stockholder of the railroads, while the commission is to apportion the expense of the improvement among them. The legislature purposely made up the commission by taking the three railroad commissioners, who had no interest in the matter, and adding one member as a representative of the city and one as representing the railroads, giving power to a majority to determine any matter. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

The fact that the company will be subjected to great expense if the order should be enforced is no reason against its legality. It is a matter to be urged before the commission, which has power to allow the company for any special damage as a part of the expense of the improvement. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

Such commission was not *functus officio* by reason of its having adopted a plan for the work. It had a right to reconsider and adopt another. It was a part of its duty to see to the performance of the work as well as to plan for it, and it could not be *functus officio* so long as anything remained to be done to remove the danger at the crossing. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

Forbidding a company to use its property in a way that would be dangerous to the public is not a taking of it for public use; nor is it so to prohibit its use in a particular way by reason of which its value is depreciated. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

The return in the above case set up that, at the time when the order of the commission took effect, the company "did not have any such surface tracks within the limits named in the order as could in any event have anything to do with the intent and purpose of said resolution of the general assembly." *Held*, that a demurrer did not admit the correctness of the construction of the resolution claimed, but merely referred the question of its construction to the court. *Woodruff v. New York & N. E. R. Co.*, 59 Conn. 63, 20 Atl. Rep. 17.

23. To provide for private crossings.—Under Iowa Act of 1884, ch. 133, the railway commissioners have power, by suit in the name of the state, to order the construction of an overhead farm-crossing. *State v. Chicago, M. & St. P. R. Co.*, 55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323. *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 Iowa 516, 52 N. W. Rep. 490.

It was argued "that if by implication the board of railroad commissioners have the jurisdiction and power to make this order, they have the jurisdiction and power to make any order that any court can make relating to railroad companies, whether the same be a public duty or a private duty." Such a conclusion is not logical, since the

order of the railroad commission was based on the relation and obligation of the corporation to the public at the inception of its enterprise, and in no way involved contractual or business relations directly between the corporation and individuals. *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 Iowa 516, 52 N. W. Rep. 490.

24. Regulation of railway crossings.—The directors of a railroad company, by their attorney, filed a petition for the removal of grade crossings under the Connecticut statute. An interested town appealed from an order of the commissioners to the superior court, alleging that the petition was brought by the railroad company, which was admitted. In subsequent pleadings the town alleged that the petition was not signed by the directors or by any person authorized to do so. *Held*, that the allegation that the petition was filed by the railroad company implied that it was filed by its authority, and was, therefore, in due form. *Westbrook's Appeal*, 37 Am. & Eng. R. Cas. 446, 57 Conn. 95, 16 Atl. Rep. 724, 17 Atl. Rep. 368.

A railroad company, wishing to cross the track of another, filed a petition, and commissioners were appointed to appraise the damages and fix the line, grade, and manner of crossing. They made a report providing that the petitioning company should insert and place crossing frogs at the points of intersection "to be of a material, style, and pattern approved by the engineers" of both companies, and in case they could not agree, the commissioners would decide the question. *Held*, that the report was too indefinite and uncertain to be capable of enforcement by judgment, and should be set aside. *In re New York, L. & W. R. Co.*, 35 Hun (N. Y.) 232.

5. Conclusiveness of Their Decisions.

25. In general.—The courts will not interfere or grant relief to a railroad company upon a complaint made as to one of several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety. *Pensacola & A. R. Co. v. State*, 37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522.

Where a tariff of freight and passenger rates has been established by the commissioners, and a company and the commis-

sioners differ as to whether such rates, considered as a whole, will prove remunerative, and there is room for a difference of intelligent opinion on the subject, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commission must be left to the test of experiment. *Storrs v. Pensacola & A. R. Co.*, 29 Fla. 617, 11 So. Rep. 226.

The official reports of railroad commissioners charging themselves with a certain fund are not conclusive against their sureties, in an action upon their bond, that the commissioners then had the fund on hand; and, it appearing that the fund had in fact been received and converted by one of their number during a prior term, the sureties are not liable. *Bissell v. Saxton*, 66 N. Y. 55.

In such case statements made by the principals upon applying for a reappointment are not conclusive against the sureties. *Bissell v. Saxton*, 66 N. Y. 55.

Where a railroad company makes application to the state board of railroad commissioners to issue a certificate that public convenience and necessity require the construction of its road as proposed in its articles of association, and the application is denied, a court will treat it as in the nature of a review of a subordinate tribunal, and cast the burden on the company to show that there was error in refusing the certificate. *In re New Hamburg & P. C. R. Co.*, 27 N. Y. Supp. 664.

26. Not conclusive—Constitutional law.—The Pacific railway commission is not a judicial body, and possesses no judicial powers under the Act of Congress of March 3, 1887, creating it, and can determine no rights of the government, or of the corporations. *In re Pacific R. Co.*, 31 Am. & Eng. R. Cas. 598, 12 Sawy. (U. S.) 559, 32 Fed. Rep. 241.

The enforcement of the right secured by South Carolina constitution, forbidding the use of private property for public purposes without just compensation, and the provision of the federal constitution forbidding the states to deprive a person of his property without due process of law, belongs to the courts. They can always institute an inquiry whether the rates imposed by a railroad commission are just and reasonable, and on the determination of this depends their right to interfere; and they may ap-

point a master to take evidence and report thereon. *Clyde v. Richmond & D. R. Co.*, 57 Fed. Rep. 436.

The enforcement of a tariff rate which will not pay the expenses of operating a railroad is an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and amounts to a taking of the company's property without just compensation. *Pensacola & A. R. Co. v. State*, 37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522.

The effect of the provision of the statute that the schedules of rates fixed by the commissioners shall be deemed and taken as sufficient evidence that the rates fixed therein are just and reasonable is not to make such schedules conclusive as against judicial inquiry, but is to provide a new mode of proving the reasonableness and just character of the rates fixed by the commissioners, and makes the schedules competent and adequate evidence of the correctness of the action of the commissioners, in the absence of countervailing proof that they have exceeded their powers, or abused their discretion, and invaded some right of the railroad company. *Pensacola & A. R. Co. v. State*, 37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522.

Under Kan. Laws of 1883, ch. 124, § 5, an order or recommendation of the board of railroad commissioners to a company, requiring repairs to be made upon its road or track, to promote the security, convenience, and accommodation of the public, is advisory only. Such an order or recommendation is not final or conclusive upon the company or in the courts. *State v. Kansas C. R. Co.*, 49 Am. & Eng. R. Cas. 176, 47 Kan. 497, 28 Pac. Rep. 208.

The schedule of rates fixed and published by the commissioners is not conclusive and final. A statute depriving railroad companies of the right of judicial inquiry as to the reasonableness of such rates is unconstitutional and void as depriving the companies of their property without due process of law. *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702; reversing 38 Minn. 281.

Under the laws of this state, the award of the commissioners is not deemed final and

conclusive upon the parties, but is open to future examination and revision. Upon the complaint of an aggrieved party, the court will appoint a committee to review the same, and will sustain the proceedings of said committee when they conform to the law. *Eastern R. Co. v. Concord & P. R. Co.*, 47 N. H. 108.

27. Decision as prima facie evidence of reasonableness of rates.—It is the duty of the board of transportation of Nebraska to fix freight rates and charges within the state at such sum as shall be reasonable and just, and to make findings of the fact. Its findings are *prima facie* evidence of the truth of the same, but when issue is taken upon them in court the question of what are reasonable and just charges must be determined like other questions of fact. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 442, 23 Neb. 117, 36 N. W. Rep. 305. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.

And the Iowa statute providing that the rates fixed shall be taken in all courts of the state as *prima facie* evidence that they are reasonable and just, and that any greater charge by any railroad company shall be deemed extortion, is not unconstitutional as abridging the privileges and immunities of railroad companies by compelling them to enter involuntarily into contract relations with each other, but imposes upon said companies a duty to make such rates, or to accept those fixed by the railroad commissioners as *prima facie* reasonable and just, if they fail to act as required by law. *Burlington, C. R. & N. R. Co. v. Dey*, 45 Am. & Eng. R. Cas. 391, 82 Iowa 312, 48 N. W. Rep. 98.

The above statute simply prescribes a rule of evidence, and does not prevent companies from having the question of the reasonableness of rates fixed determined in the courts of the state. *Burlington, C. R. & N. R. Co. v. Dey*, 45 Am. & Eng. R. Cas. 391, 82 Iowa 312, 48 N. W. Rep. 98.

Chapter 17 of the Acts of the Twenty-third General Assembly of Iowa is to be read and construed with chapter 28 of the Acts of the Twenty-second General Assembly, and, when so construed, the joint through rates established thereunder by the commissioners are not thereby made conclusive, but only *prima facie* evidence that they are

just and reasonable. *Burlington, C. R. & N. R. Co. v. Dey*, 45 Am. & Eng. R. Cas. 391, 82 Iowa 312, 48 N. W. Rep. 98.

28. Matters within discretion of commissioners.—A Conn. act created a commission for the purpose of carrying overhead certain railroad tracks that crossed streets in a city at grade. They were empowered with all the general powers of the legislature, and were to direct what proportion of the entire expense, including land damages, each party should pay and bear, and determine the cost of the whole or any portion of the work. One of the railroads interested presented a claim for the destruction of its old station, the cost of resurfacing tracks, the cost of extra switching, and other items. The commission disallowed the claim. *Held*, that a mandamus would not lie to compel them to consider the claim, and allow it if just. *State ex rel. v. Asylum St. Bridge Co.*, 63 Conn. 91, 26 Atl. Rep. 580.

Where a tariff of rates has been established by the railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs, as fixed by the commissioners, must, in so far as the courts are concerned, be left to the test of experiment. *Pensacola & A. R. Co. v. State*, 37 Am. & Eng. R. Cas. 579, 25 Fla. 310, 3 L. R. A. 661, 5 So. Rep. 833, 2 Int. Com. Rep. 522.

Under Minn. St. of 1887, ch. 10, § 8, the determination of the railroad and warehouse commission as to what are equal and reasonable fares and rates is conclusive. *State ex rel. v. Chicago, M. & St. P. R. Co.*, 38 Minn. 281, 37 N. W. Rep. 782; reversed in 134 U. S. 418, 10 Sup. Ct. Rep. 462, 702. Which latter case also overthrows *Railway Transfer Co. v. Railroad & W. Co.*, 39 Minn. 231, 39 N. W. Rep. 150. *State ex rel. v. Minneapolis Eastern R. Co.*, 40 Minn. 156, 41 N. W. Rep. 465.

No appeal lies to the district court from an order of the railroad and warehouse commission relating to the mode of operating a railway so as to promote the safety and convenience of the public. Objections to such an order can only be made by way of defense to an action brought to enforce

It. *Minneapolis & St. L. R. Co. v. Railroad & W. Com.*, 44 Minn. 336, 46 N. W. Rep. 559.

6. Remedy to Enforce Orders.

20. In general.—The petition in an action to enforce an order of railroad commissioners alleged that plaintiffs were commissioners; that defendant was a common carrier; that an association having in view the shipment of coal over defendant's road applied for room on the company's side tracks for the erection of a coal shed, which application was rejected; that the association complained to the commissioners, who notified defendant; that the parties appeared before the commissioners, and that, on the hearing, an order was made granting the application, with which defendant refused to comply. A copy of the complaint, attached to the record, did not show for what purpose the association wanted room for the coal-house, nor did it show that the association, at the time of making the complaint, was or ever proposed to be a shipper of coal over defendant's railroad, nor that defendant had any land to grant to any one; neither did it show that any discrimination had been practised. No other or further complaint was filed. *Held*, that, so far as the record showed, no cause of complaint existed which justified the commissioners in making their order. *State v. Chicago, M. & St. P. R. Co.*, 55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323.

Under the statute which provides that a statement of the complaint before the commissioners shall be served upon the defendant, matters existing outside of the records as made before the commissioners cannot be pleaded in the district court to show that the complaint made before the board was, in fact, well grounded, since the court cannot, in determining whether the order made was just and reasonable, resort to facts which had never been the basis of complaint before the commissioners, and hence not passed upon or investigated by them. The defendant cannot be required to defend against a case in the district court which was never presented to or passed upon by the commissioners. *State v. Chicago, M. & St. P. R. Co.*, 55 Am. & Eng. R. Cas. 487, 86 Iowa 641, 53 N. W. Rep. 323.

* Effect of recommendations of state railway commissioners. Enforcement of findings by courts, see note, 49 AM. & ENG. R. CAS. 185.

The Regulation of Railways Act, 1873, § 26, gives the commissioners the same power to enforce a decision made under section 8 as to enforce any writs or orders made under section 6. *Portpatrick R. Co. v. Caledonian R. Co.*, 3 Ry. & C. T. Cas. 189.

The high court of justice has no original jurisdiction with regard to matters within the jurisdiction of the commissioners, but can only enforce orders made by the latter, under the Regulation of Railways Act, 1873, § 26. *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 Ry. & C. T. Cas. 238.

Under order 41 of the commissioners' general orders which provides that if either party desire to appeal to a superior court from the decision of the commissioners upon a question of law they must give notice thereof within fourteen days from the time when the decision was communicated to the parties, the commissioners held that they had no discretionary power to enlarge the time. *Berry v. London, C. & D. R. Co.*, 4 Ry. & C. T. Cas. 310.

30. By writ of attachment.—The railway commissioners have power to issue a writ of attachment or impose a penalty not exceeding £200 a day for disobedience to their orders. *Toomer v. London, C. & D. R. Co.*, 3 Ry. & C. T. Cas. 79.

31. By writ of mandamus.—The remedy provided by statute for the enforcement of orders of the railroad commissioners by mandamus is not exclusive. *State v. Mason City & Ft. D. R. Co.*, 55 Am. & Eng. R. Cas. 73, 85 Iowa 516, 52 N. W. Rep. 490. —EXPLAINING *Boggs v. Chicago, B. & Q. R. Co.*, 54 Iowa 435.

Where the board of transportation has investigated charges of unjust discrimination against a railroad company, and has found such unjust discrimination to exist, and ordered the railroad company to reduce its rates to conform to a schedule presented by such board, which order the company neglects to comply with, mandamus is a proper remedy to enforce such order, and the mention of the district court in the statute will not preclude bringing the action in the supreme court, where the latter court has original jurisdiction. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 Am. & Eng. R. Cas. 426, 22 Neb. 313, 35 N. W. Rep. 118.

The attorney-general is the law officer of the state, and is required to prosecute or defend any case in the supreme court in

which the state is a party or is interested; therefore, where a majority of the board of transportation of the state adopt a resolution asking the supreme court to continue a case pending therein against a railroad company to compel such company to conform its rates and charges to an order previously made by said board—*held*, that the board had no authority to control the action of the attorney-general in the management of the case. *State ex rel. v. Fremont, E. & M. V. R. Co.*, 32 *Am. & Eng. R. Cas.* 426, 22 *Neb.* 313, 35 *N. W. Rep.* 118.

32. By indictment and prosecution.—Indictment and prosecution in the courts of ordinary jurisdiction are not the only remedy provided for the infraction of section 4 of N. Car. Act establishing the commission. Section 5 expressly confers upon the commission authority to make rules and regulations to prevent such infraction. *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 *N. Car.* 463, 16 *S. E. Rep.* 393.

33. By decree in an equitable action.—It was insisted that the courts had no jurisdiction to enforce an order by the commissioners for a private crossing, on the ground that their jurisdiction was dependent upon orders of the commissioners affecting public rights, the contention being that the order in question affected a private and not a public right. The statute provides that "the * * * district courts of this state shall have jurisdiction to enforce, by proper decrees, injunctions, and orders, the rulings, orders, and regulations affecting public right, made * * * by the board of railroad commissioners." *Held*, that the court had jurisdiction to enforce the order. *State v. Mason City & Ft. D. R. Co.*, 55 *Am. & Eng. R. Cas.* 73, 85 *Iowa* 516, 52 *N. W. Rep.* 490.

The order of the board of commissioners, as the result of its investigation, not being the judgment or conclusion that binds the parties, but merely the basis of an action wherein the rights of the parties are investigated and determined, it is immaterial whether or not the board is a court within the meaning of the constitution, which provides that "the judicial department shall be vested in a supreme court, district court, and such other inferior courts" as the legislature may establish. *State v. Mason City & Ft. D. R. Co.*, 55 *Am. & Eng. R. Cas.* 73, 85 *Iowa* 516, 52 *N. W. Rep.* 490.

Under the statute giving the courts juris-

diction to enforce the orders of the railroad commissioners by "equitable actions in the name of the state," it will not be held that an action to enforce the orders of the commissioners must be by mandamus. *State v. Mason City & Ft. D. R. Co.*, 55 *Am. & Eng. R. Cas.* 73, 85 *Iowa* 516, 52 *N. W. Rep.* 490.

An order of the railway commissioners relating to switching and switching rates will not be enforced by a decree where the enforcement would involve a change in the management of the company as to the classification and operation of its trains. *State v. Chicago, M. & St. P. R. Co.*, 88 *Iowa* 445, 55 *N. W. Rep.* 331.

34. By infliction of penalties.—A fine of not less than \$1000 nor more than \$5000 for a first violation of the provisions of a railroad commission law, and of not less than \$5000 nor more than \$10,000 for a second such offense, is not excessive within the meaning of Iowa Constitution, art. 1, § 17. *Burlington, C. R. & N. R. Co. v. Dey*, 45 *Am. & Eng. R. Cas.* 391, 82 *Iowa* 312, 48 *N. W. Rep.* 98.

An act giving authority to the commission to prescribe rules and regulations for the government of railroads, and providing that, upon failure of any railroad company to make full and ample recompense for the violation of such rules and regulations, the commission should be entitled to proceed in the courts, after notice, to enforce the penalties to be prescribed therein for such violation, is valid without providing in detail the methods of procedure. *Atlantic Exp. Co. v. Wilmington & W. R. Co.*, 111 *N. Car.* 463, 16 *S. E. Rep.* 393.

So, Car. Gen. St., § 1457, provides that the railroad commission may suggest to a railroad company to make enlargements and improvements in stations and station houses; and, if their suggestions are not complied with, they are authorized to take such legal proceedings as they may deem expedient, but provides no fine or forfeiture or mode of redress. *Held*, that under this section the commissioners cannot maintain a suit in their own name to compel a railroad company to establish and maintain a station house, in charge of a competent agent, at a certain place on its road; that the company, if liable at all, is liable under section 1539, which provides that where no penalty has been provided for a violation of the statute the penalty shall not be less

than \$1000, to be recovered by the state by action in any circuit court, to be brought by the attorney-general upon the request of the commissioners. *Railroad Com'rs v. Columbia & G. R. Co.*, 30 *Am. & Eng. R. Cas.* 177, 26 *So. Car.* 353, 2 *S. E. Rep.* 127.

35. Determination of reasonableness before enforcement of order.

—Before the court will enforce the running of through trains, it must be shown that the public convenience requires them, and that it can reasonably be done. *In re Barrett*, 1 *C. B. N. S.* 423, 26 *L. J. C. P.* 83.

The courts have power under Iowa Act of 1884, ch. 133, giving them power to enforce the orders of the railway commissioners, to determine the proper construction of a private farm-crossing, but before such orders can be enforced by the courts they must be found reasonable and just. *State v. Chicago, M. & St. P. R. Co.*, 86 *Iowa* 304, 53 *N. W. Rep.* 253. *State v. Des Moines & Ft. D. R. Co.*, 49 *Am. & Eng. R. Cas.* 186, 84 *Iowa* 420, 51 *N. W. Rep.* 38.

An order requiring the building of an overhead farm-crossing will not be enforced where it appears that there is already constructed in the best possible manner, in a locality not dangerous, a good grade farm-crossing. *State v. Chicago, M. & St. P. R. Co.*, (*Iowa*) 53 *N. W. Rep.* 323.

In order to enforce an order at the instance of the commissioners by a decree of the court, the court and the commissioners must concur in a finding of the facts. The law makes such a proceeding an equitable one, and the reasonableness or justness of the order, based upon the facts found, is to be determined from equitable considerations. *State v. Des Moines & Ft. D. R. Co.*, 49 *Am. & Eng. R. Cas.* 186, 84 *Iowa* 420, 51 *N. W. Rep.* 38.—QUOTING *Chicago & A. R. Co. v. Schoeneman*, 90 *Ill.* 258.

36. Action to recover overcharges.

—A provision in a statute to the effect that whenever any railroad company violates, refuses, or neglects to obey any lawful order or requirement of the board, it shall be the duty of the commission to enter complaint in the circuit court of the state, sitting in equity, and that such court shall have power upon notice to the company to proceed to hear and determine the matter speedily, does not authorize such a proceeding in order to enforce the repayment of money charged on freight claimed to be in excess of a reasonable charge; a claim of that

character can only be enforced by a common law action. *Railroad Com'rs v. Oregon R. & N. Co.*, 35 *Am. & Eng. R. Cas.* 542, 17 *Oreg.* 65, 19 *Pac. Rep.* 702, 2 *L. R. A.* 195.

37. Petition should be in name of state.—Under chapter 133 of the Acts of the Twentieth General Assembly, Iowa, a petition by the commissioners to enforce an order made by the board should be in the name of the state and not in the name of the commissioners. *Smith v. Chicago, M. & St. P. R. Co.*, 86 *Iowa* 202, 53 *N. W. Rep.* 128.

But under section 16, chapter 28 of the Acts of the Twenty-second General Assembly, Iowa, a petition in the name of the commissioners instead of the state may be amended so as to make the state the plaintiff. *Smith v. Chicago, M. & St. P. R. Co.*, 86 *Iowa* 202, 53 *N. W. Rep.* 128.

7. Interstate Freights.

38. May regulate charges within but not without the state.*—A charge made for switching cars is local; and state railroad commissioners may regulate such charges, though the cars switched contain interstate freights. *Chicago, M. & St. P. R. Co. v. Becker*, 32 *Fed. Rep.* 849.

The Cal. board of railroad commissioners, although it is made its duty by the state constitution to establish rates for transportation of passengers and freights by all railroad, canal, and other transportation companies, has no authority to interfere with interstate or foreign commerce. Its power is limited to that commerce which is purely domestic. *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, 9 *Sawy. (U.S.)* 253, 18 *Fed. Rep.* 10.—APPLIED IN *Wells v. Northern Pac. R. Co.*, 10 *Sawy.* 441, 23 *Fed. Rep.* 469. **DISTINGUISHED IN** *State ex rel. v. Chicago, St. P., M. & O. R. Co.*, 37 *Am. & Eng. R. Cas.* 602, 40 *Minn.* 267, 41 *N. W. Rep.* 1047, 3 *L. R. A.* 238, 2 *Int. Com. Rep.* 519.

N. H. Laws of 1883, ch. 101, § 4, authorize the railway commissioners of the state to fix rates within, but not without, its boundaries. *Merrill v. Boston & L. R. Co.*, 21 *Am. & Eng. R. Cas.* 48, 63 *N. H.* 259.

Whether the statutes give to the railroad commissioners the right to regulate charges to points outside of the state is a question

*State railroad commissions cannot regulate interstate commerce, see 26 *AM. & ENG. R. CAS.* 47, *abstr.*

of jurisdiction which may be raised at any time." *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 *Am. & Eng. R. Cas.* 29, 22 *So. Car.* 220.

The railroad commission of South Carolina cannot regulate passenger fares to a point in another state, but a regulation as to the hours for opening the ticket office is not a matter of interstate commerce. *Hall v. South Carolina R. Co.*, 25 *So. Car.* 564.—QUOTING *Railroad Com'rs v. Charlotte C. & A. R. Co.*, 22 *So. Car.* 236.

39. Law authorizing commissioners to regulate interstate commerce is unconstitutional.—An order of the board of railroad commissioners of Iowa, that a railway company shall so revise and alter its interstate tariff, so far as relates to freight shipped from points within the state to points without the state, and from points outside the state to points within the state, as to make it correspond to the Iowa local distance tariff, is contrary to U. S. Const., art. 1, § 8, and void. *State v. Chicago & N. W. R. Co.*, 27 *Am. & Eng. R. Cas.* 15, 70 *Iowa* 162, 30 *N. W. Rep.* 398.—FOLLOWING *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 7 *Sup. Ct. Rep.* 4; *Carton v. Illinois C. R. Co.*, 59 *Iowa* 148.

The General Railroad Law of South Carolina being intended to confer upon the railroad commissioners the right to regulate freight upon all railroads where any part thereof is within the state, and to all stations on those roads, including stations outside of the state, is unconstitutional as an invasion of the power, exclusively vested in congress by the constitution of the United States, to regulate interstate commerce. *Railroad Com'rs v. Charlotte, C. & A. R. Co.*, 26 *Am. & Eng. R. Cas.* 29, 22 *So. Car.* 220.—QUOTING *Munn v. Illinois*, 94 U. S. 135.—QUOTED IN *Hall v. South Carolina R. Co.*, 25 *So. Car.* 564; *Sternberger v. Cape Fear & Y. V. R. Co.*, 29 *So. Car.* 510, 7 *S. E. Rep.* 836.

8. Suits against Commissioners.

40. Suit against commissioners is not a suit against the state.—A suit against state railroad commissioners to restrain the enforcement of rates, charges, and regulations prescribed by them as unjust and unreasonable is not a suit against the state, because it is not interested pecuniarily, but only in a governmental sense, and consequently the eleventh amendment

to the constitution of the United States, inhibiting suits in federal courts against one of the states by citizens of another state, has no application. *Reagan v. Farmers' L. & T. Co.*, 58 *Am. & Eng. R. Cas.* 670, 154 U. S. 362, 14 *Sup. Ct. Rep.* 1047. *McWhorter v. Pensacola & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 566, 24 *Fla.* 417, 12 *Am. St. Rep.* 220, 2 *L. R. A.* 504, 5 *So. Rep.* 129.

But where a statute prescribes a penalty for violation of the rates fixed, and authorizes the commissioners to institute an action in the name of the state to recover the penalty, in so far as a bill seeks to enjoin them from doing this, it is in effect a suit against the state. *McWhorter v. Pensacola & A. R. Co.*, 37 *Am. & Eng. R. Cas.* 566, 24 *Fla.* 417, 12 *Am. St. Rep.* 220, 2 *L. R. A.* 504, 5 *So. Rep.* 129.

41. Suits to enjoin enforcement of unreasonable regulations.*—(1) *In general.*—A trust company, trustee of a railroad mortgage, which shows an actual ownership and possession of the mortgage securities of the road, which it alleges are being irreparably injured and threatened with destruction by the tariffs and orders promulgated by a state railroad commission, has such an equitable interest in the fair earnings of the railroad as entitles it to sue to restrain the railroad commission from putting or continuing such tariffs and orders in effect. Such an action does not constitute a suit against the state. *Mercantile Trust Co. v. Texas & P. R. Co.*, 50 *Am. & Eng. R. Cas.* 559, 51 *Fed. Rep.* 529.—APPLYING *Peik v. Chicago & N. W. R. Co.*, 94 U. S. 164; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307, 6 *Sup. Ct. Rep.* 334. FOLLOWING *Pennoyer v. McConaughy*, 140 U. S. 1, 11 *Sup. Ct. Rep.* 699.

In a suit against a state railroad commission to restrain the enforcement of certain rates and regulations, where a general averment that the tariff established is unjust and unreasonable is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the

* Suits against railroad commissioners, see note, 37 *AM. & ENG. R. CAS.* 600.

of the United States, several courts against one of another state, *Reagan v. Farmers' L. & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 1047. *McWhorter v. Pensacola & A. R. Co.*, 50 Am. & Fla. 417, 12 Am. St. Rep. 129. It prescribes a penalty for rates fixed, and authorizes the state to recover a bill seeks to enjoin it is in effect a suit *Whorter v. Pensacola & A. R. Co.*, 50 Am. & Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129.

Enforcement of railroads.—(1) *In company, trustee of a mortgage shows an actual interest in the fair value of the mortgage which it alleges are fixed and threatened by the railroad commission, and orders the railroad commission to enforce its interest in the fair value of the mortgage from the railroad commission. Such tariffs and orders do not constitute a taking of property without compensation.* *Mercantile Trust Co. v. N. W. R. Co.*, 94 U. S. 334. *Folsom v. Connaughy*, 140 U. S. 599.

The railroad commission has no power to enforce certain rates where a general average is established is unjustly supported by the additional cost far more than the stock and bonds repaid in its construction; or mismanagement or operation; that the rates have been purchased at a price consistent with the

commissioners, see note, 3 L. R. A. 500.

successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent.; that under the rates thus voluntarily established the stock, which represents two fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one half the interest on the bonded debt above the operating expenses—such averment, so supported, in the absence of any satisfactory showing to the contrary, will sustain a finding that the proposed tariff is unjust and unreasonable, and will also support a decree restraining the enforcement thereof. *Reagan v. Farmers' L. & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 1047. *U. S. 362, 14 Sup. Ct. Rep. 1047.*

Where the law invests an officer with discretion in the performance of an act, the courts will not interfere with or control his action by injunction. If injustice is done by his action, some other remedy must be sought. The statute gives these commissioners discretion in making rates for railroads, and they are entitled to the benefit of this rule. *McWhorter v. Pensacola & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129.

Whether rates made by the commissioners are reasonable and just or not, even if subject to judicial control, is not open to inquiry in a suit to enjoin their discretionary action. *McWhorter v. Pensacola & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129.

In a declaration in prohibition by a railway company against the railway commissioners it appeared that a complaint, under the Railway and Canal Traffic Act, 1854, had been made to the commissioners against the company, and that the commissioners proposed to order certain things to be done by the company in respect of such complaint, and that the company denied the jurisdiction of the commissioners to hear and determine the complaint or any part of it, and prayed for a writ to prohibit the commissioners "from further proceeding in any

way touching the premises before them." The court being of opinion that the commissioners had jurisdiction over the general matter of the complaint, and that they had jurisdiction to order some of the things they proposed ordering, though not to order the others—*held* (Brett, L.J., dissenting), that a general demurrer by the commissioners to the whole declaration should be allowed. *South Eastern R. Co. v. Railway Com'rs*, L. R. 6 Q. B. D. 586, 50 L. J. Q. B. 201, 44 L. T. 203; *reversing* L. R. 5 Q. B. D. 217, 49 L. J. Q. B. 273, 41 L. T. 760, 28 W. R. 464, 44 J. P. 362.

(2) *Jurisdiction of federal courts.*—A United States circuit court has jurisdiction of a bill filed on behalf of citizens of Europe and of other states, to enforce equitable rights, and to prevent action by railroad commissioners which may result, as is alleged, in serious injury to those rights. It is not necessary to wait until the commissioners have put the law in full operation. *Pick v. Chicago & N. W. R. Co.*, 6 Biss. (U. S.) 177.

The fact that the commissioners assume to act under a constitutional statute will not oust the federal courts of jurisdiction to restrain their excessive and illegal acts. *Reagan v. Farmers' L. & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 1047. *U. S. 362, 14 Sup. Ct. Rep. 1047.*

Texas Act of April 3, 1891, § 6, establishing a railroad commission and allowing any dissatisfied railroad company or other party in interest to file a petition against the commissioners in a "court of competent jurisdiction in Travis county, Texas," does not confine the application for relief to a state court, but allows the filing of a petition in a federal court which includes such county within its circuit. *Reagan v. Farmers' L. & A. R. Co.*, 37 Am. & Fla. 417, 12 Am. St. Rep. 220, 2 L. R. A. 504, 5 So. Rep. 129. *U. S. 362, 14 Sup. Ct. Rep. 1047.*

IV. COMPENSATION.

42. Compelling railway companies to pay salaries of commissioners.—Kan. Act of 1883, ch. 124, § 4, providing for raising a fund for the payment of salaries and current expenses of the state railroad commissioners and their secretary, by taxing the property of railroad companies only, is in violation of the state constitution, art.

* Jurisdiction of federal court to restrain enforcement of rates fixed by state railroad commissioners, see note, 3 L. R. A. 238.

11, § 1, which provides that "the legislature shall provide for a uniform and equal rate of assessment and taxation." *Atchison, T. & S. F. R. Co. v. Howe*, 32 Kan. 737, 5 Pac. Rep. 397.—DISTINGUISHED IN *Columbia & G. R. Co. v. Gibbes*, 24 So. Car. 60.

Under the New York statute of 1882, which provides that the salaries and expenses of the board of railroad commissioners shall be apportioned among the several railroad companies, partly in proportion to net income and partly "in proportion to the length of the main track or tracks on road," where several tracks are laid between the same points, "the length" is not the quantity of numbers of miles of rail laid, but the distance between the terminal points. *People ex rel. v. Chapin*, 34 Am. & Eng. R. Cas. 136, 106 N. Y. 265, 12 N. E. Rep. 595, 8 N. Y. S. R. 678; reversing 42 Hun 239, 3 N. Y. S. R. 728.

The South Carolina General Railroad Act of 1881, giving to a state officer the supervision of all the railroads in the state, and imposing the burden of paying his salary and expenses upon them, is valid, under the various statutory and constitutional provisions, as an amendment of the charter of the plaintiff company. *Charlotte, C. & A. R. Co. v. Gibbes*, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49.

An act requiring all the railroad companies in the state to contribute to the salary and expenses of the state railroad commissioner is not invalid as contravening a constitutional provision requiring that all taxation shall be uniform. *Charlotte, C. & A. R. Co. v. Gibbes*, 31 Am. & Eng. R. Cas. 464, 27 So. Car. 385, 4 S. E. Rep. 49.

43. Salaries do not cease while commissioners are restrained from performing their duties.—The Tenn. statute which creates a railroad commission provides that each commissioner shall receive a salary of \$2000 annually, "unless restrained by law from the performance of their duties." *Held*, that their salaries would not cease upon the suing out by several railroad companies of temporary injunctions against the performance of their functions, so far as those roads were concerned, which injunctions the courts, upon motion and argument for the purpose, declined to dissolve, but had not made perpetual by final decrees. *Savage v. Pickard*, 22 Am. & Eng. R. Cas. 490, 14 Lea (Tenn.) 46.

RAILWAYS CLAUSES ACT.

Joint use of stations under, see STATIONS AND DEPOTS, 148.

RAPID TRANSIT ACTS.

Construction of elevated railways under, see ELEVATED RAILWAYS, 6-25.

1. How construed, generally.—N. Y. General Surface Act was not intended to, and does not, interfere with the rights of any street-surface railroad company organized before its passage under the Rapid Transit Act. It only prohibits the construction of surface roads by corporations thereafter organized. The saving clause in the General Surface Act protects, not only consummated and perfected rights of a company theretofore organized, but such rights as the company had, although inchoate and subject to the performance of further conditions; and by the subsequent performance of the conditions those rights are perfected. (Earl, J., dissenting.) *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; affirming 40 Hun 1.

The provision of the act of 1870, ch. 135, authorizing the making and filing of amended certificates where an informality exists in the original certificate of incorporation of "any corporation organized under any general act for the formation of companies," and declaring that "upon the making and filing of such amended certificate the said corporation shall, for all purposes, be deemed and taken to be a corporation from the time of filing such original certificate," does not apply to the Rapid Transit Act of 1875, ch. 606. *In re New York Cable R. Co.*, 109 N. Y. 32, 15 N. E. Rep. 882, 14 N. Y. S. R. 51; affirming 45 Hun 153, 9 N. Y. S. R. 836.

Under N. Y. Rapid Transit Act no power is given to the commissioners appointed by the mayor of a city, after they have once completed articles of association and delivered the certificate in attempted compliance with the act, to reconvene and amend or reform either articles or certificate; the delivery of the certificate terminates their duties and ends their office. *In re New York Cable R. Co.*, 109 N. Y. 32, 15 N. E. Rep. 882, 14 N. Y. S. R. 51; affirming 45 Hun 153, 9 N. Y. S. R. 836.

And the provisions of the act are not violated or rendered ineffectual by the grant of a conditional instead of an absolute franchise

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of 1870, ch. 135, filing of amended ality exists in the poration of "any r any general act ing," and declar- ing and filing of the said corpora- be deemed and from the time of te," does not ap- Act of 1875, ch. *le R. Co.*, 109 N. 4 N. Y. S. R. 51; Y. S. R. 836.

sit Act no power rs appointed by they have once iation and deliv- npted compliance and amend or re- ficate; the deliv- mates their duties *n re New York* 5 N. E. Rep. 882, *ing* 45 Hun 153, 9

the act are not vio- al by the grant of absolute franchise

to an elevated railroad company, or by the imposition of conditions subsequent. *In re Atlantic Ave. El. R. Co.*, 136 N. Y. 292, 32 N. E. Rep. 771, 49 N. Y. S. R. 389; *affirming* 58 Hun 609, 35 N. Y. S. R. 371, 12 N. Y. Supp. 228.

2. Powers of commissioners as to route, etc.—On a petition presented by a rapid transit company created by N. Y. Act of 1872, ch. 833, for the appointment of commissioners to determine the amount to be paid to the city of New York for the use of streets, it was stated that it was "the intention of the company in good faith to construct, operate, and maintain a railroad on the line mentioned in said act," which was denied in the city's answer. *Held*, that, after the company had offered evidence on the question of intent, it was error to exclude evidence offered by the city tending to show the inability of the company to build the road, and other circumstances tending to controvert the expressed intention. *In re Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. Rep. 645, 20 N. Y. S. R. 516; *affirming* 48 Hun 620, 15 N. Y. S. R. 977, 1 N. Y. Supp. 114.

The above act named the streets over which the main line of such road would pass; therefore, the commissioners had no power to name such streets, or change or omit any portion of the line as located by the act. *In re Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. Rep. 645, 20 N. Y. S. R. 516 *affirming* 48 Hun 620, 15 N. Y. S. R. 977, 1 N. Y. Supp. 114.

And where the location of the main line of such road cannot be sustained, then all branches fall with it. *In re Metropolitan Transit Co.*, 111 N. Y. 588, 19 N. E. Rep. 645, 20 N. Y. S. R. 516; *affirming* 48 Hun 620, 15 N. Y. S. R. 977, 1 N. Y. Supp. 114.

Commissioners appointed under New York Rapid Transit Act of 1875, ch. 606, to determine upon the necessity of steam railways, may authorize different railways, but cannot organize more than one company to operate them. *People ex rel. v. Hoe*, 20 Hun (N. Y.) 26.

3. — general plan of construction.—Under the provision of N. Y. Rapid Transit Act, § 5, requiring the mayor's commissioners to fix the plan or plans for the construction of the railway or railways, it is, at least, essential that they shall determine whether the contemplated road shall be an underground, overground, or surface road,

and a failure on their part to determine this question is a failure to comply with one of the conditions precedent to the acquisition of corporate power. *New York Cable Co. v. Mayor, etc., of N. Y.*, 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 Hun 1.—QUOTED IN *Re Rapid Transit R. Com'rs*, 45 N. Y. S. R. 810.

New York Rapid Transit Act of 1891, § 4, provides that the commissioners shall prepare "a general plan of construction" so as to show the general mode of operation, and to contain such details as to the manner of construction as may be necessary to show the extent of encroachment upon any street or avenue. *Held*, that such plans need not show the precise amount of encroachment, or the precise locality where the encroachment may occur; but a plan giving property owners notice of the general character of the encroachments is sufficient. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.—FOLLOWING IN *re Kings County El. R. Co.*, 112 N. Y. 47, 19 N. E. Rep. 654. QUOTING AND FOLLOWING *New York Cable Co. v. Mayor, etc., of N. Y.*, 104 N. Y. 1, 10 N. E. Rep. 332.

The report and plans of such road show distinctly upon the south side of the Harlem river as to what portion of the road is to be a viaduct, tunnel, or depressed structure, and gives the general dimensions of the tunnel and its location, and the width and height; and as to that part which is to be upon a viaduct the maps indicate the general character of the structure which is to be erected in different locations. *Held*, sufficient as to that portion of the road. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

As to the general plans of the road beyond the Harlem river, it is sufficient if they disclose, as far as reasonably practicable, to what extent the streets are to be encroached upon. It appears by the act of 1890, ch. 545, that the grades of streets and avenues beyond the Harlem river have not been fixed and are not required to be fixed for two and a half years from Jan. 1, 1891, and the commissioners are not required to show what is impossible before such streets and avenues are graded. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

It was further objected that the precise height of the viaduct or depressed structure at each particular place is not shown.

Held, that the plan is only a general one, and that it is impossible to show the same without the details of an engineer's specifications, which are not required. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

It is not necessary that the report should locate the stations along the road; and it is not defective for failing to do so. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

An objection that on Fourth avenue above Fourteenth street, and on all streets above Thirty-fourth, the manner of construction is left wholly undetermined is entirely unfounded. The report shows that the method of construction in these localities is by excavations from the surface and underground tunnel, which in the main would not disturb the surface of the streets. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

4. — time within which road shall be built.—The requirement of New York Rapid Transit Act of 1875, ch. 606, that the commissioners shall fix the time in which the work shall be constructed, is not sufficiently complied with by fixing a time after the required consents of property owners shall have been obtained. *New York Cable R. Co. v. Forty-second St., M. & St. N. A. R. Co.*, 13 *Daly* (N. Y.) 118.

The intent of the provision of section 6, requiring the commissioners appointed by the mayor of a city to fix the time within which the proposed railway or railways, or portions thereof, shall be constructed, is to limit the corporation in respect only to time during which it is possible for it to prosecute the work, excluding time when legal barriers to such prosecution exist. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 *Hun* 1.

The commissioners appointed by the mayor of New York specified a time within which each of twenty-nine different routes should be completed, but provided that the time should begin to run from the date of obtaining the requisite consent of property owners and of the local authorities, or, in case of failure to procure such consent, from the date of the confirmation of the report of commissioners appointed by the court; and also provided that the time unavoidably consumed by the pendency of legal proceedings, or the interference of

public authorities, or the omission to open or grade, shall not be deemed a part of the time limited. *Held*, that this was a substantial compliance with the act. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 *Hun* 1.

The articles of association, framed by the mayor's commissioners, instead of providing, as required by said act (section 7), for the release and forfeiture to the supervisors of the county of all the rights and franchises acquired by the corporation, in case the proposed railways were not completed in time, provided that in case the several portions of such railways were not completed each within the time limited the rights and franchises "for and as to any portion of such railway or railways not so completed" should be released and forfeited. *Held*, that this was a material departure from the requirements of the act; that the provision should have been for the release and forfeiture of all the rights and privileges; that the provision was an attempt to override the action of the legislature in refusing to make the amendment to the Rapid Transit Act of 1882, ch. 393, § 2, applicable to the city of New York by incorporating the substance of the amendment in the articles of association. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 *Hun* 1. —DISTINGUISHED IN *Re Washington St., A. & P. R. Co.*, 115 N. Y. 442, 22 N. E. Rep. 356, 26 N. Y. S. R. 504. FOLLOWED IN *Re Kings County El. R. Co.*, 105 N. Y. 97, 13 N. E. Rep. 18, 7 N. Y. S. R. 186, 7 Cent. Rep. 232; IN *Re New York Dist. R. Co.*, 107 N. Y. 42. QUOTED AND FOLLOWED IN *Re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320.

As there was no general law declaring a forfeiture or requiring a release to the supervisors, a compliance with the provision was necessary to carry out the legislative intent, and the failure to comply was a fatal defect in the articles. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 *Hun* 1.

5. — mode of operation, motive power, etc.—N. Y. Act of 1875, known as the Rapid Transit Act, ch. 606, prior to the passage of the General Surface Act of 1884, ch. 252, authorized the formation of companies to construct street railways on the

surface, to be operated by any power other than animal. (Earl, J., dissenting.) *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 Hun 1.—DISTINGUISHED IN *Re Kings County El. R. Co.*, 112 N. Y. 47, 19 N. E. Rep. 654, 20 N. Y. S. R. 336. REVIEWED IN *Re Union El. R. Co.*, 112 N. Y. 61, 19 N. E. Rep. 664, 20 N. Y. S. R. 498, 2 L. R. A. 359, 51 Hun 644.

Objection was made that a report of commissioners under the Rapid Transit Act of 1891 was not sufficiently definite as to the mode of operation of the road. The language of the act is that such general plan shall show the general mode of operation. The language of the report is that the cars shall be moved by motors capable of a uniform speed for long distances, of not less than forty miles per hour, exclusive of stops, the power being supplied by some method not requiring combustion within tunnels, which would exclude the present cable and locomotive now operated. *Held*, that the description was sufficient. *In re Rapid Transit R. Com'rs*, 18 N. Y. Supp. 320, 45 N. Y. S. R. 810.

6. Consent of abutting owners.—Under New York Rapid Transit Act of 1891, it is not necessary that the general plan prepared by the commissioners should be presented to each property owner before he is applied to for his consent. It is sufficient if public notice has been given, and the property owners might examine the general plan and the maps in the proper office. *In re Rapid Transit R. Com'rs*, 45 N. Y. S. R. 810, 18 N. Y. Supp. 320.—QUOTING *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 4 N. Y. S. R. 308. REVIEWING *In re Kings County El. R. Co.*, 112 N. Y. 47, 20 N. Y. S. R. 336.

7. Rights acquired by incorporation under.—As N. Y. Rapid Transit Act prescribes the proceedings by which rights may be acquired, a substantial compliance with the material requirements of the act is a condition precedent, without performance of which a company never becomes legally incorporated or acquires any rights under the act. *New York Cable Co. v. Mayor, etc.*, of N. Y., 104 N. Y. 1, 10 N. E. Rep. 332, 4 N. Y. S. R. 308; *affirming* 40 Hun 1.

A corporation duly organized under N. Y. Rapid Transit Act of 1875, ch. 606, acquires by the act of incorporation, and upon obtaining the necessary consents of the

public authorities and the property owners, an indefeasible right to construct its road upon the route or routes designated in its articles of incorporation; the lands necessary for the purpose are by the sovereign power appropriated to that exclusive use, and a lien is impressed upon them in favor of the corporation, which ripens into title through purchase or condemnation proceedings; the subsequent condemnation of the lands in the course of the railroad construction is merely incidental, in order to compensate property holders. *Suburban Rapid Transit Co. v. Mayor, etc.*, of N. Y., 128 N. Y. 510, 28 N. E. Rep. 525, 40 N. Y. S. R. 498; *reversing* 60 Hun 577, 37 N. Y. S. R. 642, 14 N. Y. Supp. 230.

The distinction between such a corporation and one organized under the General Railroad Act pointed out. *Suburban Rapid Transit Co. v. Mayor, etc.*, of N. Y., 128 N. Y. 510, 28 N. E. Rep. 525, 40 N. Y. S. R. 498; *reversing* 60 Hun 577, 37 N. Y. S. R. 642, 14 N. Y. Supp. 230.

Prior to the passage of N. Y. Act of 1884, ch. 522, providing for laying out new parks in the city of New York, plaintiff was organized under the Rapid Transit Act. One of its routes, to which the necessary consents of the public authorities and property holders had been obtained, ran through private grounds, which were included in one of the parks designated in said act. Subsequent to the passage of the act plaintiff, by condemnation proceedings, acquired the right to the strip of land over which the route was located. The commissioners of estimate, appointed under the act of 1884, made an award to plaintiff, as the value of the strip, which it refused to receive. The city authorities, claiming to have acquired the fee, took possession of the strip and prevented plaintiff from proceeding with its work of construction. In an action to determine the rights of the parties—*held*, that plaintiff, by and upon its organization, became possessed of the absolute and exclusive franchise to construct, operate, and maintain its road over the strip in question, which operated to vest in it a legal right to have said strip; that said franchise was not impaired by the fact that the work of actual construction had not been commenced or the land condemned before the passage of the act of 1884, and plaintiff was not divested thereof by the proceedings under said act; that it was inoperative to take

away or to authorize a deprivation or curtailment of such right; that it was not necessarily to be inferred from the language of the act that it was the legislative intent to destroy the prior public use included in plaintiff's franchise, but rather that the two uses should stand together; and that the appropriation for a public park was intended to be subject to the exercise by the plaintiff of its franchise. *Suburban Rapid Transit Co. v. Mayor, etc., of N. Y.*, 128 N. Y. 510, 28 N. E. Rep. 523, 40 N. Y. S. R. 498; *reversing* 60 Hun 577, 37 N. Y. S. R. 642, 14 N. Y. Supp. 230.—APPLYING *In re Buffalo*, 68 N. Y. 167.

8. Compensation of the commissioners.—Rapid transit commissioners presented a claim for 250 days' actual service in locating an underground railway. *Held*, that, in view of the fact that the legislature has frequently fixed an annual salary of \$5000 as a fair compensation for commissioners in various public boards of the city, and as that is the pay allowed to the aqueduct commissioners, and the service rendered by the transit commissioners is similar, the same amount was allowed as a reasonable compensation. *In re Rapid Transit R. Com'rs*, 21 N. Y. Supp. 570, 50 N. Y. S. R. 418, 66 Hun 634, *mem.*

RAPID TRANSIT COMMISSION.

Powers and duties of, see ELEVATED RAILWAYS, 10-14.

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Competition as affecting, see INTERSTATE COMMERCE, 35.

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— allowed as damages, see DEATH BY WRONGFUL ACT, 440.

— on damages, what rate governs, see DAMAGES, 111.

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— railway commissioners to fix, see RAILWAY COMMISSIONERS, 7-17.

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— directors of acts of president, see PRESIDENT, 9.

— legislature of corporate mortgage, see MORTGAGES, 3.

— stockholders of acts of directors, see STOCKHOLDERS, 122.

— trustees of leases given by mortgagor, see MORTGAGES, 144.

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Of action of meeting irregularly called, see STOCKHOLDERS, 12.

— acts of agents, see AGENCY, 106-116.

— — partner, see PARTNERSHIP, 4.

— agent's contract to limit liability, see CARRIAGE OF MERCHANDISE, 441.

— wrongful acts, see FALSE IMPRISONMENT, 13.

— assault upon passenger, see ASSAULT, 3.

— assignment of lease, see LEASES, ETC., 83.

— contracts for supplies, see CLAIMS AGAINST UNITED STATES, 3.

— made by officers and agents, see CONTRACTS, 4.

— former election to give railway aid, see MUNICIPAL AND LOCAL AID, 156, 157.

— invalid ordinance, see MUNICIPAL CORPORATIONS, 14.

— — release, see RELEASE, 19.

— irregular issue of bonds, see BONDS, 10.

— — — railway aid bonds, see MUNICIPAL AND LOCAL AID, 337-340.

— leases, see LEASES, ETC., 79-81.

— libel, see LIBEL, ETC., 5.

— license by grantee or licensor, see LICENSE, 10.

— mortgage executed without authority, see MORTGAGES, 64.

— payment for stock by stranger, see SUBSCRIPTIONS TO STOCK, 136.

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CARRIAGE OF MERCHANDISE, 627.
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 — carrying the mails, tax on, see **REVENUE**, 8.
 — goods, effect of, as evidence, see **CARRIAGE OF MERCHANDISE**, 587.
 Indorsement of notice limiting liability on, see **LIMITATION OF LIABILITY**, 14.
 In full, by subcontractor, effect of, see **CONSTRUCTION OF RAILWAYS**, 84.
 — of all damages as a defense, see **FLOODING LANDS**, 61.
 Limitation of liability by stipulations or conditions in, see **CARRIAGE OF LIVE STOCK**, 64; **CARRIAGE OF MERCHANDISE**, 432; **EXPRESS COMPANIES**, 61, 62.
 Of baggage by carrier, check as evidence of, see **BAGGAGE**, 57.

Of goods by carrier, bill of lading as evidence of, see **BILLS OF LADING**, 14-16.

— prima facie evidence of through contract, see **CARRIAGE OF MERCHANDISE**, 610.

— money by mortgage trustees, see **MORTGAGES**, 145.

Parol evidence to contradict, see **EVIDENCE**, 187.

Passengers tickets are, see **TICKETS AND FARES**, 1.

Warehouse, see **WAREHOUSEMEN**, 2, 3.

Weight of, as evidence, see **EVIDENCE**, 278.

When deemed special contracts limiting liability, see **EXPRESS COMPANIES**, 71.

1. **Conclusiveness, generally.**—Plaintiff shipped certain perishable freights over defendant's road to commission merchants to be sold for him, who receipted to the company for the property as received in good order. *Held*, that such receipt did not estop plaintiff from maintaining an action for damages to the goods while in the carrier's hands. *Monell v. Northern C. R. Co.*, 16 *Hun* (N. Y.) 585; *affirming* 67 *Barb.* 531.

2. **Receipts in full.**—Where, in an action to recover damages for personal injuries, the company pleads a receipt in full, the plaintiff has a right to file a bill in equity alleging the receipt to have been obtained by fraud, and praying that the company may be restrained from setting it up as a defense, but for no further relief. *Stewart v. Great Western R. Co.*, 2 *DeG., J. & S.* 319, 11 *Jur.* N. S. 627, 13 *W. R.* 907, 13 *L. T.* 79. — **DISTINGUISHED** in *Lee v. Lancashire & Y. R. Co.*, L. R. 6 Ch. 527, 25 *L. T.* 77, 19 *W. R.* 729.

A motion for a nonsuit has the effect of a demurrer to plaintiff's evidence, and admits the truth of every inference to be fairly drawn therefrom. So in a suit by a contractor to recover for extra work in constructing a railroad proof by plaintiff, direct, positive, clear, and precise, that he gave a receipt in full through fraudulent representations of the directors makes a question that should be left to the jury. *McGrann v. Pittsburgh & L. E. R. Co.*, 111 *Pa. St.* 171, 2 *Atl. Rep.* 872.

3. **Parol evidence to explain or vary.**—A receipt, even when it purports to be in full, is at all times liable to explanation and impeachment. *Union Pac., D. & G. R. Co. v. McCarty*, 3 *Colo. App.* 530, 34 *Pac. Rep.* 767.

Where a railroad contractor gives a re-

ceipt in full to the company, he may afterwards, in a suit to recover an additional amount, testify that he gave the receipt under the belief that a falsehood asserted by the directors was true, and believing it to be true, it was his judgment at the time that he could not recover any greater amount; but it is not competent for him to testify that his judgment was based on professional advice. *McGrann v. Pittsburgh & L. E. R. Co.*, 111 Pa. St. 171, 2 Atl. Rep. 872.

Parol evidence is admissible to explain a receipt or release of a claim for damages caused by fire. *Haverly v. State Line & S. R. Co.*, 125 Pa. St. 116, 17 Atl. Rep. 224.

RECEIVERS.

Appointment of, as ground of abatement, see ABATEMENT, 8.
— in proceedings to dissolve, see DISSOLUTION, ETC., 22.

As experts, see WITNESSES, 174

Citizenship of, on question of removal of cause, see REMOVAL OF CAUSES, 32.

Compelling construction of highway crossing by, see CROSSING OF STREETS AND HIGHWAYS, 12.

Duty of, to grant equal facilities to connecting lines, see INTERSTATE COMMERCE, 104.

Effect of appointment of, on creditors' right to enforce payment of subscription, see STOCKHOLDERS, 32.

Indemnity to, to protect against debts, see INDEMNITY BONDS, 3.

In foreclosure suits, see MORTGAGES, 215-234.

Interference with, as a contempt, see CONTEMPT, 3, 4.

— by strikers, see STRIKES, 5.

Liability of company for personal injuries where road is in hands of, see CROSSINGS, INJURIES, ETC., AT, 53.

— for injuries caused by fire, see FIRES, 102.

— killing stock, see ANIMALS, INJURIES TO, 648.

Necessity of assessment on subscription where road is in hands of, see SUBSCRIPTIONS TO STOCK, 47.

Of relief associations, see RELIEF ASSOCIATIONS, 10.

Operation of road by, as a defense to action for causing death, see DEATH BY WRONGFUL ACT, 167.

Power of, to contract for rebates and drawbacks, see DISCRIMINATION, 64.

Proceedings against, by interstate commerce

commission, see INTERSTATE COMMERCE, 160.

Property in hands of, when subject to taxation, see TAXATION, 80.

Sufficiency of declaration in actions against, see DEATH BY WRONGFUL ACT, 150.

Variance between pleading and proof in actions against, see PLEADING, 130.

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I. THE POWER TO APPOINT A RECEIVER.*

1. Generally.—(1) *The power, generally.*—Ind. act entitled "An act establishing provisions respecting corporations," § 16 (1 Rev. St. 1876, p. 369), authorizing the appointment, and defining the powers and duties, of receivers of corporations, does not govern in case of a receiver of a railroad company, appointed in proceedings supplementary to execution. *Garver v. Kent*, 70 Ind. 428.

Under the New York statute a supreme court can only appoint a receiver of a corporation as therein specified; and there is no provision for the appointment of a receiver for either a domestic or foreign cor-

* Power of court to appoint receivers, see notes, 30 AM. & ENG. R. CAS. 158; 20 L. R. A. 210.

† Nature and character of a receivership, see note, 3 AM. & ENG. R. CAS. 180.

poration upon the application of a creditor at large on a bill filled on behalf of himself and all others similarly situated. *Lehigh C. & N. Co. v. Central R. Co.*, 43 Hun 546, 7 N. Y. S. R. 270.—DISTINGUISHING *Woerishoffer v. North River Constr. Co.*, 99 N. Y. 398, 34 Hun 634, 6 Civ. Pro. 113.

The power, however, of appointing a receiver, *pendente lite*, is incidental to the jurisdiction of a court of equity. Such a receiver is a mere temporary officer of the court, he does not possess the power of a permanent receiver or any legal power except such as is specifically conferred upon him by order of the court; his functions are limited to the care and preservation of the property committed to his charge. *Decker v. Gardner*, 48 Am. & Eng. R. Cas. 683, 124 N. Y. 334, 26 N. E. Rep. 814, 36 N. Y. S. R. 267.

Nothing contained in Tex. Act of July 9, 1879; the act of 1887, p. 120, § 3; the act of 1885, p. 66, § 4; or Rev. St., art. 606, relating to the appointment of receivers, is in violation of the rights of any person or corporation. *East Line & R. R. Co. v. State*, 40 Am. & Eng. R. Cas. 574, 75 Tex. 434, 12 S. W. Rep. 690.—FOLLOWED IN Texas *Trunk R. Co. v. State*, 83 Tex. 1.

(2) *In courts of equity*.—A court of chancery has authority without the aid of a statute to take charge of, manage, and operate a railroad, which is the subject of litigation, by its receivers, when such a course is indispensable to secure the right of creditors and others or to prevent a failure of justice. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467. *Stevens v. Davison*, 18 Gratt. (Va.) 819.

When a railroad company is insolvent, its preferential indebtedness large, its credit gone and its property liable to be seized by different courts, its assets dissipated and its system disrupted, a court of equity, upon petition by the company, setting forth these facts, may appoint a receiver to take charge of the property. But the company cannot thus on its own petition displace vested liens by unsecured claims, and the court must require that the property shall be held by the receiver for the benefit of all concerned therein. *Quincy, M. & P. R. Co. v. Humphreys*, 51 Am. & Eng. R. Cas. 38, 145 U. S. 82, 12 Sup. Ct. Rep. 787; affirming 34 Fed. Rep. 259.

New Jersey Act of April 15, 1846, and the subsequent legislation supplementary there-

to, conferred upon the court of chancery the same general powers over an insolvent railroad corporation which have been conferred upon it over other insolvent corporations; and, where it is necessary, the court may operate a railroad so as to keep it in good condition and dispose of it advantageously. *Vanderbilt v. Central R. Co.*, 35 Am. & Eng. R. Cas. 18, 43 N. J. Eq. 669, 10 Cent. Rep. 849, 12 Atl. Rep. 188; affirming 41 N. J. Eq. 167, 3 Atl. Rep. 134.—FOLLOWING *Barton v. Barbour*, 104 U. S. 126; *Wallace v. Loomis*, 97 U. S. 146.

The chancellor may personally direct or make contracts for the operation of an insolvent railroad, or he may confer a discretionary authority for such purpose upon a receiver. *Vanderbilt v. Central R. Co.*, 35 Am. & Eng. R. Cas. 18, 43 N. J. Eq. 669, 10 Cent. Rep. 849, 12 Atl. Rep. 188; affirming 41 N. J. Eq. 167, 3 Atl. Rep. 134.

N. J. Act of March 3, 1880 (Rev. Sup., p. 834, § 42), authorizing the chancellor to appoint a receiver if a railroad neglects to run daily trains, confers such power upon the court of chancery, and not upon the chancellor in his personal capacity. The chancellor can, in the ordinary course, refer such matter to a vice-chancellor, and to a master, for hearing and an advisory opinion. *Delaware Bay & C. M. R. Co. v. Markley*, 37 Am. & Eng. R. Cas. 421, 45 N. J. Eq. 139, 16 Atl. Rep. 436.

The usages of courts of equity both as to the manner of appointing and discharging a receiver, where it is not otherwise provided by statute, are applicable to cases arising under the Code of Ohio. *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.

2. Discretion of the court.*—The appointment or removal of the receiver of a railroad rests in the sound discretion of the trial court, and is not reviewable on appeal. *Milwaukee & M. R. Co. v. Soutter*, 17 Law. Ed. (U. S.) 616. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 24 Am. & Eng. R. Cas. 166, 27 Fed. Rep. 146.

But the above rule is not applicable to all cases. While the parties to a suit are litigating the amount of a mortgage debt, and

* Grounds for appointment of receiver. How far discretionary, see note, 30 AM. & ENG. R. CAS. 159.

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the question of fraud in the origin of the debt, the appointment or discharge of a receiver for the mortgaged property properly belongs to the discretion of the trial court. But when those questions have been passed upon on appeal, and the amount of the debt definitely fixed, the right of the defendant to pay that sum and have a restoration of his property by discharge of the receiver is clear, and does not depend on the discretion of the trial court. *Milwaukee & M. R. Co. v. Soutter*, 2 *Wall. (U. S.)* 510.—QUOTED IN *Tysen v. Wabash R. Co.*, 8 *Biss. (U. S.)* 247; *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 *Vt.* 500.

And as a general rule a receiver will be appointed to protect a fund when the complainant has an equitable interest therein, and the defendant, having possession of the property, is wasting it, or removing it out of the jurisdiction of the court. *Vose v. Reed*, 1 *Woods (U. S.)* 647.

But all the circumstances of the case are to be taken into consideration, and if it be such that greater injury would ensue from the appointment of a receiver than from leaving the property in the hands of those holding it, or if other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed. *Vose v. Reed*, 1 *Woods (U. S.)* 647.

But where the fund arises under what is known as the Florida Internal Improvement Act, and certain state officers are made trustees *ex officio*, and the state has a great interest in the trust, and it is a matter pertaining to the public duties of such officers, the court will not take the fund out of their hands, except for the most cogent reasons, such as gross fraud, or imminent danger of loss to the fund. *Vose v. Reed*, 1 *Woods (U. S.)* 647.

3. What courts or judges have the power.—Under U. S. Rev. St., § 563, giving federal district courts jurisdiction "of all suits by or against any association established under any law providing for national banking associations within the district within which the court is held," a district court has power to appoint a receiver of an insolvent corporation upon the application of a national bank established in the district where the court is held. *Fifth Nat. Bank v. Pittsburgh & C. S. R. Co.*, 1 *Fed. Rep.* 190.

A federal-circuit court in a state where a

part of the property is located, and where the mortgage was executed, has jurisdiction to appoint a receiver for the entire road. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 *Woods (U. S.)* 409.—APPROVING *Ellis v. Boston, H. & E. R. Co.*, 107 *Mass.* 1.

Under the constitution and laws of Florida, a receiver cannot be appointed by the judge of one circuit to take possession of property in another. *State v. Jacksonville, P. & M. R. Co.*, 15 *Fla.* 201.

A judge of a state circuit court in Illinois cannot, in vacation, appoint a receiver of a railroad. The possession of a receiver so appointed is not that of the court, and will not be recognized as against a receiver subsequently appointed by a U. S. court. *Hammock v. Farmers' L. & T. Co.*, 7 *Am. & Eng. R. Cas.* 465, 105 *U. S.* 77.

The authority of a judge of the court of common pleas to appoint or discharge a receiver, or to act on other provisional remedies, is not required to be exercised within the county in which the action is pending. *Cincinnati, S. & C. R. Co. v. Sloan*, 31 *Ohio St.* 1, 15 *Am. Ry. Rep.* 376.

Texas Act of April 2, 1887, § 13, concerning receivers, does not limit the power to appoint a receiver to those courts exercising jurisdiction over the territory in which the principal office of the corporation is located. *Bonner v. Hearne*, 39 *Am. & Eng. R. Cas.* 580, 75 *Tex.* 242, 12 *S. W. Rep.* 38.—QUOTING *De La Vega v. League*, 64 *Tex.* 214.

4. Conflict of jurisdiction.—(1) *In general.*—It is well settled that where both a state and a federal court have concurrent jurisdiction the court which first takes control of the subject-matter and of the parties cannot be ousted by subsequent proceedings instituted in the other court. So where a state court has lawfully appointed a receiver, a federal court should not appoint another receiver at the suit of other parties. *Central Trust Co. v. South Atlantic & O. R. Co.*, 57 *Fed. Rep.* 3.

The comity which exists between state and federal courts does not prevent a federal court from appointing a receiver of railroad property because prior foreclosure proceedings have been instituted in a state court, where it clearly appears that it is but an amicable proceeding, as an attempt to nurse the business of the company into success, without any immediate purpose of appointing a receiver. *East Tenn., V. & G. R. Co.*

v. Atlanta & F. R. Co., 49 *Fed. Rep.* 608.—QUOTING *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 426.

Comity does not demand that the enforcement of a statute be deferred to await the action of the courts of another state, which appointed a receiver in reference to the property of the corporation situated in that state. *Ft. Dodge v. Minneapolis & St. L. R. Co.*, 55 *Am. & Eng. R. Cas.* 58, 87 *Iowa* 389, 54 *N. W. Rep.* 243.

Indiana Act of March 4, 1863, is probably valid where it operates alone on persons and rights under the laws of the state, but, so far as it undertakes to empower the state courts to control the earnings of railroads which have been placed in the care and management of receivers by orders of federal courts, it is inoperative and void. *Ohio & M. R. Co. v. Fitch*, 20 *Ind.* 498.—DISTINGUISHED IN *Heath v. Missouri, K. & T. R. Co.*, 83 *Mo.* 617. EXPLAINED IN *Ohio & M. R. Co. v. Davis*, 23 *Ind.* 553.

Under the New Jersey law a verdict before judgment is entered does not create a lien on real estate. So where a receiver is appointed for a railroad in a federal court between the time of rendering a verdict and the entry of judgment thereon, it does not create a lien on the property, so that it must be paid by the receivers there, but the judgment creditor must apply to the federal court appointing the receiver for the payment of the judgment. *Jennings v. Philadelphia & R. R. Co.*, 23 *Fed. Rep.* 569.

The prior jurisdiction acquired by the pendency of a former action in which an injunction and receivership are sought will exclude the interference of the court in another suit of which the principal object is the same provisional remedies. *Young v. Rollins*, 12 *Am. & Eng. R. Cas.* 455, 85 *N. Car.* 485.

It was urged against the action of a trial court in appointing a receiver of a railway that a receiver had previously been appointed by a United States court, but it did not appear at what time the proceedings were begun in the United States court. *Held*, that the action of the trial court cannot be held erroneous. *Texas Trunk R. Co. v. State*, 83 *Tex.* 1, 18 *S. W. Rep.* 199.

(2) *Where road extends through two or more states.*—Where a railroad extends through two states, and a foreclosure proceeding is instituted, and the same person is appointed receiver by a federal court in

each of the two states, but under orders differing somewhat as to mere matters of administration, the court will not interfere to modify such orders, where they do not affect any substantial rights of the parties. *Central Trust Co. v. Texas & St. L. R. Co.*, 17 *Am. & Eng. R. Cas.* 334, 22 *Fed. Rep.* 135.

Where both New York and Pennsylvania corporations consolidate and a judgment is taken in New York against the corporation, and suit is brought in a federal court in Pennsylvania to enforce the judgment, the jurisdiction of the federal court over the subject-matter is not affected by the appointment of a receiver in a state court of Pennsylvania; nor will the prosecution of the suit in the federal court interfere with the receiver in the management of the property. *Union Trust Co. v. Rochester & P. R. Co.*, 29 *Fed. Rep.* 609.

Receivers appointed by courts of one jurisdiction are not entitled as of right to recognition in other jurisdictions, and courts of equity cannot acquire extraterritorial jurisdiction over property by appointing receivers. So where a United States court in Missouri appoints receivers of a railway system largely in Illinois, a United States court in Illinois may remove such receivers and appoint another for so much of the property as is within its jurisdiction. *Atkins v. Wabash, St. L. & P. R. Co.*, 26 *Am. & Eng. R. Cas.* 441, 29 *Fed. Rep.* 161.

Where a supplemental petition is filed in a federal court in Iowa, seeking to recover the rental value of certain cars which had been used by receivers, it cannot be sustained where the railroad companies were both incorporated in Missouri, and the rental claimed is for the cars while in the possession of receivers appointed in that state, and where the Iowa court never had possession of the property. *United States Trust Co. v. Wabash, St. L. & P. R. Co.*, 42 *Fed. Rep.* 343.—EXPLAINING *Minnesota Co. v. St. Paul Co.*, 2 *Wall.* (U. S.) 609.

5. Necessity of proceedings to dissolve.—A receiver will not be appointed to take charge of the property of a corporation, the charter of which has neither expired nor been declared forfeited, and which has competent officers. *Baker v. Louisiana Portable R. Co.*, 34 *La. Ann.* 754.

The court of chancery cannot take from the directors of a corporation, or vest in a receiver, the management and control of

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by statute. *Port Huron & G. R. Co. v.*
St. Clair Circuit Judge, 31 Mich. 456.

The *ex parte* appointment of a receiver to
manage the corporate business, and the *ex*
parte granting of an interlocutory injunction
to deprive the directors of control, are
more than irregular, and are absolutely
void, as beyond the power of the court.
Port Huron & G. R. Co. v. St. Clair Cir-
cuit Judge, 31 Mich. 456.

Though a statute provides for winding up
the business of corporations by dissolution
before the expiration of the charter, on the
resolution of the directors authorized by the
stockholders, yet a court of chancery may,
in its discretion, upon a proper case, inter-
pose, and place the business of the corpora-
tion in the hands of a receiver. *New Found-*
land R. Constr. Co. v. Schack, 40 N. J. Eq.
222, 1 Atl. Rep. 23.

The right which the state has to have the
charter of a corporation declared forfeited
for non-payment of taxes does not preclude
the state from seeking the appointment of
a receiver of such corporation in order that
it may get what it might not reach by the
bootless remedy afforded by a suit for dis-
solution. *State v. Georgia Co.*, 112 N. Car.
34, 17 S. E. Rep. 10.

**6. Appointment of receiver for
foreign corporation.**—N. Y. Code, §
1784, authorizes the appointment of a re-
ceiver in an action to sequester the prop-
erty of a corporation created by the laws of
the state; but there is no provision author-
izing a receiver in such suit against a for-
eign corporation. *Burgoyne v. Eastern &*
W. R. Co., 19 Civ. Pro. 384, 13 N. Y.
Supp. 537.

A foreign corporation is, for purposes of
jurisdiction, a "resident" of the state
which creates it; hence under R. I. Pub.
Laws, cap. 723, § 2, of June 20, 1878, the su-
preme court has no power to appoint a re-
ceiver of the estate of a foreign corporation
doing business in Rhode Island. *Stafford*
v. American Mills Co., 13 R. I. 310.

**7. Power to appoint in England
and Canada.**—A railway company which
has never commenced to acquire the lands
or construct the railways authorized by its
act is not an "undertaking," within the
meaning of the Railway Companies Act,
1867, § 4, of which a receiver can be appointed
under that section. *Semble*, the powers of

a receiver appointed under the above section
do not extend to getting in unpaid calls.
In re Birmingham & L. J. R. Co., 3 Am.
& Eng. R. Cas. 616, L. R. 18 Ch. D. 155, 50
L. J. Ch. D. 594, 45 L. T. 164, 29 W. R. 908.

A receiver and manager of the under-
taking of a tramways company may be
appointed. *Bartlett v. West Metropolitan*
Tramways Co., [1893] 3 Ch. 437.—DIS-
TINGUISHING *Gardner v. London, C. & D.*
R. Co., L. R. 2 Ch. 201.

On the application of a judgment creditor
of a railway company whose line was par-
tially completed, the court granted a receiver
over the portion of the line open for traffic,
with the liberty to extend him over any
part of the line which might thereafter be
opened. *In re Southern R. Co.*, 5 Ir. L. R.
165.

A company formed by act of parliament
for the purpose of making a dock was after-
wards authorized to make a short piece of
railway over its own land connecting with
a line of railway, and to work it for through
traffic. *Held*, that the dock company was a
company "constituted by act of parliament
for the purpose of making a railway," and
so was a railway company within the mean-
ing of the Railway Companies Act, 1867, and
that a receiver and manager could, there-
fore, be appointed on the application of a
judgment creditor. *In re East & W. I.*
Dock Co., L. R. 38 Ch. D. 576.—REVIEWING
In re Mersey R. Co., 37 Ch. D. 610; *Great*
Northern R. Co. v. Tahourdin, 13 Q. B. D.
320.

But the receiver and manager must be
appointed of the whole undertaking of the
company, and not merely of the railway be-
longing to it. *In re East & W. I. Dock*
Co., L. R. 38 Ch. D. 576.

In the appointment of a receiver the
court acts only upon a proper case, made
according to well-established principles,
and in that sense only can a receiver be
said to be *ex debito justitia*, whether the
application be interlocutory or made at the
hearing, whether the appointment of the
receiver is the sole object of the action or
only incidental to other relief, and whether
the relief is sought at the instance of a judg-
ment creditor, or of any one else. *Smith v.*
Port Dover & L. H. R. Co., 25 Am. &
Eng. R. Cas. 639, 12 Ont. App. 288; *affirm-*
ing 8 Ont. 256.—DISTINGUISHING *Peto v.*
Welland R. Co., 9 Grant's Ch. 455; *Fox v.*
Toronto & N. R. Co., 28 Grant's Ch. 212;

Lee v. Credit Valley R. Co., 29 Grant's Ch. 480; In re Manchester & M. R. Co., 14 Ch. D. 645. QUOTING Simpson v. Ottawa & P. R. Co., 1 Chan. Chamb. 126.

II. WHO MAY BE APPOINTED.

8. Generally.—Ordinarily a non-resident receiver of a railroad should not be appointed, nor more than one. *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476.

Secured creditors cannot dictate who shall be appointed a receiver. He is the hand of the court; and the interest of creditors of every grade will be considered in making the appointment. *Richards v. Chesapeake & O. R. Co.*, 1 Hughes (U. S.) 28.

Where by agreement two receivers of a railroad are appointed, and they establish their offices a long distance apart, and subsequently become hostile to each other, the court will remove them both and appoint an impartial person residing in the state where the principal part of the road is located. *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476.

Objection was made to a receiver of railroad property that he was too hostile to the corporation and too strong a partisan of plaintiff's claim. *Held*, that a receiver must rest on the facts of his case, and a strong feeling in favor of the plaintiff is no objection. *Olmsted v. Rochester & P. R. Co.*, 8 N. Y. S. R. 856, 44 Hun 627; *affirmed* in 106 N. Y. 673, *mem.*, 13 N. E. Rep. 937, 11 N. Y. S. R. 881, *mem.*

A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund; therefore in making the appointment the court will endeavor to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication. *Simpson v. Ottawa & P. R. Co.*, 1 Chan. Chamb. (U. C.) 99.

9. Parties and persons interested.—It is the uniform practice of the federal court in the fourth circuit to appoint no one receiver of a railroad corporation who has been one of its officers, or who had anything to do with its control prior to its insolvency. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 45 Fed. Rep. 436.

A receiver should be an impartial person,

not interested in the litigation, or a partisan of any of the litigants. *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476.

The office of receiver should not be conferred upon a party to the cause. *Young v. Rollins*, 12 Am. & Eng. R. Cas. 455, 85 N. Car. 485.

10. Officers of the company.—Officers who have defrauded their corporation cannot prevent the attorney-general from bringing an action to have a receiver appointed by having one of their confederates begin suit, and another appointed receiver. *People v. Bruff*, 9 Abb. N. Cas. (N. Y.) 153, 60 How. Pr. 1.

As a rule, where the directors of a railway company have been acting fairly, one of them will be appointed manager under the Railway Companies Act, 1864, where such an appointment is required by a judgment creditor. *In re Manchester & M. R. Co.*, L. R. 14 Ch. D. 645, 49 L. J. Ch. D. 365, 42 L. T. 714.

III. GROUNDS FOR THE APPOINTMENT.

11. When appointed, generally.*—Where it is made to appear that a railroad company is unable to do further work in the extension of its road, and that a large land grant will lapse in a short time unless the road is completed, and that this grant is the principal security of the company's bondholders, a court will appoint a receiver, on the application of such bondholders, and clothe him with power to borrow money and complete the road. *Kennedy v. St. Paul & P. R. Co.*, 2 Dill. (U. S.) 448.—EXPLAINED IN *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 36 Fed. Rep. 48. QUOTED IN *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 Vt. 500. REVIEWED IN *Snow v. Winslow*, 54 Iowa 200.—*Allen v. Dallas & W. R. Co.*, 3 Woods (U. S.) 316.

A railroad corporation had collected only five per cent. of its capital stock, which it had expended. Judgments had been rendered against it, which, in default of assets, had been, on proper legal proceedings, paid by plaintiffs as stockholders, and other debts and judgments existed; the officers and directors of the corporation had not met for eighteen months, and had made no provision for its debts; its franchises were

* Receivers, when and over what property will be appointed, see valuable note, 64 AM. DEC. 482.

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abandoned, and it had no assets. Some of its shareholders were non-residents and some were insolvent, and plaintiffs were about to have cast upon them the payment of the entire corporate indebtedness. *Held*, that plaintiffs could maintain a bill for the appointment of a receiver to assess the stockholders to pay debts, etc. *Ford v. Kansas City & I. S. L. R. Co.*, 52 Mo. App. 439.

A receiver will not be appointed to supersede permanently the managers of a railway, and to take entire charge of the affairs of the road. But where two railroad companies possess a community of interest in the property in dispute (as, for example, being tenants in common of an easement), the court will exercise judicial control over their conduct towards each other in order to protect their respective rights. *Delaware, L. & W. R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298.—DISTINGUISHED IN *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755. QUOTED IN *Lehigh Valley R. Co. v. Society, etc.*, 30 N. J. Eq. 145.

Where it becomes necessary to compel obedience to its injunction or decree, the court will appoint a receiver to take control of the defendants' property. *Stockton v. Central R. Co.*, 50 N. J. Eq. 489, 25 Atl. Rep. 942.

Where a railroad is placed in the hands of a receiver on the application of second mortgage creditors, the original appointment may be extended to cover the prior mortgage, upon proper application. *Farmers' & M. Nat. Bank v. Philadelphia & R. R. Co.*, 14 Phila. (Pa.) 456.

Although not a creditor of a corporation dissolved, the state, in the interest of the public, may apply for the appointment of a receiver of the defunct corporation; and an appointment of such receiver is properly made on application of the state upon a judgment of forfeiture entered against a railway corporation. *Texas Trunk R. Co. v. State*, 83 Tex. 1, 18 S. W. Rep. 199.—FOLLOWING *East Line & R. R. Co. v. State*, 75 Tex. 434.

12. When refused, generally.—(1) *Federal decisions.*—Where the relief sought is founded upon a disputed equity, a court of chancery will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railroad company who would be affected similarly with plaintiff

are before the court, it ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock. *Overton v. Memphis & L. R. R. Co.*, 3 McCrary (U. S.) 436, 10 Fed. Rep. 866.

It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. *Overton v. Memphis & L. R. R. Co.*, 3 McCrary (U. S.) 436, 10 Fed. Rep. 866.

A court will not, in deference to the mere technical rights of a very small minority of bondholders, take a railroad over 600 miles in length, running through three great states, and by the appointment of a receiver imperil, if not destroy, the interests of others whose rights are entitled to equal consideration with those of the plaintiff; especially where those in charge of the road are not charged with any fraud or dishonesty, and where there is a prospect of general prosperity in the near future. *Tysen v. Wabash R. Co.*, 8 Biss. (U. S.) 247.—QUOTING *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. (U. S.) 523.

And a court will not make such appointment where it appears that a much greater injury to all interested in the road, including even the plaintiff, would result from so doing than would result from leaving the property in the hands of the company during a foreclosure. *Tysen v. Wabash R. Co.*, 8 Biss. (U. S.) 247.

A stockholder filed a bill alleging that he held certain shares of stock which had been illegally issued, and praying that the question of their legality might be inquired into, and if held illegal, that he might be repaid the amount paid for the shares, and that a receiver be appointed to hold such amount of the corporate property as would indemnify plaintiff. It appeared that the moneys received by the corporation from the shares had not been kept separate, and could not be traced or identified. *Held*, that neither could an injunction be granted to prevent the company from selling its property, nor a receiver appointed. *Whelpley v. Erie R. Co.*, 6 Blatchf. (U. S.) 271.

Where a receiver is already in possession of property, an additional receiver will not be appointed unless it seems to be necessary for the protection of those asking for it. *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 17 Am. & Eng. R. Cas. 264, 22 Fed. Rep. 272.

Where a railroad track is laid, but not being used, and two parties are in dispute over it, both claiming the right of possession, and the object of the suit is to quiet title, the court will not interfere by the appointment of a receiver, but will leave the parties to their remedy at law to settle the question of title and possession. *St. Louis, K. C. & C. R. Co. v. Dewees*, 23 Fed. Rep. 519, 691.

(2) *State decisions.*—No interference with the management of a corporation can be justified, and, in the absence of statutory authority, courts have no jurisdiction to appoint receivers, except in cases of extreme necessity. *Ford v. Kansas City & I. S. L. R. Co.*, 52 Mo. App. 439.

When legal process against responsible claimants of a railroad is an adequate remedy for a neglect to keep the road in suitable repair, the remedy of a receivership may be denied. *Boston, C. & M. R. Co. v. Boston & L. R. Co.*, 51 Am. & Eng. R. Cas. 106, 65 N. H. 393, 23 Atl. Rep. 529.

An action will not lie in behalf of a stockholder, against the corporation and its directors, to remove the directors and appoint a receiver, and for an injunction, upon allegations of misconduct in a part of the directors only, in which the others are not charged with participating except that they are under the influence of the former. The misconduct of some, or even of all the directors, affords no ground for taking away the rights of the stockholders who constitute the company, either by dissolving the corporation, or taking away its management and placing it in the hands of an officer of the court. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.—QUOTING *Waterbury v. Merchants' Union Exp. Co.*, 50 Barb. 157.

Where it is sought to prevent the usurpation of corporate powers, the proper remedy is by an action in the name of the attorney-general, and not an action by a stockholder for a receiver and an injunction. *People v. Erie R. Co.*, 36 How. Pr. (N. Y.) 129.

A receiver ought not to be appointed, unless where it is necessary to protect stockholders or creditors, or to prevent an abuse

of corporate franchises. *Rochester v. Bronson*, 41 How. Pr. (N. Y.) 78.

It is the right of every party to a litigation to appeal from decisions against him, and therefore, in so far as the resistance by a railroad company to actions brought to recover rent due for a leased line is concerned, or the resistance by directors of such leased line who have been held by the courts not to be duly elected, no grounds are furnished for the appointment of a receiver. *Rochester v. Bronson*, 41 How. Pr. (N. Y.) 78.

In an action to prevent the consolidation of railroad companies, the election of directors for the new company, at a meeting of the stockholders held under section 3383 of the Revised Statutes, will not justify the appointment of a receiver against either of the companies on the ground that part of the stockholders participating in the meeting have been inhibited from doing so by injunction. *Cincinnati, H. & D. R. Co. v. Jewett*, 8 Am. & Eng. R. Cas. 702, 37 Ohio St. 649.

13. Failure to meet indebtedness.—A company whose road extended through three states mortgaged its property to secure bondholders, with a provision that, if the company failed to pay interest or principal of the bonds, the mortgage trustees should take possession and sell the property. *Held*, that if the trustees failed to take possession and execute the trust, after a default, and upon demand, the bondholders might file a bill requiring such action, and the court would decree that they execute the trust, or appoint a receiver to do so. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 409.—QUOTED IN *McFadden v. Mays Landing & E. H. C. R. Co.*, 49 N. J. Eq. 176; East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. Rep. 608.

The fact that there is no probable deficiency of property to pay the mortgage debt will not operate to prevent the appointment of a receiver. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 409.

And proof that a part of the property has passed into the hands of different receivers, appointed by different courts, and that the whole property is likely to suffer therefrom, is sufficient reason for the appointment of one receiver for the whole property. *Wilmer v. Atlanta & R. A. L. R. Co.*, 2 Woods (U. S.) 409.

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directs the mortgage trustees in default of
payment of interest to take possession of
the property and apply the income to the
payment of interest, mere proof of a default
is sufficient for the appointment of a re-
ceiver at the application of the trustees.
Allen v. Dallas & W. R. Co., 3 Woods
(U. S.) 316.

The bondholders in such case are not
precluded from the appointment of a re-
ceiver because it is not shown that the
property is insufficient to pay the mortgage
debt, that the mortgagee is insolvent, that
the trust property is in jeopardy, or because
the amount due is in dispute. *Allen v.*
Dallas & W. R. Co., 3 Woods (U. S.) 316.

A court will not appoint a receiver of rail-
road property merely upon a showing that
the company is in default in paying interest
on the mortgage debt, and that under the
mortgage the trustees were entitled to pos-
session upon such default. It must be
shown further that ultimate loss will result
from permitting the property to remain in
the hands of its owners until a decree of
sale be entered and a sale made. *Union*
Trust Co. v. St. Louis, I. M. & S. R. Co., 4
Dill. (U. S.) 114.—FOLLOWING *Williamson*
v. New Albany, etc., R. Co., 1 Biss. (U. S.)
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Persons who have guaranteed the pay-
ment of a debt of a corporation, and have
paid the debt, are creditors of the company,
and are entitled to the benefit of New
Jersey act "respecting railroads and canals,"
section 57, which provides that a receiver of
any railroad company may be appointed on
application of any creditor, if the company
has been in default for ninety days in pay-
ing principal or interest on its mortgage
debt. *Pennsylvania R. Co. v. Pemberton &*
N. Y. R. Co., 28 N. J. Eq. 338.

14. Failure to run trains.—Cape
May, N. J., is not a seaside resort within
the meaning of an act providing that rail-
roads at seaside resorts shall not be sub-
ject to the provisions of a law providing for
a receiver for roads that fail to run trains
for ten days. *In re Delaware Bay & C. M.*
R. Co., (N. J. Eq.) 11 Atl. Rep. 261; ad-
hered to on rehearing in 11 Atl. Rep. 737.

Notwithstanding the fact that a company
has been incorporated under the New Jersey
General Railroad Law, and has declared its
purpose of doing a general business in the

transportation of freight and passengers, it
is (if its road otherwise answers the descrip-
tion) within the purview of the act of March
3, 1880, which declares that the act of Feb-
ruary 12, 1874, which authorizes the ap-
pointment of a receiver of any company
which has not operated its road for ten
days, shall not apply to any company whose
road is constructed at any seaside resort,
does not exceed four miles in length, and
is built and intended merely for the trans-
portation of summer travelers and tourists.
Delaware Bay & C. M. R. Co. v. Markley,
37 Am. & Eng. R. Cas. 421, 45 N. J. Eq.
139, 16 Atl. Rep. 436.

The act of March 3, 1880, is retrospective
in its operation and applies not only to
roads thereafter constructed, but also to
roads in operation at the time of its enact-
ment. Said statute is not unconstitutional
as a special act conferring corporate privi-
leges, the railroads to which it applies form-
ing a distinct class. *Delaware Bay & C.*
M. R. Co. v. Markley, 37 Am. & Eng. R.
Cas. 421, 45 N. J. Eq. 139, 16 Atl. Rep. 436.

15. Fraudulent conveyance of property.—A bill was filed stating that
plaintiff had recovered a judgment against
a railroad company and issued execution,
upon which a return of *nulla bona* had been
made, and that prior to the judgment the J.
S. R. Co. had transferred all of its rolling
stock, franchises, etc., to appellant com-
pany; that appellant company had never
operated the line so purchased; that the J.
S. R. Co. held no power to sell nor the ap-
pellant company to buy said railroad (both
being Illinois corporations), and charging
that the sale was fraudulent, and praying
for the appointment of a receiver. *Held,*
that a receiver was properly appointed, and
was entitled to costs for attendance in court,
and that a writ of error having been sued
out to complainant's judgment, and a *super-*
sedeas bond filed securing him, a motion to
vacate the order appointing the receiver
should have been granted. *Louisville &*
St. L. R. Co. v. Southworth, 38 Ill. App. 225.

16. Insolvency.—If a railroad com-
pany has become insolvent and has made
default, it should be placed in the hands of
a receiver, upon the application of its mort-
gage creditors. *Taylor v. Philadelphia &*
R. R. Co., 14 Phila. (Pa.) 451.

Where a majority of the creditors and
stockholders of a consolidated company file
a bill showing that there are a large amount

of judgments against both the existing company and the consolidating companies, and that the officers cannot distinguish the property of the several companies, so as to levy on it for their respective debts, and, in consequence, the property is being sacrificed, the court has jurisdiction, as between the parties, to appoint a receiver. *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

The provisions of N. Y. Act of 1870, ch. 151, touching the appointment of receivers for corporations, upon the application of a creditor, after execution returned unsatisfied, covers all the cases mentioned in the Rev. St. title 4, ch. 8, part 3; and, therefore, in such a proceeding, the act of 1870 must be followed. *Clinch v. South Side R. Co.*, 1 Hun (N. Y.) 636, 4 T. & C. 224.

No mere creditor of a corporation can have a receiver appointed until he has a judgment and execution returned unsatisfied. *People v. Erie R. Co.*, 36 How. Pr. (N. Y.) 129. *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y.) 193, 7 Abb. Pr. N. S. 156.

Where the insolvency of a railroad company is as positively denied by its president as it is affirmed in the complaint, so far as insolvency forms a ground for the appointment of a receiver, it is removed. *Rochester v. Bronson*, 41 How. Pr. (N. Y.) 78.

An action against a railroad company upon its unsecured promissory notes is an action at law, and is not changed into a suit in equity, in which a receiver may be appointed, merely because the complaint contains allegations that the company is insolvent, that other creditors are threatening to sue it, that it has no property out of which plaintiff will be able to satisfy a judgment, and that the action is brought in behalf of plaintiff and all other creditors who are willing to come in as plaintiffs. The appointment of a receiver in such a case is unauthorized and void, and will be annulled on certiorari if the proceedings are commenced in due time. *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. Rep. 322.

And the consent of the company to the appointment of the receiver does not affect the right of a creditor aggrieved thereby to have the order appointing such receiver annulled on certiorari. *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. Rep. 322.

In an action by a debenture holder on behalf of himself and the other holders of an issue of £15,000 debentures, the holders of that issue are entitled to stand in the posi-

tion of judgment creditors for £15,000, and to have appointed a receiver of the property of the company subject to be seized by a judgment creditor. *Hope v. Croydon & N. Tramways Co.*, L. R. 34 Ch. D. 730.

Under the Railway Companies Act, 1867, § 4, an unpaid judgment creditor of a railway company may properly require the appointment of a receiver, although the railway is a leased line or merely receives rent and tolls under a working arrangement with another company. *In re Manchester & M. R. Co.*, L. R. 14 Ch. D. 645, 49 L. J. Ch. D. 365, 42 L. T. 714.

The words "if necessary" in the above statute point to the necessity of carrying on the business, and whenever a railway company is carrying on business in the ordinary way a manager will be appointed, since he is necessary. *In re Manchester & M. R. Co.*, L. R. 14 Ch. D. 645, 49 L. J. Ch. D. 365, 42 L. T. 714.

17. Misapplication of assets—Waste.—A company mortgaged its road to secure its bondholders, with a provision that in case of default of payment of either interest or principal of the bonds the trustees should take possession of the property, and might sell it; but this provision was not enforced upon a default. The proceeds of the bonds were not sufficient to complete the road, and, acting upon the advice of a large number of the bondholders, the company made other loans, and applied its earnings in completing the road. *Held*: (1) that such application of the earnings was not a misapplication of the company's funds; (2) that a trustee might waive the provision giving him the right to take possession, and file a bill to foreclose; (3) that the act of the company in expending its income would be respected, so far as to relieve the company or its officers from any penalty or charge of misappropriation. *Williamson v. New Albany, etc., R. Co.*, 1 Biss. (U. S.) 198.

Where a company mortgages its property, and afterwards becomes insolvent and is wasting the same, the court may appoint a receiver to take charge of the property, with directions, after paying current expenses, to apply the net profits to the payment of mortgage claims. *North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691.

In general, where personal property, or the rents and profits of real estate in dispute, are in imminent danger of being wasted, a receiver may be appointed to take care of

£15,000, and if the property is seized by a *Croydon & N. D.* 730. *Act, 1867*, of a rail- require the ap- gh the railway eives rent and gement with *Chester & M.* 19 *L. J. Ch. D.* in the above of carrying on a railway com- n the ordinary ed, since he is *& M. R. Co., Ch. D.* 365, 42

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the property during the controversy for the benefit of all concerned. *State v. Northern C. R. Co.*, 18 Md. 193.

A company, whose road lies partly in Maryland and partly in Pennsylvania, and is chartered by both states, executed a mortgage of its entire road and revenues to the state of Maryland, to secure the payment of an annuity of \$90,000. Under this mortgage the state stood as second and third encumbrancer. *Held*, that upon its being shown that the company, in violation of its duty, was applying, and intended to continue to apply, its revenues (the only means of paying the annuity) to the payment of junior encumbrances, a court of Maryland ought to interfere, upon the application of the state, by injunction and the appointment of a receiver of the mortgaged property. *State v. Northern C. R. Co.*, 18 Md. 193.

18. Mismanagement of officers.—

An action may be brought by the attorney-general, in the name of the people, against a corporation and its officers, on the ground of mismanagement, for the purpose of compelling them to account, and for their removal and for the appointment of a receiver. *People v. Bruff*, 9 Abb. N. Cas. (N. Y.) 153, 60 How. Pr. 1.

When the president of a company takes an assignment of the contract for the construction of the railroad, obtains all the securities under pretense of paying the nominal contractor, and, as chief engineer, makes to himself, as contractor, certificates for work done, and then as president pays himself many hundred thousand dollars in advance of what the original contractor was entitled to receive under the contract, ample cause is shown for the appointment of a receiver, and the duty of the attorney-general to bring an action becomes imperative. *People v. Bruff*, 9 Abb. N. Cas. (N. Y.) 153, 60 How. Pr. 1.

19. Suits by judgment creditors.—

(1) *In federal courts.*—Mere insolvency may or may not call for the appointment of a receiver. *Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 24 Am. & Eng. R. Cas. 166, 27 Fed. Rep. 146.

A court in its discretion may appoint a receiver for an insolvent railroad, on the application of a judgment creditor, without first requiring him to sue out execution, and obtain a return thereon of *nulla bona*, where the petition alleges that such execu-

tion would result in expense and delay, and be unavailing, and that if the property should be sold under existing mortgages it would be sacrificed, but if kept together and carefully managed it would pay expenses, and a large revenue annually to the discharge of debts. *Sage v. Memphis & L. R. R. Co.*, 35 Am. & Eng. R. Cas. 40, 125 U. S. 361, 8 Sup. Ct. Rep. 887.—FOLLOWED IN *Farmers' L. & T. Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. Rep. 182.

Where a company mortgages its property and becomes insolvent, and the former trustee is dead, having made no reports of the manner in which he performed his trust, and other parties are in possession of the road acting in a manner hostile to the decrees of the court, a receiver should be appointed. *Bill v. New Albany, etc., R. Co.*, 2 Biss. (U. S.) 390.

A mortgage upon canal property provided that possession should remain in the company, unless it affirmatively appeared that a default resulted from some cause other than a failure of business. A bondholder, suing for the benefit of all, filed a bill asking the appointment of a receiver, but failed to show that the default resulted from some other cause than a failure of business. *Held*, that the court would refuse a receiver; but as the company was utterly insolvent and had paid no net income for some years, but by proper management the income might be made sufficient to pay interest on the bonds, the court would retain the bill and require the company to make quarterly reports of its business, and grant such further relief as the bondholders might ask for. *Stewart v. Chesapeake & O. Canal Co.*, 4 Hughes (U. S.) 47, 5 Fed. Rep. 149.

(2) *In state courts.*—The case ought to be one of urgency to justify a court in appointing a receiver to manage and operate the business of a railroad at all; and officers conducting such a business, to whom no fraud or fault is imputed, should not be displaced from the *ad interim* management, pending litigation, merely because the corporation is insolvent. It might, instead, be sometimes more expedient to require the earnings of the road to be paid over to, and disbursed by, a receiver appointed by the court, and to prevent by injunction the interference of others with the management in the meantime. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467.—REVIEW.

ING Gardner v. London, C. & D. R. Co., L. R. 2 Ch. 201.

Where a railroad corporation has been declared bankrupt, and interest has accumulated on its bonds exceeding the value of the property mortgaged to secure them, and purchasers of the equity of redemption at the assignees' sale are in possession of the road and mortgaged property, receiving the incomes which the mortgage entitles the mortgagee to take, and using the property for their exclusive use and benefit, the appointment of a receiver is not an interference with the corporate authority over the road, or a disturbance of the corporate possession, but merely of that of the purchasers. *Kelly v. Alabama & C. R. Co., 58 Ala. 489, 21 Am. Ry. Rep. 138.*

The allegation of insolvency, made with respect to a railway corporation in a bill for a receiver, is sustained by proof that the corporation had acquiesced in the construction of its roadbed by a companion corporation which had either paid for or pledged its own credit for the cost of such construction, and that debts honestly due and owing therefor were outstanding, and suits pending that the defendant corporation had neither means nor prospects of settling. *Tuckahoe & C. M. R. Co. v. Baker, 49 N. J. Eq. 581, 25 Atl. Rep. 402.*

More than the entire capital stock of defendant company was expended in building and equipping its road, and an indebtedness for current expenses and taxes incurred. Bonds were issued, but the indebtedness had not been liquidated nor the interest on the bonds paid. A New Jersey statute declares that when a company shall become insolvent, or shall suspend its business for want of funds to carry on the same, a receiver may be appointed. Under these circumstances a bill was filed and a receiver appointed. Upon a motion to dissolve and dismiss—*held*, that the facts justified the conclusion that the company was insolvent within the meaning of the statute and authorized the appointment of a receiver. *Sewell v. Cape May & S. P. R. Co., (N. J. Eq.) 20 Am. & Eng. R. Cas. 155, 9 Atl. Rep. 785.*

IV. THE APPLICATION, AND HOW DISPOSED OF.

20. Time to apply.—When a railroad corporation, with its well-known obligations

to the public, has become entirely insolvent and unable to pay the interest upon its secured debts, unable to pay its floating debt, unable to pay the sums due its connecting lines, unable to borrow money, and is in peril of the breaking up and destruction of its business, and confesses this inability, although no default has yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen where, upon a bill for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril, a temporary receiver may properly and wisely be appointed. *Brassey v. New York & N. E. R. Co., 17 Am. & Eng. R. Cas. 285, 22 Blatchf. (U. S.) 72, 19 Fed. Rep. 663.*

An act incorporating a railroad company repealed the charter of an existing company, and authorized the new one to take the tracks of the old, and made provision for compensation therefor. The tracks were taken, and a petition for damages was duly filed. Pending this petition, the three years allowed by the Mass. Gen. St. ch. 68, § 36, for a corporation whose charter is annulled to close its business expired; and, no receiver having been appointed under section 37, the petition was dismissed. Before the expiration of the time allowed for filing a petition for damages, a stockholder of the old company brought a bill in equity to restrain the new one from doing business. After the dismissal of the petition for damages, but within a year after the bill in equity was decided, a creditor of the old company brought a bill in equity against the new one for the appointment of a receiver to prosecute the claim for damages by reason of the taking of the tracks. *Held*, that the bill could not be maintained; and that the Gen. St. ch. 63, § 30, did not apply. *Bigelow v. Union Freight R. Co., 20 Am. & Eng. R. Cas. 425, 137 Mass. 478.*

Mich. Comp. Laws, § 6565, providing for the sequestration of corporate property and for the appointment of a receiver, does not contemplate that an appointment shall precede an adjudication or the adjudication a hearing on notice. *Cook v. Detroit & M. R. Co., 12 Am. & Eng. R. Cas. 459, 45 Mich. 453, 8 N. W. Rep. 74.*

The three-year limitation in reference to the appointment of receivers under N. Car. Rev. Code, ch. 26, § 6, does not apply where

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the receiver is appointed in less than three years after the corporation ceased to exist, but does not give bond until after the three years. *Young v. Rollins*, 25 Am. & Eng. R. Cas. 646, 90 N. Car. 125.

It seems, that the limitation of two years would not conclude the right to have a receiver appointed, if the facts otherwise require such control of property in litigation. The refusal by the trial court to appoint a receiver will not affect the power on final trial to make such appointment when called for by the facts. *Becker v. Gulf City St. R. & R. E. Co.*, 80 Tex. 475, 15 S. W. Rep. 1094.

A judgment creditor gains no priority by obtaining a receivership order. When such order has been made and is in force, another judgment creditor gains no benefit whatever by obtaining a similar order, and such subsequent order ought not to be made, and if made, should be discharged. *In re Mersey R. Co.*, L. R. 37 Ch. D. 610.

21. Must be an action pending.—N. Y. Act of 1870, ch. 151, provides that a judgment creditor of a corporation, after execution returned not satisfied, may apply "by a civil action" for the appointment of a receiver. Plaintiff made an affidavit that he was a judgment creditor of defendant corporation, and that execution had been returned not satisfied, and gave notice and moved for the appointment of a receiver. Held, that this was not a compliance with the statute, and the proceeding was irregular. *Clinch v. South Side R. Co.*, 1 Hun (N. Y.) 636, 4 T. & C. 224.

22. Ex parte applications.—In view of the fact that it seems to be the practice in federal courts to grant an ancillary receivership on *ex parte* application, the circuit court for the first circuit will follow the practice, but without prejudice, to a full consideration of the question, if a motion is afterwards made to dissolve or annul the order. *Platt v. Philadelphia & R. R. Co.*, 54 Fed. Rep. 569.

A court is not justified in appointing a receiver *ex parte* when the complaint does not show that the property or any part of the same is about to be wasted, misappropriated, or removed beyond the jurisdiction of the court, and that delay in granting the relief might entirely defeat the object of the suit. *Chicago & S. E. R. Co. v. Cason*, 133 Ind. 49, 32 N. E. Rep. 827.

A receiver cannot be appointed *ex parte*

in a proceeding by creditors to wind up an insolvent corporation, and pending the decision on a demurrer whereby the right to file the bill is put in issue. *Cook v. Detroit & M. R. Co.*, 12 Am. & Eng. R. Cas. 459, 45 Mich. 453, 8 N. W. Rep. 74.

The court will not grant a sequestration or appoint a receiver of a corporation against whom an execution has been returned unsatisfied upon an *ex parte* application of the judgment creditor. But upon filing a petition duly verified, an order to show cause, at a future day, why the prayer of the petitioner should not be granted may be entered; and an injunction will be allowed restraining the officers of the company from selling, assigning, transferring, or encumbering the property or effects of the corporation in the meantime. *Devoe v. Ithaca & O. R. Co.*, 5 Paige (N. Y.) 521.—REVIEWED IN *Ramsey v. Erie R. Co.*, 38 How. Pr. (N. Y.) 193.

A receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard, except in those cases where he is out of the jurisdiction of the court and cannot be found, or where for some reason it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party to prevent the destruction or loss of property. *People v. Albany & S. R. Co.*, 1 Lans. (N. Y.) 308, 7 Abb. Pr. N. S. 265, 38 How. Pr. 228; modified in 5 Lans. 25, which is reversed in 57 N. Y. 161.

When a corporation has become extinct by legislative enactment, and its powers and property transferred to a new corporation substituted for it, the courts have no power, on an *ex parte* application, to appoint a receiver of the assets of the defunct corporation. *Young v. Rollins*, 12 Am. & Eng. R. Cas. 455, 85 N. Car. 485.

23. Notice.—A second mortgagee filed a bill for a receiver for railroad property, making the first mortgagee a party, and admitting the priority of the lien of the first mortgage. A receiver was appointed without notice to the first mortgagee, but a copy was served on him three days afterwards, with a notice to appear promptly and protect the interest of the first mortgage bondholders. Held, no ground for charging that the bill was fraudulent as attempting to create a receivership for the sole benefit of the second mortgage bondholders. *Mittenberger v. Logansport, C. & S. W. R. Co.*, 12

Am. & Eng. R. Cas. 464, 106 U. S. 286, 1 *Sup. Ct. Rep.* 140.

Service of notice of a motion for the appointment of a receiver was made upon the vice-president of defendant company, which was legal service on the company; but he fraudulently concealed the service, by means of which the company failed to resist the appointment. *Held*, that the court should reopen the case, and allow the company to move to vacate the appointment. *Allen v. Dallas & W. R. Co.*, 3 *Woods (U. S.)* 316.

Where no serious injury to the property involved in the controversy can result from the delay, notice should always be given before a receiver is appointed. A case of great urgency should be made to appear to justify such an appointment without notice, and, wherever an injunction or restraining order is sufficient to protect the rights of the plaintiff, no receiver should be appointed. The appointment of a manager of a line of railway is an extraordinary exercise of power. Such appointment should be made only in extreme cases clearly justifying such action. *State v. Jacksonville, P. & M. R. Co.*, 15 *Fla.* 201. *Cincinnati, H. & D. R. Co. v. Jewett*, 8 *Am. & Eng. R. Cas.* 702, 37 *Ohio St.* 649.

In an action for the appointment of a receiver without notice, the sufficiency of the cause required to be shown must be (1) the necessity of the appointment of a receiver at all; (2) the necessity for not giving notice to the adverse party; and sufficient cause not being defined in the statute, that question must be determined by the adjudged cases and precedents. A statement in a complaint that there is an emergency for the immediate appointment of a receiver without notice, being a mere statement of opinion, is not a sufficient showing, but the facts on which the opinion is founded should be pleaded. *Wabash R. Co. v. Dykeman*, 133 *Ind.* 56, 32 *N. E. Rep.* 823.

An action for the appointment of a receiver of a corporation, and to sequester its property, is an action for "a distribution of its assets" within the meaning of N. Y. Act of 1883, ch. 378, § 8, requiring copies of notices and motion papers in such actions to be served upon the attorney-general; and the appointment of a receiver without compliance with the section is void. *Whitney v. New York & A. R. Co.*, 66 *How. Pr. (N. Y.)* 436, 32 *Hun* 164, 5 *Civ. Pro.* 118.

24. Parties.—Where a second mortgagee of a railroad files a bill for a receiver, the first mortgagee is a necessary party; and the order appointing the receiver being served on the first mortgagee three days after made, it becomes his duty to appear promptly and protect the interests of the first mortgage bondholders. *Milttenberger v. Logansport, C. & S. W. R. Co.*, 12 *Am. & Eng. R. Cas.* 464, 106 U. S. 286, 1 *Sup. Ct. Rep.* 140.

Where railroad property is in the hands of a third person, as a purchaser under a judgment, who is not a party to the suit, the court will refuse to appoint a receiver. *Searles v. Jacksonville, P. & M. R. Co.*, 2 *Woods (U. S.)* 621.

A judgment creditor of a railroad company filed a bill for the appointment of a receiver to collect unpaid subscriptions to stock, making the company and certain of the stockholders defendants. Pending a hearing before the master other creditors were made plaintiffs, and the remaining stockholders were made defendants, but the pleadings were not amended. *Held*, that the appointment of a receiver without an issue joined as to the added defendants was not error. *Barley v. Pittsburgh Coal R. Co.*, 139 *Pa. St.* 213, 21 *Atl. Rep.* 72.

25. Sufficiency of the bill.—A bill alleging that plaintiff holds a majority of stock in a consolidated railroad company, and that his co-plaintiffs are judgment creditors of one of the original companies; that the business of the company is in a precarious condition, and that a receiver is necessary for the interest of all the parties to prevent levying executions and consequent loss, with a prayer for a receiver and an adjustment of all claims to and with creditors, is sufficient to enable a court to administer the affairs of the company, and marshal the debts, making necessary parties before deciding on the merits. *Union Trust Co. v. Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 U. S. 434, 6 *Sup. Ct. Rep.* 809. — QUOTED IN *Stevens v. Union Trust Co.*, 57 *Hun* 498, 33 *N. Y. S. R.* 130.

A corporation will not be declared insolvent and a receiver appointed on naked statements in the bill that it is insolvent and has suspended business for want of funds. Such facts must be set out as will show the insolvency. *New Foundland R. Constr. Co. v. Schack*, 40 *N. J. Eq.* 222, 1 *Atl. Rep.* 23.

An order appointing a receiver of an ex-

inct corporation cannot properly be made except in a proceeding to which its successor or substitute is a party. *Young v. Rollins*, 12 Am. & Eng. R. Cas. 455, 85 N. Car. 485.

When the prayer in a bill which seeks the appointment of a receiver describes the property for the control of which the receiver is asked, other property, though included in the order making the appointment, if the description given thereof is not in the prayer of the bill, is not thereby placed in *custodia legis*; as to it, the jurisdiction of the court not having attached, the order placing it in the hands of the receiver is without authority of law and void. *St. Louis, A. & T. R. Co. v. Whitaker*, 68 Tex. 630, 5 S. W. Rep. 448.

26. — or petition.—Under the Railway Companies Act, 1867, § 4, a judgment creditor is entitled to the appointment of a manager where his petition is supported by an affidavit to the effect that he is an unpaid judgment creditor and that the company is a going concern conducting its own business. *In re Manchester & M. R. Co., L. R. 14 Ch. D. 645*, 49 L. J. Ch. D. 365, 42 L. T. 714.

Where, in a petition for the appointment of a receiver of a railroad company, plaintiffs claim as heirs and legatees of their father, who, they allege, owned all the stock of the company, it is not error to dismiss without prejudice a subsequent pleading, filed by them shortly before trial, which recites that it is filed in lieu of their original petition, and in which they allege that their father fraudulently converted community property, one half of which belonged to their mother, to the building of the road, and claim as heirs of their mother. *McIlhenny v. Binz*, 80 Tex. 1, 13 S. W. Rep. 655.

The court of chancery appointed receivers of certain railroads, pursuant to a mandate of the supreme court that "said receivers and said roads and property shall be at all times subject to the jurisdiction and orders" of the court of chancery. A consent decree subsequently entered provided that the original cause should be continued on the docket of the court of chancery, and that any party might "apply to the court from time to time for further orders in the premises, as he or it may be advised." A special act of the legislature, authorizing a compromise adjustment to be carried into

effect, provided for petitions in that behalf instead of bills. The original parties to the cause continued, personally or by succession, to be parties for all the purposes for which the cause had been kept on foot. Other parties became interested after the consent decree, by connecting themselves with the current administration of the subject-matter of the trust, and thus, at least as far as form and judicial procedure were concerned, subjected themselves to the scope and operation of that and subsequent orders and decrees. *Held*, that as the subject-matter of the petition in this case, and the grounds on which it asked the action of the court, consisted of the proceedings, decrees, and orders in the original cause as thus kept pending, and of the administration of the property thereunder, a petition was the form and manner for presenting those matters for the consideration and action of the court contemplated by the law, under the original decree, and by the parties under the special act of the legislature and the ensuing consent decree. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 Vt. 500, 14 Am. Ry. Rep. 497.

27. — or complaint.—A stockholder may, under some circumstances, have a receiver appointed for his corporation, as where the company is insolvent, or where he asks that it be dissolved and wound up; yet where no such charge is made, and the prayer is for a general receivership, it will be refused, where its effect would be to remove all of the directors. *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637.—**APPROVING** *Fisk v. Chicago & R. I. R. Co.*, 36 How. Pr. 20.

A complaint must show that the plaintiff has such an interest in the controversy as entitles him to relief. So where a complaint fails to show that plaintiff has any standing in court, either as a creditor, bondholder, or stockholder of a railroad company, which would entitle him to a receiver or referee, no relief can be granted. *Ramsay v. Erie R. Co.*, 38 How. Pr. (N. Y.) 193, 7 Abb. Pr. N. S. 136.—**REVIEWING** *Galwey v. United States Steam Sugar Refining Co.*, 36 Barb. (N. Y.) 257; *People v. Norton*, 1 Paige (N. Y.) 17; *Devoe v. Ithaca & O. R. Co.*, 5 Paige 521; *Gibson v. Martin*, 8 Paige 481.

An order was granted to show cause why a receiver should not be appointed. Before the day fixed an application was made for an order to show cause why the com-

plaint should not be made more definite, and for a stay until a decision of the application. The judge granted the order to show cause, but refused the application for the stay, and an appeal was taken to the general term from a denial of the stay. *Held*, that the motion to make more definite should be decided first; but the general term, on appeal, would not presume that the trial court would not act properly, and would refuse a stay. *People v. Manhattan R. Co.*, 9 *Abb. N. Cas. (N. Y.)* 448, 24 *Hun* 662, *mem.*

28. Affidavits—Counter affidavits.

—When the defendant in an application for a provisional remedy meets the plaintiff's allegations by counter affidavits, it is competent for plaintiff to support his original affidavits by others to the same effect and in reply to those offered by the defendant. *Young v. Rollins*, 12 *Am. & Eng. R. Cas.* 455, 85 *N. Car.* 485.

29. *Matters of defense.*—Defendant corporation resisted an application by a judgment creditor for a receiver, and as a defense alleged that the judgment was obtained through the fraud of its president. The court granted time to make a motion to open the judgment on that ground, but the company failed to make any motion, or ask that the judgment be opened. *Held*, that this was sufficient to authorize the court to infer that the defense was without merit. *Loder v. New York, U. & O. R. Co.*, 4 *Hun (N. Y.)* 22.

30. *The order of appointment, generally.*—An order appointing a receiver and an advisory board to take possession of a railroad with all its property and operate it for the benefit of its creditors, stockholders, and all others interested, is not a judicial, but an administrative, order, which may be modified or changed without the consent of parties. *Ex parte Dunn*, 8 *So. Car.* 207.

In an action in the name of the state for the foreclosure of a railroad mortgage and the appointment of a receiver, on motion of the attorney-general an order was passed reciting that, as the state cannot be required to give security as other plaintiffs, the president and directors of the company, under the order of and subject to the court, continue in the possession and management of the property of the company, and continue to conduct and carry on the business of the company, and that they report to the

court at such times as it require. *Held*, that this order constituted the president and directors of the corporation receivers, and that they continued in the management of the road and its business as officers of the court and not of the company. (*Simpson, C.J.*, dissenting.) *In re Fifty-four First Mortgage Bonds*, 9 *Am. & Eng. R. Cas.* 739, 15 *So. Car.* 304.—REVIEWED IN *Ex parte Carolina Nat. Bank*, 18 *So. Car.* 289.—*In re Fifty-four First Mortgage Bonds*, 9 *Am. & Eng. R. Cas.* 723, 15 *So. Car.* 518.

A court passed an order which had the effect of constituting the officers of a railroad company receivers of the road, but this did not seem to be well understood, and the company continued to elect officers and to conduct its business as before. During the time the company note in its corporate name signed by its president and treasurer. *Held*, that the note was not made or received with reference to the receiver's fund, and the rights and obligations of the parties were the same as if the order had not been made. *Ex parte Williams*, 12 *Am. & Eng. R. Cas.* 425, 17 *So. Car.* 396.

31. What provisions are proper.*

—Upon the appointment of a receiver of all the property and effects of a corporation, for the purpose of closing up its affairs, it is proper to restrain its directors and officers from collecting debts and demands due to the corporation, and from paying out, assigning, or delivering any of its property, money, or effects to any other person, or from encumbering such property. *Morgan v. New York & A. R. Co.*, 10 *Paige (N. Y.)* 290.

A court has no power, in a suit appointing a receiver, to provide that claims must be established by intervention within a time shorter than what would constitute an equitable bar. *Kretz v. Texas & P. R. Co.*, (*Tex. App.*) 14 *S. W. Rep.* 1067.—FOLLOWING *Texas Pac. R. Co. v. Johnson*, 76 *Tex.* 421, 13 *S. W. Rep.* 463.

Though the court should properly, under the circumstances, appoint a receiver to take charge of and manage the road, it may not be proper to enjoin the directors of the company from doing any act as such. *Stevens v. Davison*, 18 *Gratt. (Va.)* 819.—

* Power of court on appointing receiver to make provision for payment of claims accruing prior to receivership, see note, 9 *AM. & ENG. R. CAS.* 718.

This rule is not qualified by the fact that the bond contains no provision for a report or accounting by the receiver. *French v. Dauchy*, 134 N. Y. 543, 31 N. E. Rep. 1041, 47 N. Y. S. R. 900; *affirming* 57 Hun 100, 32 N. Y. S. R. 544, 10 N. Y. Supp. 468.

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35. Appeals from the order.—Under N. Y. Act of 1870, ch. 408, § 10, the jurisdiction of the general term of the supreme court, in each department, is confined to orders which have been entered in the department. So where a justice in one district at chambers appoints a receiver of railroad property, an appeal will not lie from the order in another department, unless it appears that the order has been entered therein. *Clinch v. South Side R. Co.*, 2 Hun (N. Y.) 154, 4 T. & C. 683.

One aggrieved by a decree appointing a receiver may appeal in a proper case, even if the receiver cannot question the decree of the court appointing him. *Melendy v. Barbour*, 25 Am. & Eng. R. Cas. 622, 78 Va. 544.

V. RIGHTS, POWERS, AND DUTIES OF RECEIVERS.

1. Title and Possession—Contempt.

36. The receiver's title.—Before the receiver of an insolvent railroad corporation which has surrendered its property for the benefit of creditors can be held to have adopted outstanding leases, reasonable time is required to ascertain the situation, in order that the court may determine intelligently the proper course to be pursued. So where the income of a leased line is not sufficient to pay operating expenses, and it is not profitable as a feeder to the main line, the receiver of the system does not, merely by virtue of his appointment, become the assignee of the leased line, so as to require him to take general earnings to pay the rental of the leased road. *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. Rep. 795.—FOLLOWING Quincy, M. & P. R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. Rep. 787.

A temporary receiver, appointed at the instance of the attorney-general in an action brought upon the ground that a railroad corporation is insolvent, is not vested with the title to the property of the corporation, but is a mere custodian and manager of its property and franchise under the direction of the court, and, so being, is not a necessary party to a suit to foreclose a mortgage upon the railroad. *Herring v. New York, L. E. & W. R. Co.*, 35 Am. & Eng. R. Cas. 54, 105 N. Y. 340, 19 Abb. N. Cas. 340, 12 N. E. Rep. 763, 7 N. Y. S. R. 547; affirming 34 Hun 634, mem., 63 How. Pr. 497.

It seems, that jurisdiction to appoint a receiver of a corporation upon its dissolution is wholly statutory. Such a receiver is the representative of the corporate body, and in New York he is vested with the title to and is made trustee of the corporate property, and for the purpose of administering thereon and winding up the affairs of the corporation, he succeeds to its powers and franchises and possesses generally all the powers and authority conferred by statute upon the assignees of insolvent debtors. *Decker v. Gardner*, 48 Am. & Eng. R. Cas. 683, 124 N. Y. 334, 26 N. E. Rep. 814, 36 N. Y. S. R. 267.

Placing the property of a corporation in charge of a receiver does not work its dissolution, nor is the title of the property changed; a power only is delegated to take charge of it and sell it. *State (New Jersey S. R. Co. Pros.) v. Railroad Com'rs*, 41 N. J. L. 235.

The title of a receiver to the property attaches from the date of the order of court appointing him, without reference to the time of his giving bond. *Maynard v. Bond*, 67 Mo. 315.

Since no reassignment is necessary to reinvest the assignor with the title to an estate formerly placed in the custody of a receiver by order of a court of competent jurisdiction, it follows that no formal conveyance to the receiver is required in the first place from the owner or corporation whose estate is placed by judicial order in his custody. No formal assignment to the receiver from the owner is requisite to enable the court to pass title to a purchaser through a sale made by the receiver acting under its orders. *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. Rep. 686.

37. Receiver's possession, generally.*—Where a receiver, under New Jersey Act of Feb. 12, 1874, is appointed, in behalf of the public, to operate a railroad, the road so taken should, as a general rule, be returned to the company who was in possession when the receiver was appointed. The right of possession cannot be settled between two railroad companies, each claiming such right, in a proceeding under this act. *Long Branch & S. S. R. Co. v. Sneden*, 26 N. J. Eq. 539.

* Receiver's right of possession of property as affected by time of appointment and giving bond, see note, 20 L. R. A. 393.

One company had been running the railroad of another company in connection with its own road, when both roads were taken possession of by a receiver appointed under the above act. The second company filed a petition, asking that it might be permitted to run its own road. *Held*, that such petition was properly denied, it appearing that the right to the possession of this road was in dispute between the companies. *Long Branch & S. S. R. Co. v. Sneden*, 26 N. J. Eq. 539.

Where the court of common pleas, having jurisdiction in an action against a railroad corporation, has appointed a receiver who is in possession of the road, its property, and assets, and is proceeding in the execution of the trust under the direction and orders of the court, mandamus will not be issued against such corporation and receiver directing their conduct in operating the road. *State ex rel. v. Marietta & C. R. Co.*, 35 Ohio St. 154.

The provisions of Pa. Act of June 16, 1836, empowering a sequestrator to take possession and assume the control and management of the property of a corporation, are restricted by the act of April 22, 1858, so as not to apply to an unfinished railroad. It is the design of the latter act to give to the sequestrator, as the representative of creditors, the earnings of the completed portion of the road, but to preserve the corporate property within the possession, management, and control of the corporate officers. *Muncy Creek R. Co. v. Hill*, 84 Pa. St. 459.

38. Possession of receiver is the possession of the law.—After the appointment of a receiver the property to which the receivership relates is to be deemed in the custody of the law. *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 16 S. W. Rep. 647. *Turner v. Cross*, 83 Tex. 218, 18 S. W. Rep. 578. — FOLLOWED IN TEXAS & P. R. Co. v. Bledsoe, 2 Tex. Civ. App. 88.—*Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. Rep. 686. *Pacific R. Co. v. Wade*, 50 Am. & Eng. R. Cas. 362, 91 Cal. 449, 27 Pac. Rep. 768. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 46 Vt. 792.

But in running a railroad a receiver represents the company. *Bartlett v. Keim*, 35 Am. & Eng. R. Cas. 15, 50 N. J. L. 260, 11 Cent. Rep. 351. 13 Atl. Rep. 7.

The possession of a receiver appointed by a state court is the possession of that court, and a federal court will not disturb that

possession by granting a receiver. *Bruce v. Manchester & K. R. Co.*, 19 Fed. Rep. 342.

39. Obtaining possession.—An order appointing a receiver directed that "all the books, vouchers, and papers touching the operation of the road" should be delivered to the receiver. *Held*, that the order was not confined to such books as the receiver might specially demand, or such as related to the future business of the company, but included all relating to the past history of the company. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 Fed. Rep. 937.

An order appointing a receiver, and directing the delivery to him of "all and every part of the properties, interests, effects, moneys, receipts, and earnings" of the road, embraces the company's seal. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 52 Fed. Rep. 937.

The receiver had a rule issued to show cause why possession of certain real estate should not be surrendered to him. Both the parties and the subject-matter were within the jurisdiction of the court. The respondent appeared and voluntarily set forth in his answer his claims to the premises, and submitted the same to adjudication. *Held*, that this was a waiver of objections to the form of the proceeding. *Ex parte Davidson*, 57 Fed. Rep. 883.

A receiver claimed possession of certain books of the corporation under an order of court; but it appeared that the property of the company had been sold under a foreclosure, and that the books had been delivered to the purchaser, and had passed into the possession of a new company which claimed them under the purchase as owner. *Held*, that it could not be deprived of the possession in a summary manner, and that the receiver could only get possession by a proper suit in which the new company was made a party. *Olmsdt v. Rochester & P. R. Co.*, 46 Hun 552, 12 N. Y. S. R. 551.

An order appointing a receiver of a defunct corporation, with power to receive into his possession all the effects of the company, and also investing him with the usual rights and powers of receivers, involves the correlative duty of delivering the same to him by the late officers of the company in whose hands the funds are, although not expressly required in the decretal order. *Young v. Rollins*, 25 Am. & Eng. R. Cas. 646, 90 N. Car. 125.

40. Conflicting receiverships in federal and state courts.*—A court which first takes jurisdiction of a controversy and of the parties is entitled to retain it to final termination. So where a receiver is appointed in a state court, on a bill filed after proceedings have been commenced in a federal court, possession of the *res* under such appointment is wrongful, and must give way to the prior jurisdiction of the federal court. *Gaylord v. Ft. Wayne, M. & C. R. Co.*, 6 Biss. (U. S.) 286.

Where the property of a railroad company is in possession of a receiver appointed by a federal court, another corporation cannot obtain title by attempting to condemn a right of way over it, by proceedings in a state court instituted without the consent of the federal court. *Western Union Tel. Co. v. Atlantic & P. Tel. Co.*, 7 Biss. (U. S.) 367.

Where a federal court has appointed a receiver and he has actually taken possession of the property, the jurisdiction of that court is complete, and possession of the property will not be yielded to a receiver subsequently appointed in a state court, though the proceeding in the state court was instituted first. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. Rep. 608.

In such case a mere order of the state court, prior to the appointment of the receiver by the federal court, restraining the officers of the corporation from using its funds, except for strict corporate purposes, is not such possession of the property as to give it prior jurisdiction. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. Rep. 608.

Plaintiff company filed a bill alleging that it operated and controlled several lines of railway, and that it was unable to pay interest on its bonds, and had a receiver appointed to prevent dismemberment or disastrous litigation. Thereafter a receiver of a branch road, which plaintiff company controlled as part of its system, filed a petition asking that the road be surrendered to him, and alleged that he had been appointed by a state court after the other receivers had been appointed. It appeared that plaintiff company was a mere creditor of the other road, and held a majority of the stock therein, but had no other rights of

ownership. *Held*, that it had no right to the possession of the road, and that the prayer of the petition must be granted. *Central R. & B. Co. v. Farmers' L. & T. Co.*, 56 Fed. Rep. 357.

An order of a state court appointing a receiver of a railroad directed him to take possession of the property, but when he demanded possession it was refused by a receiver who had been appointed in a federal court, and the receiver of the state court applied to his court for a writ of assistance to obtain possession. It appeared that the federal receiver had been appointed in two suits, one of which had been commenced before the suit in the state court, and that the other was commenced afterwards upon a mortgage previously executed, and that the federal receiver was appointed before the receiver in the state court. *Held*, that the writ of assistance should not issue, though it was claimed that the federal court did not have jurisdiction. The proper remedy was by an action against the federal receiver, where his rights could be adjudicated. *Gelpeke v. Milwaukee & H. R. Co.*, 11 Wis. 454.

41. Possession of property out of state where appointed.*—Where a receiver has once obtained rightful possession of personal property situated within the jurisdiction of his appointment, he will not be deprived of its possession though he takes it, in the performance of his duty, into a foreign jurisdiction. While there it cannot be taken from his possession by creditors of the insolvent debtor who reside within such jurisdiction. *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.*, 108 Ill. 317.

Where a receiver has been appointed by the courts of another state, the courts of Pennsylvania, on the ground of the comity existing between the states, will recognize his appointment, provided his claims thereunder do not come into conflict with the rights of citizens of Pennsylvania. *Bagby v. Atlantic, M. & O. R. Co.*, 86 Pa. St. 291.

42. Conflict as to possession between receivers and attachment or execution creditors.†—Where property

* Jurisdiction of receiver as to property out of state where he is appointed, see note, 20 L. R. A. 392.

† Right to possession of property as between receiver and execution or attachment creditor, see note, 20 L. R. A. 392.

* Receiver's right to possession of property as between state and federal courts, see note, 20 L. R. A. 393.

is in the hands of a receiver, a sale thereof under an execution is void. *Wiswall v. Sampson*, 14 How. (U. S.) 52. — DISAPPROVED IN *Kinney v. Crocker*, 18 Wis. 74. DISTINGUISHED IN *Hills v. Parker*, 111 Mass. 508. FOLLOWED IN *Robinson v. Ohio & P. R. Co.*, 2 Pittsb. (Pa.) 257.

Where the property of a railroad is in the hands of a receiver, all litigation for its possession must be in the court appointing the receiver, without regard to citizenship. So a purchaser or bidder at a sale of the property subjects himself to the jurisdiction of the court without reference to where he may reside. *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609. — EXPLAINED IN *United States Trust Co. v. Wabash, St. L. & P. R. Co.*, 42 Fed. Rep. 343. REVIEWED IN *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y. 314.

By virtue of his appointment, and an order directing a receiver to take possession of all goods and chattels of a railroad company, he is not entitled to possession of lumber and wood which had formerly been owned by the company, but which had been sold on execution before the appointment of the receiver. *McIlrath v. Snure*, 22 Minn. 391.

Mortgage trustees instituted a suit in Kentucky to foreclose a mortgage on a road and to have a receiver appointed. Pending the suit certain rolling stock, which was covered by the mortgage, was temporarily in Ohio, and while there was taken in attachment by an unsecured Kentucky creditor. The whole property of the road was insufficient to pay the mortgage debt. *Held*, that upon principles of interstate comity the receiver would be allowed to institute suit in Ohio to recover possession of the property. *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 174.

A company owning land and having power to mortgage it gave a mortgage of all its estate and property, real and personal. *Held*, that the mortgage covered the land, whether it was necessary to the enjoyment of its franchises or not. A receiver of all the mortgaged property having been appointed, the land was in legal custody and could not be levied on. Whether the land should pass into the hands of a receiver could be determined only by the court that appointed him. *Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. St. 160.

Where a receiver of a corporation has

been appointed by a court of competent jurisdiction in another state, a creditor who resides in that state and is bound by the decree of its court appointing said receiver, cannot, in an attachment execution, recover assets of the corporation in Pennsylvania, which the receiver claims. *Bagby v. Atlantic, M. & O. R. Co.*, 86 Pa. St. 291.

Property in the hands of a receiver appointed by a court of chancery is not liable to seizure and sale under execution on a judgment at law. *Robinson v. Ohio & P. R. Co.*, 2 Pittsb. (Pa.) 257. — FOLLOWING *Wiswall v. Sampson*, 14 How. (U. S.) 52.

A decree of the supreme court of the state allowed plaintiff to redeem certain property from certain conveyances to defendant on the payment of a certain sum within ninety days therefrom. The circuit court, to which the mandate was sent, on the application and consent of the parties, made an order enlarging the time for redemption to three years, and placing the property in the hands of two persons during that time. *Held*, that these persons were not receivers, but only agents of the parties, and that their appointment would not prevent this court from directing the sale of a certain portion of said property on which plaintiff has a lien in virtue of a decree. *Hickox v. Holladay*, 12 Sawy. (U. S.) 204.

A sale of property in the hands of a receiver, made under execution issuing from another court, or in a different case, unless authorized by the order of the court appointing the receiver, is a nullity, and no title passes. *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. Rep. 686.

43. — between receivers and assignees in bankruptcy.*—Where foreclosure proceedings are instituted against a corporation in a federal court, a receiver appointed who has possession before bankruptcy proceedings are commenced in a federal court cannot be dispossessed by the federal court. *Davis v. Alabama & F. R. Co.*, 1 Woods (U. S.) 661.

Where the proceeding in a state court is to enforce a specific and vested lien, such possession is lawful, and can only be avoided by the payment of the mortgage debt by the assignee in bankruptcy. *Davis v. Alabama & F. R. Co.*, 1 Woods (U. S.) 661.

* Exclusive jurisdiction of court appointing receiver as against assignee in bankruptcy, see note, 20 L. R. A. 391.

And where the property has been taken from the receiver and sold by the assignee in bankruptcy, and due notice of the illegality of the sale is given at the time, it will be set aside, and the purchase money returned. *Davis v. Alabama & F. R. Co.*, 1 *Woods* (U. S.) 661.

Where receivers, appointed by state courts, take possession of a railway, the property must be regarded as in the possession of the courts, and such possession will not be interfered with, unless the title of the receivers can be impeached under the bankrupt act. *Alden v. Boston, H. & E. R. Co.*, 1 *Fed. Cas.* 328, 5 *Bankr. Reg.* 230.

44. — between receiver and lien for taxes.—Railroad property which is in the hands of a receiver appointed by a federal court is not subject to seizure under a process issued from a state court to enforce the collection of taxes. *In re Tyler*, 149 U. S. 164, 13 *Sup. Ct. Rep.* 785.

In such case the remedy of the tax collector is to apply to the court which appointed the receiver, where the validity of the tax, and the question of the priority of payment of the taxes under the state laws, may be determined. *In re Tyler*, 149 U. S. 164, 13 *Sup. Ct. Rep.* 785.

Railroad property in the hands of a receiver may be seized and sold for state taxes, when there is nothing to show that the taxes are not just and legal, or that they are not due. The mere fact that the receivers have no money on hand to pay the taxes is no excuse for stopping the process of the state for their collection. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 26 *Fed. Rep.* 11.

An order appointing a receiver which confers upon him all the powers and authority of a permanent receiver vests him with all the estate, real and personal, of the corporation, and he becomes a trustee of such estate for the benefit of the corporation creditors and stockholders. He is, therefore, both the owner and the occupant of the real estate of a railroad, and the assessment of a tax thereon against the company, and not against the receiver, cannot be collected. *In re Mallory*, 18 *N. Y. S. R.* 499, 2 *N. Y. Supp.* 437.

45. Interference with possession of receivers.—(1) *Federal decisions.*—When a receiver is in possession of property pending a suit involving the right to its possession merely, as in a suit to redeem from a

mortgage, the court is of opinion that a mere sale of such property on the process of another court is not an interference with such possession. *Hickox v. Holladay*, 12 *Sawyer* (U. S.) 204.

A railroad company petitioned for leave to cross the tracks of another company near a station which was in the hands of a receiver appointed by a federal court. *Held*, that it was not the policy of the court to place obstacles in the way of public improvements, and the leave would be granted upon the petitioning company giving bond to secure any damages that might be caused to the other company by such crossing. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 26 *Fed. Rep.* 3.

After a street-railway company operated by horse power, but which had the privilege of using electricity, had gone into the hands of a receiver, the city authorities granted an electric railway company the right to lay its tracks on a street partly within the rails of the existing company for a distance of five blocks in the business portion of the city. *Held*, that this would materially impair the enjoyment of the property, and would be enjoined on application by the receiver. *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 *Fed. Rep.* 687.

But where it appears that the receiver does not desire to use electricity as a motive power on his road, the court will not consider how its use, for the distance above stated, would affect purchasers of the road at a foreclosure sale, if they should decide to use electricity. The relative rights of such persons and the new company can be settled when they arise. *Fidelity T. & S. V. Co. v. Mobile St. R. Co.*, 53 *Fed. Rep.* 687.

(2) *State decisions.*—A conveyance by a railroad company of a portion of its property to parties with whom it had contracted to convey such portion upon the breach of a condition cannot disturb the possession of a receiver appointed by the court, in an action against the company for the foreclosure of a mortgage, or embarrass him in the discharge of his duties. *Klauber v. San Diego Street-Car Co.*, 95 *Cal.* 353, 30 *Pac. Rep.* 555.

On the appointment of a receiver for a railroad company, the court, by injunction, prohibited the company from interfering with the property, or disturbing the possession of the receiver; but this would not

operate to prevent the company building a fence along its right of way, as required by the statute, and so would afford no defense to an action by an adjacent landowner to recover twice the value of a fence which he had built after due notice to the company. *Ohio & M. R. Co. v. Russell*, 23 *Am. & Eng. R. Cas.* 149, 115 *Ill.* 52, 3 *N. E. Rep.* 561.

Where by a judgment of a circuit court of the United States the assets of a corporation have been taken possession of, and placed in the hands of a receiver, no writ of attachment or any other process can legally issue from any other court to disturb the receiver's possession of such assets, or take effect on any right or debt that may have accrued in favor of the corporation after the receiver had qualified and taken charge. *Gest v. New Orleans, St. L. & C. R. Co.*, 30 *La. Ann.* 28.

The petitioner was the receiver and manager of two railroads, under appointment of the court of Vermont. In the course of business large amounts due the petitioner from the earnings of these roads accumulated in the hands of corporations and parties in other states. One company brought suit in Massachusetts against the trustees of the other company under a certain mortgage, and summoned also as trustees of defendants the corporations and parties holding said sums of money, for the purpose of locking up said funds in the hands of the trustees, who were in doubt whether they could safely pay the balances to the petitioner. The petitioner prayed for an order enjoining the company from prosecuting said suit, and to release its attachment of the funds. *Held*: (1) That the proper record evidence of appointment as receiver is conclusive evidence of the right of the party to act as such until it is impeached. It is immaterial whether the order of appointment was erroneous or improper; while it is a subsisting order, the receiver will be sustained in his possession of the property. (2) The proceedings by petition are formal and valid, as the aid must be summary and speedy to be beneficial. The remedy at law is not adequate. (3) The court has the right to restrain parties within its jurisdiction from prosecuting suits in foreign courts grounded upon the fact that the party upon whom the order is made is within the jurisdiction of the court. (4) A receiver is indifferent

to both parties in the suit. He is the officer and servant of the court, and entitled to its protection while in the proper discharge of his duty. Persons interfering with him are guilty of contempt of court. The prayer for relief was granted. *Vermont & C. R. Co. v. Vermont C. R. Co.*, 46 *VI.* 792.—FOLLOWING *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 *Vt.* 470.

46. — contempt.*—A court appointing a receiver may draw to itself all controversies to which the receiver is a party, or which affect the property under his control, yet it does so only by direct action upon parties by way of injunction, or proceedings as for contempt; and the appointment in no manner affects the ordinary jurisdiction of other tribunals. *St. Joseph & D. C. R. Co. v. Smith*, 19 *Kan.* 225.

A strike occurred on a railroad while it was in the hands of a receiver appointed by a federal court. During the strike a person who claimed to be chairman of a local committee sent a communication to various employes, requesting them to stay away from the shops until the difficulty was settled, and stating that compliance would command the protection of the employes, but that it was not to be considered as an intimidation. *Held*, that this was an unlawful interference with the management of the road by the receiver, and, therefore, a contempt of court. *In re Wabash R. Co.*, 24 *Fed. Rep.* 217.

2. Rights and Powers.

47. In general.†—The placing of railroad property in the hands of receivers does not transfer to them such matters as pertain to the corporate existence, such as the annual meetings and the election of directors. *Farmers' & M. Nat. Bank v. Philadelphia & R. R. Co.*, 14 *Phila. (Pa.)* 456.

A receiver appointed under Tenn. Code, § 1101, is vested with the powers and duties of the board of directors in managing the affairs of the company, and is a public agent of the state. *Erwin v. Davenport*, 9 *Heisk. (Tenn.)* 44, 19 *Am. Ry. Rep.* 274.

* Interference with receivers as contempt of court, see note, 45 *AM. & ENG. R. CAS.* 104.

† Nature of receiver's power, see note, 4 *AM. & ENG. R. CAS.* 82.

Receivers, various powers and liabilities of, see 42 *AM. & ENG. R. CAS.* 32, *abstr.*

The rights of a true owner of property cannot be prejudiced by any act or admission of a receiver who had it temporarily in charge. *Rio Grande & E. P. R. Co. v. Milmo*, 79 Tex. 628, 15 S. W. Rep. 475.

48. Territorial powers.*—The powers of a receiver are co-extensive only with the jurisdiction of the court appointing him, and a foreign receiver will not be permitted, as against the claims of creditors resident in the state, to remove from the state the assets of the debtor, it being the policy of every government to retain in its own hands the property of the debtor until all domestic claims against it have been satisfied. *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.*, 108 Ill. 317.

Receivers or trustees of the effects of an insolvent corporation of another state, appointed under the laws of such state, with power to take possession of all the effects of such corporation, "and to sell, convey, or assign its real and personal estate," have power to sell and assign a debt due to the corporation from a citizen of this state, and such sale and assignment give to the purchaser the equitable right of action as against the debtor in the courts of this state. *Hoyt v. Thompson*, 5 N. Y. 320; *reversing 3 Sandf.* 416.—REVIEWING Willink *v. Morris C. & B. Co.*, 4 N. J. Eq. 400.

49. Powers in operating the road.—(1) *Federal decisions.*—A court of equity may, in its discretion, in view both of the public and private interests involved, authorize its receiver to keep a railroad in repair, and to manage and use it in the ordinary way, until it can be sold to the best advantage of all interested therein. *Barton v. Barbour*, 4 Am. & Eng. R. Cas. 1, 104 U. S. 126.—FOLLOWED in *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

In the matter of charges a receiver will be justified, until further order, in following a state statute, in all instances where the rates fixed by it are reasonable and fairly compensatory. *In re McElrath*, 2 Dill. (U. S.) 460.

But if the receiver is of opinion that the rates fixed by the statute are unjust, and that they are unreasonably low and will not compensate for the services required, he is at liberty to act in such cases, for the time being, under the direction and advice of

the mortgage trustees. *In re McElrath*, 2 Dill. (U. S.) 460.

Where the matters pertaining to a foreclosure suit and the appointment of a receiver are pending in the supreme court of the United States on appeal, and an early decision is expected, which will determine the rights of the litigating parties, and will terminate many other undecided questions, the trial court will refuse any order authorizing the receiver to expend the trust funds, in such matters as acquiring the right to use a new junction road through a city, or to purchase a bridge across a bay. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 Woods (U. S.) 331.

(2) *State decisions.*—Where it is alleged and admitted that the receiver of a railroad company managed and controlled the business of the company and operated the railway, a contract relative to the carriage of goods will not be held to be in violation of his authority until the authority conferred upon him by the court is shown. *Bayles v. Kansas Pac. R. Co.*, 40 Am. & Eng. R. Cas. 42, 13 Colo. 181, 22 Pac. Rep. 341, 5 L. R. A. 480, 2 Int. Com. Rep. 643.

An express company contracted with a railroad for the carrying of express matter over its road and the lines leased by it, the amounts due to the railroad for freight to be applied in repayment of money to be advanced by the express company. The railroad became insolvent, and receivers, having continued to carry the express matter, filed a motion that the express company pay in cash. *Held*, that the fact that the officers of the leased corporations induced the express company to enter into the contract and make the advance, by representations that they might safely do so, was no answer to the motion, it not appearing that the money paid by the express company was apportioned among the corporations, and the other corporations not being parties to the proceedings. *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1.

The proceedings of a receiver appointed under the N. J. Act of 1874, "for the relief of citizens of any railroad that has or may hereafter fail or neglect to operate," will not be stayed to allow an inquiry into the causes of the failure of the company to operate. *In re Long Branch & S. S. R. Co.*, 24 N. J. Eq. 398.

A company having the contract right to run over defendant's track by paying a

* Territorial powers and jurisdiction of receivers, see note, 8 AM. ST. REP. 49.

In re McElrath, 2

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is shown. *Bayles v.*
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in arrears, a receiver of defendant road severed the connection between the two roads. *Held*, on a petition for damages, and to have the connection restored, that the petitioners were not entitled to relief on the ground of oppressive and unwarranted conduct on the part of the receiver. *Elmira I. & S. Rolling Mill Co. v. Erie R. Co.*, 26 *N. J. Eq.* 284.—REFERRED TO IN *Re New Jersey & N. Y. R. Co.*, 29 *N. J. Eq.* 67.

50. Power to make contracts, generally.*—A receiver has no power, unless authorized by the court appointing him, to contract for municipal aid in order to complete the railroad. *Smith v. McCullough*, 3 *Am. & Eng. R. Cas.* 159, 104 *U. S.* 25.

A party who enters into a contract with a receiver is bound to take notice of his disability to contract, and makes a contract with him at his peril. *Tripp v. Boardman*, 49 *Iowa* 410. *Lehigh C. & N. Co. v. Central R. Co.*, 9 *Am. & Eng. R. Cas.* 479, 35 *N. J. Eq.* 426.—QUOTING *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 336.

All contracts made by a receiver are subject to the control of the chancellor, and he may modify them, or disregard them entirely, as to him may seem best. *Lehigh C. & N. Co. v. Central R. Co.*, 9 *Am. & Eng. R. Cas.* 479, 35 *N. J. Eq.* 426.

Contracts made by a receiver are, in some respects, *sui generis*. They bind the receiver, not personally, but as the representative of the trust, and are to be enforced, or redress for their breach is to be accorded out of the fund. But he who contracts with the receiver does so with the knowledge that, for any injury received thereby, he can only get redress by obtaining the permission of the court whose officer the receiver is, to sue at law, or to proceed against him in the court of chancery, and in either case by satisfying that court that the claim is well founded. *Vanderbilt v. Central R. Co.*, 35 *Am. & Eng. R. Cas.* 18, 43 *N. J. Eq.* 669, 10 *Cent. Rep.* 849, 12 *Atl. Rep.* 188; *affirming* 41 *N. J. Eq.* 167, 3 *Atl. Rep.* 134.

Upon an application for redress upon such contracts, the determination of the court is to proceed on equitable principles adapted to the administration of an insolvent estate of this character. If, on exam-

ination, the contract appears to be improvident or detrimental to the trust, it should not be enforced, nor should damages for its non-performance be awarded. But if the contractor made the contract in ignorance of its improvidence, and has in good faith prepared to perform it, and if, by its non-performance, he suffers actual loss without his fault, then the fund, the representative of which has misled him, ought to reimburse his actual loss. *Vanderbilt v. Central R. Co.*, 35 *Am. & Eng. R. Cas.* 18, 43 *N. J. Eq.* 669, 10 *Cent. Rep.* 849, 12 *Atl. Rep.* 188; *affirming* 41 *N. J. Eq.* 167, 3 *Atl. Rep.* 134.

51. Contracts of purchase.*—Receivers of a road will not be authorized to borrow money upon rolling stock manufactured at the company's shops and elsewhere for the receivers, or to create what is known as a car trust, when the net earnings of the road are sufficient to purchase necessary rolling stock, where the only reason assigned for doing so is to allow the net earnings of the road to be paid on overdue interest on bonds. *Taylor v. Philadelphia & R. R. Co.*, 3 *Am. & Eng. R. Cas.* 177, 9 *Fed. Rep.* 1, 14 *Phila. (Pa.)* 501.

Such authority will not be granted when the court deems the creation of such a loan inexpedient. *Taylor v. Philadelphia & R. R. Co.*, 3 *Am. & Eng. R. Cas.* 177, 9 *Fed. Rep.* 1, 14 *Phila. (Pa.)* 501.

A receiver of an insolvent railroad corporation has authority to make such contracts for labor and supplies as are reasonably necessary to enable him to perform the duties of his appointment, and equity will enforce such contracts against the trust. *Lehigh C. & N. Co. v. Central R. Co.*, 41 *N. J. Eq.* 167, 3 *Atl. Rep.* 134; *affirmed in* 43 *N. J. Eq.* 669, 12 *Atl. Rep.* 188.

When contracts for the purchase of goods, etc., have been orally made by a receiver, deliveries to his agents empowered to examine and certify whether such goods should be accepted, and the receipt and acceptance thereof upon such examination and certificate and payment therefor, will satisfy the provision of section 6 of the statute of frauds, and the contract will bind the fund if otherwise enforceable. *Vanderbilt v. Central R. Co.*, 35 *Am. & Eng. R. Cas.* 18, 43 *N. J. Eq.* 669, 10 *Cent. Rep.* 849.

* Powers and duties of receivers. Necessary contracts, see note, 12 *AM. & ENG. R. CAS.* 451.

* General powers of receivers to purchase rolling stock and to pay wages, etc. Wages of employes held not to include services of counsel, see note, 48 *AM. & ENG. R. CAS.* 681.

12 *Atl. Rep.* 188; *affirming* 41 *N. J. Eq.* 167, 3 *Atl. Rep.* 134.

52. Power to incur expense, make outlays, etc.—A receiver should not borrow large sums of money to pay operating expenses of his railroad without permission of court, and if he does so a court of equity may allow it in settling his accounts, but it will not be made a lien in preference to the bonded indebtedness of the road. But a receiver may borrow small sums for necessary operating expenses with the permission of the court. *Union Trust Co. v. Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809. —EXPLAINED IN *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 *Fed. Rep.* 874.

All outlays made by a receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver intrusted with the management and operation of a railroad. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331. —APPROVED IN *Meyer v. Johnston*, 64 *Ala.* 603. QUOTED IN *Lehigh C. & N. Co. v. Central R. Co.*, 9 *Am. & Eng. R. Cas.* 479, 35 *N. J. Eq.* 426.

His duties, and the discretion with which he is invested, are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance which may involve a considerable outlay of money in lump. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331.

And except in extraordinary cases the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his ap-

proval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331.

It is the duty of the receiver of the gross proceeds and revenues of a railway to pay all expenses necessary for the maintenance, management, and working of the undertaking, but he is not warranted in expending the same in extraordinary outlays, and where an application is made by the receiver to authorize the purchase of a large amount of rolling stock, the outlay in respect of which will require to be met by anticipating income, the court will refuse its sanction. *Lee v. Victoria R. Co.*, 29 *Grant's Ch. (U. C.)* 110.

53. Power to pledge assets.—Where a bill is filed by the president and directors of a company, alleging that, as a result of an unlawful lease and the diversion of its income, it has been embarrassed, but, if properly managed, it may extricate itself from its difficulties, and the court appoints the president receiver for the purpose of preserving the property, and with the aid of the court placing it upon a prosperous footing, and no lien creditors are parties, it is competent for such receiver, with the authority of the court, to pledge collateral and equitable assets of the company to secure loans necessary to its operation, and also to incur a liability for the expenses of a re-funding scheme. *Clarke v. Central R. & B. Co.*, 54 *Fed. Rep.* 556.

If, however, before such expenses are paid, creditors holding liens upon the property are made parties, the court will not *ex parte* allow the expenses of such refunding scheme to be paid by the receiver. *Clarke v. Central R. & B. Co.*, 54 *Fed. Rep.* 556.

54. Power to lease the road.—A receiver of a railroad, under an appointment of the governor, has no power to lease the road so as to vest the lessees with an interest in the road and its franchises, which cannot be divested by a subsequent act of the legislature. *McMinnville & M. R. Co. v. Huggins*, 3 *Baxt. (Tenn.)* 177.—FOLLOWED IN *State v. McMinnville & M. R. Co.*, 4 *Am. & Eng. R. Cas.* 95, 6 *Lea* 369.

A statutory receiver of a delinquent rail-

* Authority of receiver to incur expense, see note, 3 *AM. & ENG. R. CAS.* 180.

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road has no power to lease the road, and payment of rents by the lessees, under such void lease, to an officer of the state, and the reception of such rents by such officer, would be no ratification of the void lease; the legislature alone could ratify it. There can be no recovery for improvements made upon the road by the lessees under such void lease. *State v. McMinnville & M. R. Co.*, 4 Am. & Eng. R. Cas. 95, 6 Lea (Tenn.) 369.—FOLLOWING *McMinnville & M. R. Co. v. Huggins*, 3 Baxt. 177.

55. Power to pay claims and debts.

—A consolidated railroad which was made up in part of leased lines was placed in the hands of a receiver, with the privilege to any lessor company to resume possession of the leased line if the rent was unpaid. It was made to appear that one branch of the system was earning more than operating expenses, whereupon an order was entered directing that "after meeting obligations which have been directed to be discharged by former orders the rental of such branch shall be paid to the intervener, until otherwise directed." Held, that this did not authorize the payment of such until the debts expressly directed to be paid by the former orders of the court had been paid. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 38 Fed. Rep. 63; modifying 34 Fed. Rep. 259.—APPLIED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26.

A receiver of a railroad appointed on the application of judgment creditors is not authorized to pay claims for work and materials furnished before his appointment. *Powers v. Jourdan*, 4 N. Y. S. R. 839; affirmed in 110 N. Y. 680, mem., 18 N. E. Rep. 483, mem.

A court of chancery, by its inherent powers, may enlarge the power of its receiver, but no power to pay debts except out of earnings exists as to a receiver by contract. *State v. Edgefield & K. R. Co.*, 4 Am. & Eng. R. Cas. 86, 6 Lea (Tenn.) 353.

56. Controlling power of the court.—Where the property of a railway or other corporation is being administered by a receiver, it is competent for the court to adjust difficulties between the receiver and his employés, which, in the absence of such adjustment, would tend to injure the property and to defeat the purpose of the receivership. *Waterhouse v. Comer*, 53 Am. & Eng. R. Cas. 329, 55 Fed. Rep. 149.

Certain employés of a railroad in the hands of a receiver made complaint to the court that they were overworked, underpaid, and mistreated. Held, that the court would not interfere where the only proof of overwork was that certain employés in the freight department were at times required to work a little over hours, but were sometimes idle during regular hours; that an increase of pay would not be ordered where the road was not paying expenses; and that an efficient, honest foreman would not be removed because he was energetic and pushing, and sometimes swore at the men. *Frank v. Denver & R. G. R. Co.*, 23 Fed. Rep. 757.

57. Applying to court for advice.

—Upon application to the court, receivers will be generally advised, and, in particular cases, particular advice and instruction will be given. The advice may be decisive if the parties in interest are present; but if the matter is *ex parte* such advice is binding only on the receivers, for the judge may change his mind on hearing full argument. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Am. & Eng. R. Cas. 76, 31 Fed. Rep. 862.

A federal circuit court appointed a receiver for an entire system of railroads, which included a line in another circuit. Subsequently proceedings were commenced in that circuit on an underlying mortgage, and the receiver was discharged for that circuit and a new one appointed; whereupon the first receiver applied to his court for instructions. The court directed him to relinquish control of the road in the other circuit, together with the other lines in that circuit whose earnings were not above operating expenses, unless the matter should be settled in thirty days; to deliver to the other receiver the account books relating to the roads surrendered, but to retain the general books of account, with the right to the other receiver to inspect them and take copies; to surrender the rolling stock covered by the mortgages sought to be foreclosed in the other circuit, and to retain all moneys in his hands, or which might come into his hands, subject to the order of the court. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 29 Fed. Rep. 618.

A receiver, without an order of court, has no right to grant the privilege of crossing the railway he represents, especially at a different grade, although the company rep-

resented by the receiver does not own the fee. The right to run the road over the land is property, and can only be taken by agreement or by condemnation. *Howlett v. New York, W. S. & B. R. Co.*, 14 *Abb. N. Cas. (N. Y.)* 328.

3. Duties and Liabilities.

58. Duties, generally.—A receiver of a corporation takes its property, including its franchises, in the same condition and subject to all the duties, obligations, and liabilities that rested upon the corporation itself, and, in the administration of his office, is bound for the performance of every duty and obligation imposed upon the corporation by its charter or by the general laws of the state. *State (New Jersey S. R. Co. Pros.) v. Railroad Com'rs*, 41 *N. J. L.* 235.

When a corporation is in the hands of receivers, and the treasurer of the corporation is also the treasurer of the receivers, it is clearly the treasurer's duty, under Pa. Act of 1885, to assess the tax upon the company's bonds, on payment by the receivers of interest thereon. *Com. v. Philadelphia & R. C. & I. Co.*, 137 *Pa. St.* 481, 20 *Atl. Rep.* 531, 580.—**DISTINGUISHED IN** *Com. v. Philadelphia & R. R. Co.*, 150 *Pa. St.* 312.

Where the receiver is appointed to receive "the rents, issues, and profits of the railway," it is his duty to receive the gross receipts of the company for the carriage of passengers, freight, mails, etc., and to pay the bills for running expenses thereout, and not to receive only the surplus after paying the expenses, and the order for his appointment should direct the payment to him of the tolls and profits arising from the railway. *Simpson v. Ottawa & P. R. Co.*, 1 *Chan. Chamb. (U. C.)* 126.—**QUOTED IN** *Smith v. Port Dover & L. H. R. Co.*, 12 *Ont. App.* 288. **REVIEWED IN** *Phelps v. St. Catharines & N. C. R. Co.*, 19 *Ont.* 501.

59. Duty to make repairs.*—A receiver who fails to make necessary repairs on rented engines, whereby they are damaged, is liable therefor, payment to be made out of the trust fund. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss. (U. S.)* 527.

Receivers were appointed for a road, including its leased lines, among which was a

half interest in a certain bridge and a few miles of track approaching the bridge. The receivers made a special contract for repairs to the bridge, which were made by the joint tenants. *Held*, that the receivers were liable, as such, for the repairs, to a special receiver appointed for the other joint tenant, though they might have a good defense as against the road itself. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 52 *Fed. Rep.* 908.

60. How far bound by pre-existing contracts.*—An assignee or receiver of a railroad is not bound to adopt the contracts or accept the leases of his assignor, if, in his opinion, it would be unprofitable or undesirable to do so; and he is entitled to a reasonable time to elect whether to adopt or repudiate such contracts. *United States Trust Co. v. Wabash Western R. Co.*, 150 *U. S.* 287, 14 *Sup. Ct. Rep.* 86.

Where receivers agree, in order to avoid litigation, to accept certain rails which the company had contracted for, believing that the acceptance will be advantageous, they are bound to receive them and pay the contract price, though they could have bought them at the time for less, and the prospect of advantage to the road has disappeared. *Wabash, St. L. & P. R. Co. v. Central Trust Co.*, 17 *Am. & Eng. R. Cas.* 261, 22 *Fed. Rep.* 269.

A receiver of a railroad is warranted in continuing a pooling contract in force where it is for the benefit of the road. Where such contract has been executed, the receiver cannot set up its invalidity, but must account to the other contracting roads for moneys received under it. *Central Trust Co. v. Ohio C. R. Co.*, 23 *Am. & Eng. R. Cas.* 666, 23 *Fed. Rep.* 306.

Where a railroad company has let a contract for the erection of a building, and the work is in progress when the road goes into the hands of a receiver, the builder is entitled to the contract price for work done after the receiver is appointed, and before he is notified to quit, or a new arrangement is made. *Girard L. I. A. & T. Co. v. Cooper*, 51 *Fed. Rep.* 332, 4 *U. S. App.* 631, 2 *C. C. A.* 245.

It is not true that a receiver empowered to take possession of, control, and operate a railway, is in no sense the representative of the corporation that owns it; nor is it

* Liability of receivers, trustees, etc., operating railroad, see note, 70 *AM. DEC.* 429.

* As to how far receivers of roads are bound by existing contracts, see note, 16 *L. R. A.* 90.

true that a court appointing a receiver is under no obligation to continue in force, and in some cases to cause to be fulfilled, the personal contracts of the company, though they may have been improvidently made. *Howe v. Harding*, 42 Am. & Eng. R. Cas. 1, 76 Tex. 17, 13 S. W. Rep. 41.

A receiver, as a general rule, is but the agent of the court that appoints him, with authority to take possession and control of property the subject-matter of litigation, and is not the representative of its owner for the fulfilment of the latter's contracts except in cases in which he has made the contract his own by some act of adoption. *Brown v. Warner*, 45 Am. & Eng. R. Cas. 95, 78 Tex. 543, 14 S. W. Rep. 1032.

When appellants were appointed receivers of the railway, there was a contract between the railway company and a third party for the maintenance of a switch upon his land. *Held*, that this was purely a personal contract. The duty of the receivers was to hold and operate the railway, and they were not bound to carry out the contract. *Brown v. Warner*, 45 Am. & Eng. R. Cas. 95, 78 Tex. 543, 14 S. W. Rep. 1032.—FOLLOWING *Hunt v. Reilly*, 50 Tex. 99. QUOTING *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 199; *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1. REVIEWING *Howe v. Harding*, 76 Tex. 17.

It is error to overrule a general demurrer to a petition setting up as cause of action the discontinuance by receivers of a railway company of a switch upon plaintiff's land, for maintenance of which the company only was bound. *Brown v. Warner*, 45 Am. & Eng. R. Cas. 95, 78 Tex. 543, 14 S. W. Rep. 1032.

61. — contracts for rolling stock. Where a receiver takes possession of rolling stock which is held by the company under an agreement for the payment of a rental, the title being retained by the lessor until a certain sum shall be paid, the owner of such rolling stock is entitled to payment for its use by the receiver. *Kneeland v. American L. & T. Co.*, 43 Am. & Eng. R. Cas. 519, 136 U. S. 89, 10 Sup. Ct. Rep. 950.

The rental payable by the receiver under such circumstances is to be estimated, not according to the actual mileage, but according to the reasonable value of the rolling stock, irrespective of the actual use. *Kneeland v. American L. & T. Co.*, 43 Am. &

Eng. R. Cas. 519, 136 U. S. 89, 10 Sup. Ct. Rep. 950.

Where receivers are directed to take charge of all the property of the company, including leased cars, and they take charge of certain leased sleeping cars, with full knowledge of the lease and of the rent agreed to be paid by the company and other obligations assumed, they become the assignees of the company and are bound by the contract. *Easton v. Houston & T. C. R. Co.*, 38 Fed. Rep. 784.—FOLLOWING *Woodruff v. Erie R. Co.*, 93 N. Y. 619; *Dorrance v. Jones*, 27 Ala. 630; *Pugsley v. Aikin*, 11 N. Y. 494; *Sutliff v. Atwood*, 15 Ohio St. 186; *People ex rel. v. Dudley*, 58 N. Y. 323.

62. — contracts made by former receiver.—Contracts made by a preceding receiver impose no legal duty or obligation on his successor, and damages cannot be recovered at law against the succeeding receiver for refusing to perform the contracts of his predecessor. *Lehigh C. & N. Co. v. Central R. Co.*, 41 N. J. Eq. 167, 3 Atl. Rep. 134; affirmed in 43 N. J. Eq. 669, 12 Atl. Rep. 188.

The duties of a succeeding receiver, in respect to the contracts of his predecessor, are only such as, in view of all the circumstances of the case, it is equitable to impose—such as, with the light before him, the succeeding receiver can perform without risk of personal liability and with safety to the trust. *Lehigh C. & N. Co. v. Central R. Co.*, 41 N. J. Eq. 167, 3 Atl. Rep. 134; affirmed in 43 N. J. Eq. 669, 12 Atl. Rep. 188.

Complainant contracted with a former receiver of a railroad to remove the coal, ashes, and cinders from a specified ash-pit on the road, and to have therefor the coal, ashes, and cinders so removed. He alleges that the former receiver refused to allow him to perform the contract, and that he thereby sustained great damage. *Held*, on demurrer, that this court will entertain jurisdiction of the suit, on the ground that the contract having been made with a former receiver, the present receiver (the defendant) cannot be sued thereon at law, and the claim is against the trust funds of the railroad company, which are still under the control of this court. *Kerr v. Little*, 39 N. J. Eq. 83.

In such case plaintiff may recover the damages which he sustained from the breach

of the contract. *Kerr v. Little*, 42 N. J. Eq. 528, 7 Cent. Rep. 125, 9 Atl. Rep. 110.

63. Liability on judgments obtained before appointment.—Petitioner furnished materials which were used in the construction of a leased road, and after suit was brought against the lessor, but before judgment, a receiver of the whole system was appointed. *Held*, that the judgment could not operate as a judgment against the receivers, nor bind the realty in their hands. *Clyde v. Richmond & D. R. Co.*, 56 Fed. Rep. 539.

The above receiver was appointed by a federal court in a state where the lessor was created, and was extended by ancillary proceedings in another state where the leased road was situated. The petitioner filed his claim in the court of the latter state, asking that it be paid in preference to any mortgage lien. *Held*, that he should have sought relief in the other court where the receiver was appointed; but the claim being a meritorious one, the court would retain it, in order to assist in enforcing payment. *Clyde v. Richmond & D. R. Co.*, 56 Fed. Rep. 539.

Where a receiver is appointed for a corporation, after the decision of a suit against such corporation, holding it bound to pay certain taxes, he will be concluded by the judgment the same as the body he represents. *Hopkins v. Taylor*, 87 Ill. 436.

64. Liability as carriers.*—In the operation and management of railroads, receivers in chancery sustain to persons dealing with them the character of common carriers, and though they may at all times invoke the aid of the court in any matter affecting their duty or liability, yet, waiving this, they are amenable in the common law courts to actions for negligence as carriers. *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.—QUOTED IN *Lyman v. Central Vt. R. Co.*, 59 Vt. 167. REVIEWED IN *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458.

The receiver of a railroad who controls its operation is no less a common carrier because the property of the road is in the custody of the court; and as such carrier he is obliged to receive and transport cars and freight, and to furnish accommodations to connecting lines, to the same extent and in the same manner as are the proper officers

of other railroad companies. *Beers v. Wabash, St. L. & P. R. Co.*, 35 Am. & Eng. R. Cas. 646, 34 Fed. Rep. 244.

It is error to charge that receivers are held to the greatest possible care and diligence for the safety of their passengers, and to provide for their safe conveyance, as far as human care and foresight will go. *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. Rep. 181.

65. Liability for discrimination.—An attempt by a receiver to accumulate money for the benefit of the corporators or their creditors, by making one shipper pay tribute to his rival in business, is a gross, illegal, and inexcusable abuse of a public trust, requiring his removal. *Handy v. Cleveland & M. R. Co.*, 31 Fed. Rep. 689.

In Florida an unjust discrimination in freight rates is a criminal offense; and it is, therefore, unlawful for a receiver of a railroad to make such discrimination. *Cutting v. Florida R. & N. Co.*, 43 Fed. Rep. 747. See also *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 31 Fed. Rep. 862.

66. Liability for wages of employes.—Though an employé be injured without negligence on the part of the receiver who is in charge of the road, on the ground of justice and good policy the court will order the receiver to pay him his wages until he has recovered. *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. Rep. 701.—FOLLOWED IN *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 Fed. Rep. 319.—*Missouri Pac. R. Co. v. Texas & P. R. Co.*, 41 Fed. Rep. 319.—FOLLOWING *Missouri Pac. R. Co. v. Texas & P. R. Co.*, 33 Fed. Rep. 701.

A court in New York will not, on supplementary proceedings, order a receiver appointed in another state to pay over money to a judgment creditor, though it appears that the money is due from the receiver to the defendant. *Smith v. McNamara*, 15 Hun (N. Y.) 447.

67. Liability for rental of leased lines.—Where a railroad company, having leased a connecting road, enters into a contract with other connecting companies by which it is in fact owned, giving them the right to use its tracks and terminal facilities for a fixed rent, and thereafter demands the execution of a similar contract by the receiver of another company, who previously had the use of the line, to which the receiver objects on the ground that the terms are exorbitant and oppressive, and that he has

* Receiver, liability of, as common carrier, see note, 35 AM. & ENG. R. CAS. 8.

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privileges, paying like terminal charges as
the other companies, the rent not being
fixed, but to be left to the determination of
the judge, and the same rate as previously
paid to be paid in the meantime—the
amount paid by the other roads pursuant to
such contract does not, in the absence of
evidence showing that the sum paid by the
receiver is not all that the use of the road is
fairly worth, furnish the measure of damages
for such use. *Peoria & P. U. R. Co. v.*
Chicago, P. & S. W. R. Co., 36 Am. & Eng.
R. Cas. 488, 127 U. S. 200, 8 Sup. Ct. Rep.
1125.

Where a receiver is appointed for a rail-
road system, including leased lines, he is
not liable for the rent of one of the leased
lines simply because he takes possession
under an order of the court; nor as assignee;
nor is he liable for use and occupation un-
til after a reasonable time to determine
whether the lease should be sold or the
road used for the benefit of creditors. *Quin-*
cy, M. & P. R. Co. v. Humphreys, 28 Abb.
N. Cas. (N. Y.) 332, 145 U. S. 82, 12 Sup.
Ct. Rep. 787.

Where a receiver is appointed for a whole
system, including leased lines, and the ac-
counts are so kept as not to show whether a
certain leased line is profitable in itself or
not, and where the receiver could not begin
to ascertain the fact in three months, he
cannot be said to have adopted the lease so
as to charge him with the rent from the
general funds because he has failed for
nine months to notify the lessor that he
would not pay the rent; and especially is
this so where the order of the court directs
the receiver to pay the rent out of the in-
come of the line. *St. Joseph & St. L. R.*
Co. v. Humphreys, 145 U. S. 105, 12 Sup.
Ct. Rep. 795.—FOLLOWING Quincy, M. &
P. R. Co. v. Humphreys, 145 U. S. 82, 12
Sup. Ct. Rep. 787, 28 Abb. N. Cas. 332.—
APPLIED IN Park v. New York, L. E. & W.
R. Co., 57 Fed. Rep. 799.

Where one road leases another, with the
provision that the lease shall be forfeited
upon the non-payment of rent, receivers of
the lessee company who were appointed for
the purpose of preserving the whole system
are liable for rent falling due during the
receivership. *Brown v. Toledo, P. & W. R.*
Co., 35 Fed. Rep. 444.

Defendant company leased the road of
petitioner, agreeing to pay a certain share of
the gross earnings as rental, and providing
that a failure to pay should work a forfeiture
of the lease. Subsequently, defendant be-
came insolvent and receivers were appointed.
At the time defendant was in arrears for
rent of more than \$300,000. But soon after-
ward the receivers paid over \$331,000, more
than the net earnings of the leased road, but
less than the rent stipulated for in the lease.
After this payment, and fifteen days after
the receivers were appointed, petitioner
asked that the receivers be required to pay
the balance of the rent due, and if they did
not have money enough for the purpose
that receivers' certificates should issue for
the rent due or to become due, to be made
a prior lien on defendant's property, but no
application was made for a forfeiture of the
lease. *Held*, that the receivers did not be-
come such assignees of the lease as bound
them in any event to pay the full rental;
nor had they retained possession for such a
time as amounted to an election to accept
the lease; and that the court would not
direct the receivers' certificates to issue, nor
make any charge upon the corpus of the
property generally. *Park v. New York, L.*
E. & W. R. Co., 57 Fed. Rep. 799.—APPLY-
ING Quincy, M. & P. R. Co. v. Humphreys,
145 U. S. 82, 12 Sup. Ct. Rep. 787; St. Jo-
seph & St. L. R. Co. v. Humphreys, 145 U.
S. 105, 12 Sup. Ct. Rep. 795.

68. Liability for counsel fees.—A
receiver was appointed for a railroad for the
non-payment of interest on bonds which
had been issued by the state to aid the road.
A receiver claiming authority under the
state employed counsel to oust the lessee of
another receiver, but by proceedings finally
had, the property was sold. *Held*, that the
litigation was not for the benefit of the state
so as to entitle the attorneys to a lien upon
the fund arising from the sale, but they
must look first to the receiver for their fees.
Neither were they creditors of the company,
and could not be made parties to a bill filed
in the case, praying that all creditors of the
road be made defendants. *State v. Edge-*
field & K. R. Co., 4 Baxt. (Tenn.) 92.

69. Liability for negligence.*—A
receiver operating a railroad stands, in
respect to duty and liability, where the cor-

* Liability of receivers, trustees, etc., for negli-
gence, see note, 32 AM. & ENG. R. CAS. 413.

poration would, were it operating the road, and the question whether or not the receiver is liable for negligence must be tested by the same rules that would be applied if the corporation was the actual party defendant. *Klein v. Jewett*, 26 N. J. Eq. 474; *affirmed in 27 N. J. Eq.* 550.—FOLLOWED IN *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 10 Fed. Rep. 477. REVIEWED IN *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458.

70. Liability for torts, generally.*—A receiver is not personally liable for the torts of his employes. It is only when he commits the wrong himself that he is personally liable. A proceeding against him for the torts of his employes is in the nature of a proceeding *in rem*, and renders the property held by him as receiver liable for such injuries. *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 10 Fed. Rep. 477.—FOLLOWING *Murphy v. Holbrook*, 20 Ohio St. 137; *Klein v. Jewett*, 26 N. J. Eq. 474; *Jordan v. Wells*, 3 Woods (U. S.) 527; *Kennedy v. Indianapolis & C. R. Co.*, 2 Flipp. (U. S.) 709.

When a liability of a receiver is incurred by the negligence of his servants in operating a railroad under its franchises, and his resignation is accepted by a federal court, and a successor is appointed by such court, who qualifies and assumes the charge and control of the property and fund, an action in the state court by the party aggrieved will lie against such successor in his representative capacity. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.—QUOTING *New York & W. U. Tel. Co. v. Jewett*, 115 N. Y. 166.

The receiver of a delinquent railroad, appointed by the governor of the state, under Tenn. Laws 1852, p. 151, is a public agent, and, as such, not liable for the wrongs or negligence of his employes, but only for his own wrongful acts or delinquencies. *Hopkins v. Connel*, 2 Tenn. Ch. 323.

A receiver of a railroad company, while exercising the franchise of such company and operating its road, is, in his official capacity, subject to the same rules of liability as apply to the company itself. For torts committed by his servants in operating the road under his management, he is responsible, upon the principle of *respondet superior*. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.

A continuance by the receivers of a railway company of an embankment not provided with sufficient culverts and sluices to drain the water, and the use of the same, is an adoption of the nuisance, and renders them liable, as were the originators of the wrong, without actual notice having been brought to them. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061.—DISTINGUISHING *Houston Water Works v. Kennedy*, 70 Tex. 233. FOLLOWING *Austin & N. W. R. Co. v. Anderson*, 79 Tex. 427.

71. Liability for personal injuries.*—Where receivers have the exclusive charge of the management of a railroad and the hiring of employes, as fully as such powers may be exercised by the company itself, the receivers are liable for injuries sustained whenever the corporation would be liable, if in possession. *Winbourn's Case*, 30 Fed. Rep. 167. *Ohio & M. R. Co. v. Anderson*, 10 Ill. App. 313. *Murphy v. Holbrook*, 20 Ohio St. 137.—QUOTING *Sprague v. Smith*, 29 Vt. 421. REVIEWING *Blumenthal v. Brainerd*, 38 Vt. 402; *Paige v. Smith*, 99 Mass. 395.—*Rogers v. Mobile & O. R. Co.*, (Tenn.) 12 Am. & Eng. R. Cas. 442.

The damages and costs will be directed to be paid out of the current earnings of the road, the injuries having been inflicted while the road was under the control of a receiver. *Klein v. Jewett*, 26 N. J. Eq. 474; *affirmed in 27 N. J. Eq.* 550.

Receivers of a railroad are liable for an assault on a passenger by a conductor, though it be wilful and malicious, and outside of his usual duties. *Dillingham v. Russell*, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139.

72. Liability for injuries to employes.—The receiver of a railroad is liable for an injury to an employe whenever a master would be liable under the common law for negligently injuring his employe; but the question whether a receiver is "a railroad company," within the meaning of Kansas Laws of 1879, ch. 84, § 29, which makes such companies liable for injuries to employes resulting from the negligence of their agents or employes, discussed but not decided. *McMahon v. Henning*, 1 McCrary (U. S.) 516, 3 Fed. Rep. 353.

* Liability of receiver for torts, see notes, 17 AM. & ENG. R. CAS. 301; 35 *Id.* 4.

* Liability of receiver for personal injuries, see notes, 15 L. R. A. 262; 5 AM. ST. REP. 315. See also 48 AM. & ENG. R. CAS. 673, *abstr.*

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A receiver who is operating a railroad under an order of court is within the meaning of the term "persons owning or operating railways," as used in Iowa Code, §§ 1278, 1307; and therefore a receiver, as such, is liable for an injury to an employé caused by the negligence of a co-employé. *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728, 16 N. W. Rep. 331.

A receiver of railway property who takes it subject to all "claims, debts, and liabilities" is liable to pay claims for damages for injuries to employés. *Central Trust Co. v. Sloan*, 23 Am. & Eng. R. Cas. 398, 65 Iowa 655, 22 N. W. Rep. 916.

Where the receiver of a railroad is sued for an injury to one of his employés, resulting from an insufficient number of men to keep the track in repair, he cannot defend on the ground that the road was not paying expenses, and that he did not have funds in his hands to employ a sufficient number of trackmen. *Graham v. Chapman*, 11 N. Y. Supp. 318, 58 Hun 602, 33 N. Y. S. R. 349.

In an action against a receiver for damages for the death of a fireman caused by the explosion of an engine, the circuit judge correctly ruled that "the measure of the receiver's duty was the exercise of ordinary care in the selection of machinery." *Ex parte Johnson*, 19 So. Car. 492.

A company or receiver operating a railway should be held as fully responsible to an employé and others for an injury resulting from a defect existing when the road was taken possession of by the company or receiver, as for a defect occurring under the management of either. It is not error to refuse a charge that unless the receivers had time to repair the road, if defective when they took possession, the company would not be liable for an injury from a defect in the track. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214.—FOLLOWED IN *Boggs v. Brown*, 82 Tex. 41.

And should the rule insisted upon be conceded, that the receivers should not be liable unless time sufficient was allowed them to repair defects, still it would be no defense, the road being liable from having received from the receivers large sums in way of betterments which should have been applied to such claims. *Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214.—REVIEWING *Batterson v. Chicago & G. T. R. Co.*, 8 Am. & Eng. R. Cas. 123, 49 Mich. 184.

73. Liability for injuries causing death.*—The administrator of a party injured by a railroad may, under the Ohio "act requiring compensation for causing death by wrongful act, neglect, or default," bring an action against the receiver of the company, under the same restrictions and on the same grounds that the party injured, if death had not ensued, might have done. *Murphy v. Holbrook*, 20 Ohio St. 137.—REVIEWED IN *Turner v. Cross*, 83 Tex. 218.

A receiver of a railway is neither proprietor, owner, charterer, nor hirer of the railway operated by him. He is not, therefore, liable as such under Tex. Rev. St. art. 2899 (prior to its amendment April 11, 1892), for injury negligently inflicted upon and resulting in the death of an employé of the road so operated. *Turner v. Cross*, 83 Tex. 218, 18 S. W. Rep. 578.—REVIEWING *Pierce v. Concord R. Co.*, 51 N. H. 591; *Hall v. Brown*, 54 N. H. 497; *Murphy v. Holbrook*, 20 Ohio St. 137; *Little v. Dusenberry*, 46 N. J. L. 614; *Lyman v. Central Vt. R. Co.*, 59 Vt. 167; *Erwin v. Davenport*, 9 Heisk. (Tenn.) 45.—FOLLOWED IN *Texas & P. R. Co. v. Collins*, 84 Tex. 121. FOLLOWED AND QUOTED IN *Yoakum v. Selph*, 83 Tex. 607.—*Yoakum v. Selph*, 83 Tex. 607, 19 S. W. Rep. 145.—FOLLOWING AND QUOTING *Turner v. Cross*, 83 Tex. 218.—FOLLOWED IN *Texas & P. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88; *Texas & P. R. Co. v. Collins*, 84 Tex. 121.—*Texas & P. R. Co. v. Geiger*, 79 Tex. 13, 15 S. W. Rep. 214. *Texas & P. R. Co. v. Thedens*, (Tex. Civ. App.) 21 S. W. Rep. 132.—FOLLOWING *Yoakum v. Selph*, 83 Tex. 607, 19 S. W. Rep. 145; *Texas & P. R. Co. v. Collins*, 84 Tex. 122, 19 S. W. Rep. 365.—*Houston & T. C. R. Co. v. Roberts*, (Tex.) 19 S. W. Rep. 512.—FOLLOWING *Turner v. Cross*, 83 Tex. 218, 18 S. W. Rep. 578.

74. Individual or personal liability.—If receivers act in good faith, but under a mistaken view of their powers, they are perhaps not liable at all; but if they wilfully and corruptly exceed their powers, they are liable for the actual damages sustained by their conduct, but nothing more. *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 506.

A receiver is personally liable to persons sustaining loss or injury by or through his

* See also DEATH, ETC., 150, 167; note, 15 L. R. A. 262.

own neglect or misconduct; but for the neglect or misconduct of those employed by him, he is not personally liable. In such case he must be sued as receiver, and the judgment must be payable out of the funds in his hands as such. *Camp v. Barney*, 4 Hun (N. Y.) 373, 6 T. & C. 622.

Where the property of a railroad company goes into the hands of a receiver, which property includes a hotel, if the receiver employs a person to manage the hotel, without any order of court, and afterwards leases it to the manager, he is personally liable to one who furnishes supplies to the hotel without notice of the lease. *Sayles v. Jourdan*, 2 N. Y. Supp. 827, 50 Hun 604, 19 N. Y. S. R. 349; affirmed in 121 N. Y. 685, mem., 24 N. E. Rep. 1098.

While the receiver of a railroad may be protected from an action at law in respect to the property in the possession of the court or in his hands as its receiver, or from the consequences of an accident occurring in its management, he is responsible individually for the careful and proper management of other property, the management of which he has voluntarily assumed, and over which the court has no control. *Kuin v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458, reversing 11 Hun 552.—DISTINGUISHING *Cardot v. Barney*, 63 N. Y. 281. REVIEWING *Newell v. Smith*, 49 Vt. 260; *Paige v. Smith*, 99 Mass. 395; *Klein v. Jewett*, 26 N. J. Eq. 474.—QUOTED IN *Little v. Dusenberry*, 25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614; *Lyman v. Central Vt. R. Co.*, 59 Vt. 167.

A person appointed by the governor as receiver of a railroad, under the Internal Improvement Acts, is a public agent, and not liable individually on contracts made as such, where he has not pledged his own credit. *Newman v. Davenport*, 9 Baxt. (Tenn.) 538.

VI. PAYMENT OF CLAIMS. PRIORITY.

75. In general.*—One not a party to an action cannot apply by motion for payment of money to him by a receiver appointed in the action, even if his claim is made in respect of a debt properly payable out of the receiver's funds. *Brocklebank v. East London R. Co.*, L. R. 12 Ch. D. 839.

* Payment of outstanding claims at time of appointment out of income of receiver, see note, 17 AM. & ENG. R. CAS. 313.

An appeal may be taken from a decree of a chancery court ordering the receiver of an insolvent railroad company to pay claims which are adjudged to be chargeable on funds in his hands arising from the sale of the road. *Rome & D. R. Co. v. Sibert*, 97 Ala. 393, 12 So. Rep. 69.

A receiver of a dissolved corporation, being the representative of the debtor, upon whom the duty rests to scrutinize the claims against the estate, and reject and defend against those he believes to be unfounded or illegal, cannot be impartial in a litigation between himself and creditors as to such claims; and hence a statute making such receiver the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, is in violation of the fundamental rule, in the administration of justice, that no man can be judge in his own case. *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173; reversing 10 N. Y. S. R. 596, 45 Hun 519.

A provision in such a statute, making proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of the contract, and requiring the creditor to accept payment of an obligation before maturity, violates the provision of the constitution against impairing the obligation of contracts. *People v. O'Brien*, 36 Am. & Eng. R. Cas. 78, 111 N. Y. 1, 18 N. E. Rep. 692, 19 N. Y. S. R. 173; reversing 10 N. Y. S. R. 596, 45 Hun 519.

A change of incumbent in the office of railroad receiver does not affect the status of claims against the property arising during the receivership. *Ex parte Brown*, 9 Am. & Eng. R. Cas. 723, 15 So. Car. 518.—QUOTING *Davenport v. Alabama & C. R. Co.*, 2 Woods (U. S.) 519.

After an order passed constituting the officers of a company receivers of the road, the company continued to conduct its business as before, officers were annually elected, and no separate books were opened by them as receivers. During this time a note was given by the corporation in its corporate name, signed by the president and treasurer as such, in settlement of an account for running expenses. Held, that the existence of such corporation was not interfered with, or its officers displaced, and that the note so given was not made or received with reference to the receiver's fund. *Ex parte Will-*

iams, 12 Am. & Eng. R. Cas. 425, 17 So. Car. 396.

If the account was properly chargeable against the receiver's fund, it was a mere equity, which did not attach to the note given by the corporation and to the collaterals intended to secure it. *Ex parte Williams, 12 Am. & Eng. R. Cas. 425, 17 So. Car. 396.*

A resolution of directors, providing for an indemnifying bond to a receiver, enures to the benefit of any one contemplated by it, having a just debt or claim against the receiver as such, or personally. *Ryan v. Hays, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.*

76. Operating expenses a first charge on income or earnings.*

Where a railroad is mortgaged for the benefit of bondholders, with a provision that in case of default the mortgage trustee shall take charge of the road and operate it, but instead a receiver is appointed in a suit in which the trustee is a party, the bondholders cannot object to operating expenses being made a first charge on the road, where the trustee would of necessity have incurred the same expense if he had operated the road. *Union Trust Co. v. Illinois Midland R. Co., 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.*

Debts contracted by a receiver for ordinary expenses of operating a road are entitled to priority, to be paid out of the income of the road if sufficient; if not, then they become a first charge upon the corpus of the property. *Union Trust Co. v. Illinois Midland R. Co., 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.*

Where a receiver is appointed at the instance of mortgage bondholders, the proceeds of the business must be applied first to the charges of administration and then to the discharge of the mortgage debts. Neither the company nor any one claiming under it can demand any of the income as against the prior liens. *North Carolina R. Co. v. Drew, 3 Woods (U. S.) 691.*

Ordinarily, mortgage debts are entitled to payment over all other subsequent claims; but where the corporation becomes insol-

vent and the court is asked to appoint a receiver, in doing so it may impose such conditions as may seem just, and may require the payment of current expenses from the earnings of the road. *United States Trust Co. v. New York, W. S. & B. R. Co., 25 Fed. Rep. 800.*—APPLYING *Huidekoper v. Hinckley Locomotive Works, 99 U. S. 260.* RECOGNIZING *Fosdick v. Schall, 99 U. S. 235; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. Rep. 675.*

A receiver's expenditures, made under the direction of the court, for preserving, completing, and operating a railroad, may be made a preferred claim against the road. *Hale v. Nashua & L. R. Co., 60 N. H. 333.*

Money, necessary for the proper and successful management of a railroad, borrowed by the officers of the road while acting as receivers, giving them power "to continue in the possession and management of the property," should be repaid out of the fund in court realized from the income of the road while in the receivers' hands. *Ex parte Carolina Nat. Bank, 18 So. Car. 289.*—QUOTING *Cowdrey v. Galveston, H. & H. R. Co., 1 Woods (U. S.) 331.*

When a receiver has been appointed under the Railway Companies Act, 1867, § 4, the moneys received by him must be applied first in providing for the "working expenses" of the railway, even if by the company's special act a fixed dividend on shares and the interest on debentures, forming the capital raised for a particular undertaking of the company, are charged on the gross receipts of that undertaking. *In re Eastern & M. R. Co., 45 Am. & Eng. R. Cas. 71, L. R. 45 Ch. D. 367.*—APPLYING *In re Cornwall Minerals R. Co., 48 L. T. 41.* DISTINGUISHING *Gardner v. London, C. & D. R. Co., L. R. 2 Ch. 201.*

By virtue of a special act of a company, a certain loop line was constituted a "separate undertaking," and the capital raised for the purpose of constructing it was constituted "separate capital." A receiver having been appointed under the above statute—held, that the dividend upon, and interest in respect of, the separate capital were not "working expenses" or "proper outgoings," and were to be postponed to working expenses. *In re Eastern & M. R. Co., 45 Am. & Eng. R. Cas. 71, L. R. 45 Ch. D. 367.*

77. Priority among mortgages.—After a receiver had been appointed for the benefit of third, fourth, and fifth mortgage

*Rule in *Fosdick v. Schall, 99 U. S. 235.* Payment of current expenses from earnings during receivership, see note, 38 AM. & ENG. R. CAS. 571.

Paying operating expenses prior to receiver's appointment, time when incurred, see 38 AM. & ENG. R. CAS. 573, *abstr.*; *Id.* 575.

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bondholders, the fourth class moved that the receiver be directed to pay interest out of the receipts of the road on their bonds in preference to all others, on the ground that their bonds were so drawn that the principal would fall due upon a failure to pay interest. *Held*, that the motion was properly denied. *Brown v. New York & E. R. Co.*, 22 *How. Pr. (N. Y.)* 451.

78. Claims for construction.*—A decree was entered by consent of some of the bondholders directing a receiver of a road to extend the line at a certain stated amount, to be paid out of the surplus income, the extension to stand pledged for payment. The extension cost more than the specified amount. Subsequently the order was reversed by the supreme court, and the entire road was sold. *Held*, that the builders of the road should be paid a *pro rata* share of the price that the road sold for, based upon the value of the extension as compared with the whole value of the road. *Hand v. Savannah & C. R. Co.*, 17 *So. Car.* 219.

Debts incurred by a railroad company for construction of a new road within six months before the company's insolvency and the appointment of a receiver are entitled to priority in payment out of the net earnings of the road while in the hands of the receiver over mortgages executed when the road was unfinished, and which show that it was contemplated that the road should be completed, and which attach to new road as fast as finished. *McIlhenny v. Bins*, 80 *Tex.* 1, 13 *S. W. Rep.* 655.—REVIEWING AND QUOTING *Fosdick v. Schall*, 99 *U. S.* 235.

79. Claims for damages to realty.—A receiver appointed by a federal court may be sued for a mere naked trespass to real property. *Ft. Wayne, M. & C. R. Co. v. Mellett*, 17 *Am. & Eng. R. Cas.* 293, 92 *Ind.* 535.

A claim by an abutting owner against a company for damages for building and maintaining a road in the street in front of his property is of such a kind or nature as to be entitled to payment out of the funds in the hands of a receiver in preference to the claims of mortgage creditors; and the abutting owner did not waive such claim by allowing the construction of the road before his damages were paid. *Mercantile Trust*

* When debts incurred for construction of road before insolvency entitled to priority of payment out of net earnings, see 45 *AM. & ENG. R. CAS.* 94, *abstr*

Co. v. Pittsburgh & W. R. Co., 29 *Fed. Rep.* 732.—APPLYING *Western Pa. R. Co. v. Johnston*, 59 *Pa. St.* 290.

80. Claims for labor and material.—The exercise of the equitable discretion of a court of equity may require the receiver of a railroad to pay claims of operatives and suppliyen, due at the time of his appointment, and may require him to hold the property subject to such claims. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss. (U. S.)* 315.

In passing upon such claims and in fixing a time in which they will be ordered paid, a federal court will adopt by analogy the state statute of limitations relating to the claims presented. *Turner v. Indianapolis, B. & W. R. Co.*, 8 *Biss. (U. S.)* 315.

If at the time a receiver was appointed the company was indebted for services rendered or materials furnished, the creditors are entitled to be paid out of the net revenues of the road in preference to the mortgage bondholders; and if the net revenues have been applied to pay interest to these bondholders, or to the repair, improvement, or extending of the road, upon a sale of the road the proceeds of the sale, to the extent of said net revenues, are to be applied to the payment of these creditors. *Williamson v. Washington City, V. M. & G. S. R. Co.*, 1 *Am. & Eng. R. Cas.* 498, 33 *Gratt. (Va.)* 624.—QUOTING *Fosdick v. Schall*, 99 *U. S.* 235; *Owen v. Homan*, 4 *H. L. Cas.* 997.—FOLLOWED IN *Frayser v. Richmond & A. R. Co.*, 25 *Am. & Eng. R. Cas.* 597, 81 *Va.* 388.

81. Claims for loss of, or damage to, property carried.—The earnings of a railroad in the hands of a receiver are chargeable with the value of goods lost in transportation, and with damages done to property during his management. *Cowdrey v. Galveston, H. & H. R. Co.*, 93 *U. S.* 352.

Receivers may be held responsible for the damage actually sustained by a shipper of freight, through the negligence of the receiver's agents and employes, in any case in which the company could be so held. *Melendy v. Barbours*, 25 *Am. & Eng. R. Cas.* 622, 78 *Va.* 544.

82. Claims for personal injuries.—Receivers of a railroad are not subject to suit in their official capacity for a personal injury to one of their employes in the same service. *Henderson v. Walker*, 55 *Ga.* 481.

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Passengers over a railroad and employes of the company, when entitled to damages for injuries received while the railroad is operated by a receiver, should be paid out of the fund in court realized from the earnings of the road during the receivership, in preference to mortgage or other debts existing at the time of action brought. *Ex parte Brown, 9 Am. & Eng. R. Cas. 723, 15 So. Car. 518.*

Technically the relation of master and servant does not exist between a railway company and a receiver, when the company's property is placed in his possession, and he is required to discharge the duty of a common carrier; but the profits or income of the property, while in his hands, are liable for injuries resulting from the negligence of the receiver or of his employes. *Ryan v. Hays, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.*

If current expenses are invested in betterments of the road, then such claim is entitled to satisfaction out of proceeds of sale of the road to satisfy a mortgage, to the extent of the value of such betterments. *Ryan v. Hays, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.*

Where a receiver has been discharged and the property restored to the control of the railroad company, the company is liable upon a cause of action which arose against the receiver in connection with his management of the road—e. g., a claim for damages for injuries to an employe—if the earnings during the receivership were sufficient to meet such claim, but were expended in improvements of which the company, after the receiver's discharge, has received the benefit. *Texas & P. R. Co. v. Johnson, 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463.*

83. Claims for rent.—Where receivers are appointed to operate an entire system, including certain leased roads, the mere taking of possession of the leased lines by the receivers does not make them assignees of the leases, so as to require them to pay the rent due in preference to the mortgage debts. *Central Trust Co. v. Wabash, St. L. & P. R. Co., 34 Fed. Rep. 259.*—APPLYING Bridgewater Engineering

Co., L. R. 12 Ch. D. 181. FOLLOWING Woodruff v. Erie R. Co., 93 N. Y. 609; Miltenberger v. Logansport, C. & S. W. R. Co., 106 U. S. 286, 1 Sup. Ct. Rep. 140.—CRITICISED IN Central Trust Co. v. Wabash, St. L. & P. R. Co., 46 Am. & Eng. R. Cas. 301, 46 Fed. Rep. 26.

A court of equity in appointing a receiver may require the payment of expenses of operating and preserving the road in preference to mortgage liens; but the rule does not go so far as to give priority to the rental of branch lines held under leases, and which are unprofitable, where there is nothing to show that earnings which were applicable to the payment of rent had been diverted to other purposes. *Quincy, M. & P. R. Co. v. Humphreys, 28 Abb. N. Cas. (N. Y.) 332, 145 U. S. 82, 12 Sup. Ct. Rep. 787.*—QUOTING Morgan's L. & T. R. & S. Co. v. Texas C. R. Co., 137 U. S. 171; Fosdick v. Schall, 99 U. S. 235; Wallace v. Loomis, 97 U. S. 146.

Where it appears that one of the leased lines is paying more than operating expenses, and the court orders that the rental thereof be paid out of the profits, the lessor has a right to rely upon the order, and to require the receivers to pay the rent from the time of the order. *Central Trust Co. v. Wabash, St. L. & P. R. Co., 34 Fed. Rep. 259.*

Rent for an easement of running trains over land is part of the working expenses of a railway in the hands of a receiver which he is bound to pay out of the funds in his hands before dividing anything among the holders of debenture stock. *Great Eastern R. Co. v. East London R. Co., 44 L. T. 903.*

84. Claims for rolling stock.—A vendor of cars and engines, retaining title as security, before a receiver of the road is appointed, is entitled to be paid by the receiver for their use, and to exhaust his lien thereon, but as to the balance of his debt he is only a general creditor. *Fidelity I., T. & S. D. Co. v. Shenandoah Valley R. Co., 38 Am. & Eng. R. Cas. 559, 86 Va. 1, 13 Va. L. J. 309, 9 S. E. Rep. 759.*

A company purchased rolling stock, agreeing to pay for it in instalments, the stock not to become the property of the

*When price of locomotives sold to a company is not entitled to priority where road is subsequently placed in hands of a receiver, see 45 AM. & ENG. R. CAS. 93, *abstr.*

company until complete payment, and the vendor having the right to seize the stock on default in payment of any one instalment. *Held*, that the term "working expenses" included such instalments as they became due, and also overdue instalments. *In re Eastern & M. R. Co.*, 45 *Am. & Eng. R. Cas.* 71, *L. R.* 45 *Ch. D.* 367.

85. Claims for supplies, repairs, etc.—The court will not order the payment out of the funds in the hands of a receiver of a claim for rails and supplies furnished to the company before the receiver was appointed, where they were furnished on the credit of the company. *Skiddy v. Atlantic, M. & O. R. Co.*, 3 *Hughes (U. S.)* 320.

An order directing a receiver "to pay the amounts due and maturing for materials and supplies about the operation and for the use of said road" does not include the renewal of a promissory note originally given by the company for re-rolling iron for the use of the road. *Brown v. New York & E. R. Co.*, 19 *How. Pr. (N. Y.)* 84.

Where the receiver and the bondholders enter into an agreement that the claim of a third party shall have priority over all claims against the railroad except for operating expenses, this will not preclude the court from allowing expenditures by the receiver for repairs and improvements, since all necessary repairs and improvements are to be deducted from the income of the road in order to obtain the net earnings. *State v. East Line & R. R. Co.*, (*Tex.*) 48 *Am. & Eng. R. Cas.* 656.

86. Counsel fees.—An order appointing a receiver and giving priority to claim for "labor in operation of the road" includes a claim for necessary services of counsel to the receiver. *Bayliss v. Lafayette, M. & B. R. Co.*, 9 *Biss. (U. S.)* 93.

A receiver employed attorneys who succeeded in reducing to a very considerable amount certain claims of lien-holders, but the property was sold subject to the lien and the receiver discharged. The purchasers recognized the claim of the attorneys and made a partial payment thereon; but subsequently another foreclosure suit was begun on a lien created by the purchasers, and a receiver appointed. *Held*, that the attorneys had no claim on the funds in the hands of the new receivers; that the recognition of the claim by the purchasers amounted to nothing more than a mere

contract, which was not entitled to priority over liens created by the purchasers. *Bound v. South Carolina R. Co.*, 51 *Fed. Rep.* 58.

And the fact that the services of the attorneys resulted in much reducing the lien, and thereby incidentally benefiting subsequent lien-holders, would not give them priority. *Bound v. South Carolina R. Co.*, 51 *Fed. Rep.* 58.—*QUOTING* *Hand v. Savannah & C. R. Co.*, 21 *So. Car.* 162.

One who has to apply to the court for an order directing the receivers to pay a claim justly due from a railroad company cannot claim compensation for his attorney's fees, where the services do not result in saving or adding anything to the general fund. *Central Trust Co. v. Valley R. Co.*, 55 *Fed. Rep.* 903. — *DISTINGUISHING* *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 46 *Fed. Rep.* 696; *Easton v. Houston & T. C. R. Co.*, 40 *Fed. Rep.* 189.

An order appointing a receiver directed him to pay debts "owing to the laborers and employés" of the company "for labor and services actually done in connection with that company's railways." *Held*, that it included a claim of counsel for professional services rendered by him on employment of the company in litigations relating to the railway. *Gurney v. Atlantic & G. W. R. Co.*, 58 *N. Y.* 358, 9 *Am. Ry. Rep.* 520; *reversing* 2 *T. & C.* 446.—*DISAPPROVED* in *Louisville, E. & St. L. R. Co. v. Wilson*, 138 *U. S.* 501.

87. Judgments and executions.—Tolls received on a railroad after a judgment rendered against the company, and the appointment of a sequestrator, are not bound by such judgment so as to give it a preference of payment out of them. *Leedom v. Plymouth R. Co.*, 5 *Watts & S. (Pa.)* 265.

Claims for damages sued against a corporation itself while in the hands of receivers and reduced to judgment (in one case by consent of the officers of the corporation, who were also the receivers), and afterwards presented and allowed as original claims against the receiver's fund, are not entitled, as against that fund, to interest, either from the date of the judgments or from the order giving to them the right of payment, such order not having fixed the amounts due. *Ex parte Brown*, 17 *Am. & Eng. R. Cas.* 302, 18 *So. Car.* 87.

Between the appointment of a receiver and the execution of his bond, a *fi. fa.* against the company was placed in the sheriff's

hands; there were funds in bank to the credit of the suit, representing the earnings of the road. *Held*, that the *fi. fa.* creditor was entitled to have the funds applied to satisfy his debt in preference to the trust creditors. *Frayser v. Richmond & A. R. Co.*, 25 *Am. & Eng. R. Cas.* 597, 81 *Va.* 388.—*QUOTING Gilman v. Illinois & M. Tel. Co.*, 91 *U. S.* 603; *American Bridge Co. v. Heidelberg*, 94 *U. S.* 798.

88. Statutory or specific liens.—Where a federal court has appointed a receiver for a railroad, and it appears that there are many claims that are being filed, some of which may rest on statutory liens, conditioned on the notice and proceedings required by statute, in order to avoid expense and delay, the court will allow all persons claiming statutory liens to file the same with the court, with the same force and effect as if filed in the state courts; and where demands are presented from other states, in which no statutory lien therefor exists, they will be entitled to the same status, so that statutory and equitable liens may rest on a like basis. *Blair v. St. Louis, H. & K. R. Co.*, 17 *Am. & Eng. R. Cas.* 337, 19 *Fed. Rep.* 861.

A creditor holding the specific right to be paid out of the earnings of a railway, or having a lien on the property in the hands of a receiver, may proceed by suit against the receiver. *Howe v. Harding*, 42 *Am. & Eng. R. Cas.* 1, 76 *Tex.* 17, 13 *S. W. Rep.* 41.

89. Taxes.—The amount due for a state tax upon the franchise of a corporation, which is in the hands of a receiver, takes priority of claim upon the funds in the receiver's hands over claims of the bondholders of the corporation. *Central Trust Co. v. New York City & N. R. Co.*, 35 *Am. & Eng. R. Cas.* 9, 110 *N. Y.* 250, 18 *N. Y. S. R.* 30, 18 *N. E. Rep.* 92; *reversing 47 Hun* 587, 15 *N. Y. S. R.* 178.—*APPLYING Union Trust Co. v. Illinois Midland R. Co.*, 117 *U. S.* 434; *In re Columbian Ins. Co.*, 3 *Abb. App. Dec.* 239.

90. Unliquidated demands.—Claims against a receiver, for property destroyed by fire set by sparks from defective locomotives, prior to the appointment of the receiver in foreclosure proceedings, but subsequent to default of the company in the payment of the mortgage debt, cannot be allowed. *Hiles v. Case*, 9 *Biss. (U. S.)* 549, 14 *Fed. Rep.* 141.

Such claims do not come under the head

of "operating expenses" to be paid from the earnings of the road. *Hiles v. Case*, 9 *Biss. (U. S.)* 549, 14 *Fed. Rep.* 141.—*REVIEWING Hale v. Frost*, 99 *U. S.* 389.

The fact that the company continued to operate the road, after default in the payment of the mortgage debt, did not constitute it the agent of the bondholders. *Hiles v. Case*, 9 *Biss. (U. S.)* 549, 14 *Fed. Rep.* 141.

If there are any equities in favor of a railway company growing out of the fact that liabilities of the receiver for unadjusted claims exceed the amount expended in betterments, they should be pleaded. If not pleaded, the refusal to charge upon the subject is not error. *Texas & P. R. Co. v. Bailey*, 83 *Tex.* 19, 18 *S. W. Rep.* 481.—*FOLLOWING Texas & P. R. Co. v. Johnson*, 76 *Tex.* 425.

Nor should undetermined suits for unliquidated demands be computed as claims for which the receiver is liable, if such inquiry should be gone into upon proper pleadings. *Texas & P. R. Co. v. Bailey*, 83 *Tex.* 19, 18 *S. W. Rep.* 481.

91. Unsecured debts.—With the exception of money used to pay taxes, there should be no priority of liens as between debts incurred, by the receiver of a railroad, whether the debt be evidenced by a receiver's certificate or not. *Union Trust Co. v. Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809.—*APPLIED In Central Trust Co. v. New York City & N. R. Co.*, 110 *N. Y.* 250.

If the trustees under a mortgage to secure bondholders fail to make any claim in proceedings for the appointment of a receiver, to the funds in the hands of such receiver, any surplus arising from the receiver's management is payable, not to such trustees, but to an unsecured creditor at whose suit the receiver was appointed. *Sage v. Memphis & L. R. R. Co.*, 35 *Am. & Eng. R. Cas.* 40, 125 *U. S.* 361, 8 *Sup. Ct. Rep.* 887.

If such creditor has acquired his claim by the acceptance of an offer to purchase a promissory note, and after it had been transferred by indorsement, he is under a legal obligation to pay what he agreed upon as the purchase price. The fact that such price has not been paid does not in any way affect his claim upon the funds in the hands of the receiver. *Sage v. Memphis & L. R. R. Co.*, 35 *Am. & Eng. R. Cas.* 40, 125 *U. S.* 361, 8 *Sup. Ct. Rep.* 887.

The fact that a railroad company renders a mortgage invalid by an overissue of stock, does not destroy the debt attempted to be secured by the mortgage. The debt remains, and may be considered in determining whether the road is insolvent, and whether a receiver should be appointed. *Olmsted v. Rochester & P. R. Co.*, 8 N. Y. S. R. 856, 44 Hun 627; affirmed in 106 N. Y. 673, mem., 13 N. E. Rep. 937, 11 N. Y. S. R. 881. mem.

92. Wages of employees.—A receiver was directed to pay the wages of employes eight months overdue, as to all such as were retained by him; but petitions of assignees of other overdue wages were rejected. *Skiddy v. Atlantic, M. & O. R. Co.*, 3 Hughes (U. S.) 320.

An order of court directing a receiver to pay wages due to "employes" includes compensation for services of an attorney employed at a fixed salary per month. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 526.

Back pay due employes at the time the company's railroads were placed in the hands of a receiver, by extending the order appointing the receiver, should be paid out of the net earnings of the roads which came to the hands of the receiver, and the bondholders at whose instance the receiver was appointed are postponed until the wages of the employes are first paid. *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. Ry. Rep. 273.

N. Y. Act of 1885, ch. 376, providing that where a receiver is appointed "the wages of the employes, operatives, and laborers" shall be preferred in payment, only includes such persons as perform the same kind of service as the persons mentioned, and does not include such persons of a manufacturing corporation as bookkeepers, superintendents, and foremen paid by the month. *In re Stryker*, 73 Hun 327, 55 N. Y. S. R. 903, 26 N. Y. Supp. 209.—**QUOTING** Wakefield v. Fargo, 90 N. Y. 213.

93. Restoration of diverted funds.—When the current earnings of a railroad, which ought, in equity, to have been employed to pay current debts contracted before the receiver's appointment, for labor, supplies, and the like, have been applied by the company to the payment of interest due mortgage creditors, to pay for additional equipments for the road, or for valuable and lasting improvements, it is competent for the court to restore what has been thus im-

properly diverted, and to direct such current debts to be paid out of the income in the receiver's hands, before anything derived from that source goes to the mortgage creditors. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

This doctrine of restoration of the funds rests not upon any ground of a supposed lien of the supply or labor creditor upon the earnings of the road but upon the idea that the officers of the company are, in a sense, trustees of these earnings for the benefit of the different claims of creditors, and if they give to one class of creditors that which properly belongs to another the court may, upon an adjustment of accounts, so use the income in its hands as to restore, if practicable, the parties to their original rights. *Addison v. Lewis*, 9 Am. & Eng. R. Cas. 702, 75 Va. 701.

VII. RECEIVER'S CERTIFICATES.

94. Power of the court to authorize.—A court of equity has power to appoint a receiver for a railroad, and to authorize him to raise money necessary for the management and preservation of the road, and make the debt created thereby a first lien on the road. *Wallace v. Loomis*, 97 U. S. 146.—**FOLLOWED IN** Investment Co. of Phila. v. Ohio & N. W. R. Co., 36 Fed. Rep. 48, Union Trust Co. v. Illinois Midland R. Co., 117 U. S. 434.—*Skiddy v. Atlantic, M. & O. R. Co.*, 3 Hughes (U. S.) 320. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467. *Farmers' & M. Bank v. Philadelphia & R. R. Co.*, 14 Phila. (Pa.) 456. *Karn v. Rorer Iron Co.*, 86 Va. 754, 14 Va. L. J. 217, 11 S. E. Rep. 431.

But the chancellor has no power to disregard the laws against usury by authorizing a receiver to borrow money by selling interest-bearing receiver's certificates of indebtedness at less than their face value. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467.

Such an order can only be made upon motion, and after a proper hearing. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467. *Ex parte Mitchell*, 12 So. Car. 83.

This power, however, should be exercised with great caution. *State v. East Line &*

* Receiver's certificates of indebtedness, see note, 9 L. R. A. 143.

and to direct such current of the income in the before anything derived goes to the mortgage *W. Lewis*, 9 Am. & Eng. 501.
restoration of the funds ground of a supposed labor creditor upon the road but upon the of the company are, of these earnings for different claims of creditors one class of creditors belongs to another an adjustment of income in its hands as the parties to their *W. Lewis*, 9 Am. 5 Va. 701.

CERTIFICATES.

court to authorize has power to appoint railroad, and to authorize money necessary for preservation of the debt created thereby a *Wallace v. Loomis*.
DOWED IN Investment N. W. R. Co., 36 Fed. Co. v. Illinois Mid. S. 434.—*Skiddy v. Co.* 3 Hughes (U. S.) 53 Ala. 237, 15 *Farmers' & M. Bank Co.* 14 Phila. (Pa.) *Iron Co.* 86 Va. 754. *E. Rep.* 431.
s no power to disburse by authorizing money by selling in certificates of in their face value. *la* 237, 15 Am. Ry only be made upon er hearing. *Meyer* 15 Am. Ry. Rep. 12 So. Car. 83.
should be exercised *te v. East Line &*

R. R. R. Co., (Tex.) 48 Am. & Eng. R. Cas. 656.

95. General nature and effect.*—

A receiver's certificates, being merely evidences of indebtedness, can have no higher character than the debts which they represent. *Fidelity I. & S. D. Co. v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

A receiver's certificates, issued to be paid out of the income of the road in his hands from time to time, are practically call loans, and a holder of such certificates has a right to assume that the receiver will notify him when the loan is to be called, or the money paid. *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 Fed. Rep. 874.

An application by receivers to issue certificates of indebtedness to cover certain expenses, and an order of the court thereon accordingly, does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of whose payment was not before the court. *Coe v. New Jersey Midland R. Co.*, 27 N. J. Eq. 37.

96. For what purposes issued.—

A court of equity has the power to authorize a receiver to issue certificates of indebtedness, and to make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements; but it is a power to be sparingly exercised. When the road cannot be kept running by exercising this power to a very limited extent, the safe and sound practice is to discharge the receiver or stop running the road, and speed a foreclosure. *Credit Co. v. Arkansas C. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. Rep. 46.—FOLLOWED IN *Guaranty T. & S. D. Co. v. Green Cove S. & M. R. Co.*, 139 U. S. 137.

It is no part of the duty of the court of chancery to build railroads, and the assent of all the parties interested cannot make it such; and there is no difference, so far as relates to this question, between building a railroad by raising money on a receiver's certificates, and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction. *Credit Co. v. Arkansas C. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. Rep. 46.

Where trustees of a first mortgage bring suit to foreclose, and the road is in a decayed and dilapidated condition, the court may

authorize the receivers to borrow money for the purpose of preserving it and completing a small portion thereof for the transaction of business, and may make the money borrowed a first lien on the road. *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 506.—REVIEWED IN *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 Vt. 500.

97. Issuing in payment for materials and supplies.—Where funds are applied to permanent improvements, or to the payment of interest on bonds, which should have gone to pay for materials used in keeping the road a going concern, the court will direct the receiver to issue certificates, and apply the proceeds to refunding the same; but materialmen are not entitled to further preference from the proceeds of the sale. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 52 Fed. Rep. 524.

Receivers may also be authorized to issue certificates in payment of claims for materials and supplies furnished the company not more than five months before the road was placed in their hands. *Farmers' & M. Bank v. Philadelphia & R. R. Co.*, 14 Phila. (Pa.) 456.

An order appointing a receiver provided that he should do all things necessary to complete the road; that he borrow money necessary therefor, and issue his debentures or certificates therefor; that such certificates, "whether for money borrowed, material furnished, labor performed, or on account of contracts made by him on account of the construction of the road," should constitute a first lien on the road. *Held*: (1) that the receiver was not authorized to issue certificates in payment of material until it had been furnished; and that certificates issued by him for material contracted for, but never delivered, were void; (2) that where such certificates recited upon their face that they were issued under an order of court, the holder was chargeable with notice of the order, and, in taking them, was bound to inquire whether the receiver had power to issue them in payment for material to be delivered at a future time. *Montreal Bank v. Chicago, C. & W. R. Co.*, 48 Iowa 518.—FOLLOWED IN *Central Nat. Bank v. Hazard*, 30 Fed. Rep. 484, 24 Blatchf. (U. S.) 310.

98. Should not be issued save in cases of necessity.—The court should not authorize an issue of receiver's certificates unless a detailed statement is made out, specifying the items of the sum needed,

* Effect and character of receiver's certificates, see note, 4 AM. & ENG. R. CAS. 84.

and the purposes to which it is to be applied, supported by clear proof of the correctness thereof and of the necessity for raising the money, and after proper notice to and hearing of the parties interested. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467.

A receiver was authorized by the court to build a considerable extension of the road, and in payment therefor to issue certificates which should be a first lien upon the entire line. *Held*, that in the absence of a showing of some peculiar exigency which rendered the extension necessary, a mechanic's lien on the road would not be displaced by the indebtedness so created. *Snow v. Winslow*, 54 Iowa 200, 6 N. W. Rep. 191.—*REVIEWING Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 506; *Kennedy v. St. Paul & P. R. Co.*, 2 Dill. (U. S.) 448.

Application to compel the receivers of an insolvent railroad to deliver to creditors certain certificates of indebtedness, which they were authorized to issue, and which they had offered to such creditors in payment of rolling stock, and which the creditors had accepted, refused, the creditors having had it in their power to retake their property at any time, and it appearing that it would have been to the disadvantage of the trust fund for the receivers to have paid the contract price. *Coe v. New Jersey Midland R. Co.*, 27 N. J. Eq. 37.

99. Priority over other liens.—A court authorized a receiver to borrow money and to issue certificates of indebtedness to be a lien upon the property prior to the mortgage debt, and to part with them at a rate not less than ninety cents on the dollar. The receiver borrowed money upon hypothecation of some of these certificates. The property was decreed to be sold subject to liens established and to be established in then pending references. *Held*, that the hypothecated certificates were not liens to the extent of their face value, but that a decree directing the debts secured by them to be paid on them at the rate of ninety cents on the dollar to the extent of the money actually advanced, and making that amount of certificates a lien, would be upheld in equity. *Swann v. Clark*, 17 Am. & Eng. R. Cas. 354, 110 U. S. 602, 4 Sup. Ct. Rep. 241.

Receiver's certificates issued for money to make necessary repairs on a railroad may be made a first lien on the road. *Union*

Trust Co. v. Illinois Midland R. Co., 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.—*FOLLOWING Wallace v. Loomis*, 97 U. S. 146; *Miltnerberger v. Logansport C. & S. W. R. Co.*, 106 U. S. 286.

A receiver reported that he had been compelled to take earnings that were primarily for the payment of operating expenses, to pay for betterments. The court ordered him to issue his certificates for money to pay operating expenses. *Held*, that the certificates became a first lien on the road. *Union Trust Co. v. Illinois Midland R. Co.*, 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.—*APPLIED IN Farmers' L. & T. Co. v. Chicago & A. R. Co.*, 43 Am. & Eng. R. Cas. 436, 42 Fed. Rep. 6.

A judgment creditor brought suit for the sale of a road covered by numerous mortgages, and a receiver was appointed and an order made directing him to issue certificates to parties claiming to be subcontractors for building the road, and who were about to sell certain pledged shares of the stock of a company whose road formed a part of the line. The certificates were made a first lien on a certain part of the road and so stated on their face. The trustee in the mortgages was a party to the suit, when the receiver was appointed, and consented to the issue of certificates. The trustee also filed a foreclosure bill, in which a decree of foreclosure and sale was made, providing for the payment of "court and receiver's indebtedness," prior to the payment of the bondholders, and gave leave to the purchaser to appeal from any order directing the payment of claims as prior to the mortgage bonds. The road was sold, and the purchaser, under the order of the court, received the shares of stock referred to. The claims of the holders of the certificates were reported favorably by a master, and on exceptions to the report by the purchaser, for himself and other bondholders, the court allowed all the certificates as prior liens, and directed the purchaser to pay their amount into court. *Held*: (1) that the issue of certificates was proper; (2) that good faith required that the promise of the court should be redeemed, (3) that the purchaser and the bondholders were estopped from setting up any claims against the priority of the certificates. *Kneeland v. Luce*, 50 Am. & Eng. R. Cas. 668, 141 U. S. 491, 12 Sup. Ct. Rep. 32.—*FOLLOWED IN Farmers' L. &*

Id. R. Co., 25 *Am. Eng. & R. S.* 434, 6 *Sup. Ct. Rep.* 809.—*APPEALING* Wallace v. Kenberger v. Loomis, 106 U. S. 286. That he had been that were pri- operating ex- nts. The court certificates for expenses. *Held*, e a first lien on v. *Illinois Mid- land R. Co.*, 360, *Rep.* 809.—*APPEALING* Co. v. Chicago & N. W. R. Co., 436, 42

ought suit for the numerous mort- appointed and an- to issue certi- to be subcon- ad, and who were ed shares of the e road formed a icates were made of the road and the trustee in the he suit, when the e consented to The trustee also which a decree of made, providing t and receiver's payment of the ave to the pur- y order directing rior to the mort- as sold, and the of the court, re- referred to. The certificates were aster, and on ex- the purchaser, for olders, the court s prior liens, and ay their amount at the issue of that good faith se of the court at the purchaser e estopped from st the priority of v. *Luce*, 50 *Am. Eng. & R. S.* 491, 12 *Sup. Ct. Rep.* 809.—*APPEALING* Farmers' L. &

T. Co. v. Kansas City, W. & N. W. R. Co., 53 *Fed. Rep.* 182.

Where a receiver's certificates are issued by consent of all the parties, and are made a first lien on the road, purchasers of the property at a subsequent foreclosure sale are estopped from denying the validity of the certificates on the ground that the receiver was not in possession or operating the railway, and that the suit pending was not to foreclose a mortgage. *Central Trust Co. v. Sheffield & B. C., I. & R. Co.*, 44 *Fed. Rep.* 526.

After property passes into the hands of a receiver he holds it as an officer of the court, subject to its direction and control; and the court has power to authorize the receiver to issue certificates of indebtedness, and to borrow money thereon to be used in purchasing necessary rolling stock and in paying running expenses, and to make such certificates a paramount lien. *Central Trust Co. v. Tappen*, 25 *N. Y. S. R.* 635, 53 *Hun* 638, 6 *N. Y. Supp.* 918.

Where it appears that there is no money in the treasury and no working capital on hand to pay current expenses, and the company is without credit, and has no rolling stock, except one locomotive upon which there is a vendor's lien, and one car for which a very high rental is being paid, and the receiver needs money properly to preserve and operate the road, and to protect the interest of all parties, it is proper to order him to issue receiver's certificates. *Central Trust Co. v. Tappen*, 25 *N. Y. S. R.* 635, 53 *Hun* 638, 6 *N. Y. Supp.* 918.

100. Necessity of consent of other lien-holders.—A court of equity, in administering the affairs of an insolvent railroad, may order repairs, and direct receiver's certificates to issue for moneys raised for that purpose, making them a first lien on the road, without the consent of the company, or its creditors, and without notice to them. *Union Trust Co. v. Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809.—**DISTINGUISHED IN** *American L. & T. Co. v. East & W. R. Co.*, 46 *Fed. Rep.* 101.

The power of the federal courts to authorize the issue of receiver's certificates, and to make them a charge upon the railroad superior to the mortgage and statutory liens, has been so often affirmed that it is not now open to question; but it is a power to be exercised with great caution,

and, if possible, with the consent or acquiescence of the parties interested in the funds. *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 36 *Fed. Rep.* 48.—**EXPLAINING** *Kennedy v. St. Paul & P. R. Co.*, 2 *Dill. (U. S.)* 448. **FOLLOWING** *Wallace v. Loomis*, 97 *U. S.* 146.

A receiver will not be authorized to issue certificates to raise money to complete improvements begun on the road, where it is doubtful whether they would add to the selling price of the property, except upon the consent of existing lien-holders. *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 36 *Fed. Rep.* 48.

And where some of the existing lien-holders consent to an issue of such certificates, and others do not, they will not be made a charge upon the interest of those who do not consent unless it is clearly made to appear that the salable value of the property will be thereby increased, so as to make it equitable to require those not consenting to bear a ratable portion thereof. *Investment Co. of Phila. v. Ohio & N. W. R. Co.*, 36 *Fed. Rep.* 48.

A receiver of a street-railway company, to provide funds for paving a street between its tracks, presented a petition to the court, accompanied by a contract for the paving which provided for payment in cash or in receiver's certificates. Certain holders of mortgage bonds protested, and asked that in case the certificates were issued they should be made subordinate to the liens securing the bonds, but the court denied the protest, directed the acceptance of a bid for the work, and approved the contract providing for the issuance of receiver's certificates, but did not direct the issuance of certificates, nor refuse to declare that the certificates, if issued, should be subordinate to the liens securing the bonds. *Held*, that such bondholders were not entitled to a *supersedeas* to stay the issuance of the certificates, pending an appeal by them from the order of the trial court, the application therefor being premature. *Dorn v. Crank*, 96 *Cal.* 381, 31 *Pac. Rep.* 538.

101. Duration of the lien.—The fact that a case has gone to the master to ascertain the claims against a receiver, and a report is confirmed which does not mention certain receiver's certificates, is not an adjudication which will cut them off, where it appears that they were not presented because the holder had no notice of the refer-

ence. The lien of the certificates continues as long as the order authorizing them remains in force. *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 *Fed. Rep.* 874.

Pending a foreclosure suit a receiver issued certificates, and afterwards the road was sold to a committee of bondholders to be paid for in bonds, and the sale was confirmed and a conveyance directed subject to the payment in cash of any sums on account of the purchase price which the court might afterwards direct. These conditions were incorporated in a deed to the purchasers, and a vendor's lien retained, and the same conditions were embraced in a deed conveying the property to a new company organized by the bondholders. *Held*, that the provisions were in the nature of covenants running with land, and the lien of the certificates continued on the property instead of the fund arising from the sale. *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 *Fed. Rep.* 874.

102. Power to enforce the lien.—

Where a road extends through two states, and a federal court in one state directs a receiver to issue certificates, and ancillary proceedings are instituted in a federal court of the other state, the latter court has jurisdiction to enforce the lien of the certificates in a separate suit against the purchasers of the road. *Mercantile Trust Co. v. Kanawha & O. R. Co.*, 50 *Fed. Rep.* 874.

103. Questioning priority or validity—Estoppel.—A contract to pay invalid certificates, made by a purchaser of property who subsequently becomes receiver, cannot be enforced, either against the receiver, as such, or against the property. Such a contract is but a mere voluntary and personal undertaking; and the receiver, as such, is not estopped from contesting the claim. *Stanton v. Alabama & C. R. Co.*, 31 *Fed. Rep.* 585.

On an *ex parte* application of a receiver, an order to issue receiver's certificates, was modified so as to declare some of the certificates invalid, with the privilege to the holders to intervene and have their validity adjudicated. *Held*, that a petition in intervention which recited the entry of the modified order, did not thereby admit the invalidity of the certificates. *Central Trust Co. v. Sheffield & B. C., I. & R. Co.*, 44 *Fed. Rep.* 526.

The fact that the principal of such certificates is not due does not make the inter-

vention premature, if the interest thereon is due and unpaid. *Central Trust Co. v. Sheffield & B. C., I. & R. Co.*, 44 *Fed. Rep.* 526.

The receiver who issued the certificates, and who has in his hand the funds from which they should be paid, if valid, is a necessary defendant to such intervention; but the complainant in the original suit is not a proper defendant where it appears that he no longer has any interest in the fund in controversy, and no relief is asked against him. *Central Trust Co. v. Sheffield & B. C., I. & R. Co.*, 44 *Fed. Rep.* 526.

If the holder of railroad bonds secured by trust deeds, having notice of the appointment of a receiver, and an order of court directing him to issue certificates on which to raise money to discharge a chattel mortgage on personal property of the company, and to pay taxes, current expenses, etc., and making such certificates a first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale, it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject-matter to which the certificates were applied was within the scope of the power of the court in the preservation of the property for the benefit of all concerned. *Humphreys v. Allen*, 4 *Am. & Eng. R. Cas.* 14, 101 *Ill.* 490.

The Vermont & Canada R. Co. and the first and second mortgage bondholders of the Vermont Central R. Co., through their committee, having full knowledge of the acts of the receivers and managers, in issuing negotiable obligations, as such, and acquiescing therein, and receiving some portion of the avails thereof, are estopped from denying that said acts are as binding upon them as the acts of strict receivers would have been; hence, as between the *bona fide* holders of the bonds so issued by the receivers and managers, and the Vermont & Canada R. Co., with its claim for rent, and the first and second mortgage bondholders of the Vermont Central R. Co., with their claim for interest, the former have the superior equity and must be paid first. *Langdon v. Vermont & C. R. Co.*, 4 *Am. & Eng. R. Cas.* 33, 53 *Vt.* 228.

104. Negotiability.—Receiver's certificates are not commercial paper, and the

interest thereon is
Trust Co. v. Shef-
44 Fed. Rep. 526.
 and the certificates,
 and the funds from
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v. Sheffield & B.
Rep. 526.

bonds secured by
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R. Cas. 14, 101 Ill.

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 paid first. *Lang-*
Co., 4 Am. & Eng.

—Receiver's cer-
 rial paper, and the

holder takes them subject to all equities
 between the original parties, even though he
 acquires them for value and without notice.
Central Nat. Bank v. Hazard, 30 Fed. Rep.
484, 24 Blatchf. (U. S.) 310. Turner v. Pe-
oria & S. R. Co., 1 Am. & Eng. R. Cas.
348, 95 Ill. 134. — QUOTING Dawkes v.
Lorane, 3 Wils. 207. — FOLLOWED IN Central
Nat. Bank v. Hazard, 30 Fed. Rep. 484.

Receiver's certificates, though payable to
 bearer, are not negotiable instruments by
 the law merchant, which will make them
 good in the hands of a *bona fide* purchaser
 regardless of any vice or defect attending
 their original issue. They must be gov-
 erned by the authority under which they
 are issued, and not by the form the receiver
 may choose to give them. So where the
 court directs them to be sold for not less
 than ninety cents on the dollar, a holder can
 only claim an amount actually paid for
 them; but the purchaser is not bound to
 see that the money is properly applied by
 the receiver. *Stanton v. Alabama & C. R.*
Co., 2 Woods (U. S.) 506. — FOLLOWED IN
Central Nat. Bank v. Hazard, 30 Fed. Rep.
484, 24 Blatchf. (U. S.) 310; Stanton v. Ala-
bama & C. R. Co., 31 Fed. Rep. 585. RE-
VIEWED IN Snow v. Winslow, 54 Iowa 200.

So where such certificates are directed to
 be sold at not less than ninety cents on the
 dollar, and the receivers pledge them for a
 sum much below what that price would
 realize, the court will order a return of all
 bonds not necessary to secure the loan,
 when valued at ninety cents on the dollar.
Stanton v. Alabama & C. R. Co., 2 Woods
(U. S.) 506.

A receiver's certificate was made payable
 to an individual or his order, and was de-
 livered to him by the receiver for negotia-
 tion and sale; but he was unfaithful to his
 trust and never accounted to the receiver
 either for the certificate or the money real-
 ized by its sale. Petitioner subsequently
 bought it of a third party at forty cents on
 the dollar, but with notice of the order of
 court under which it issued. *Held*, that it
 was not negotiable, and, therefore, he took
 it subject to all the equities between the
 receiver and the payee, and could not re-
 cover thereon. *Union Trust Co. v. Chicago*
& L. H. R. Co., 7 Fed. Rep. 513. — QUOTING
Baird v. Underwood, 74 Ill. 176. — FOLLOWED
IN Central Nat. Bank v. Hazard, 30 Fed.
Rep. 484, 24 Blatchf. (U. S.) 310.

In such case the order of court directing

the receiver to issue and sell certificates
 created a personal trust, and he had no
 power to appoint an agent; and if he as-
 sumed to make such appointment he re-
 mained personally responsible for the con-
 duct of the agent. But if the trust was one
 which could be delegated, he would be
 liable in his official capacity. *Union Trust*
Co. v. Chicago & L. H. R. Co., 7 Fed. Rep.
513.

105. Rights of purchasers.—A pur-
 chaser of receiver's certificates, issued by
 order of court, not connected with the suit
 or the parties thereto, is not bound to see
 to the application of the funds. *Union*
Trust Co. v. Illinois Midland R. Co., 25 Am.
& Eng. R. Cas. 560, 117 U. S. 434, 6 Sup.
Cl. Rep. 809.

Where receiver's certificates issue by
 order of court, not to be sold for less than
 ninety cents on the dollar, a purchaser at a
 discount within that fixed by the court is
 entitled to the face of the certificates with
 interest. *Union Trust Co. v. Illinois Mid-*
land R. Co., 25 Am. & Eng. R. Cas. 560, 117
U. S. 434, 6 Sup. Cl. Rep. 809.

Where a court orders a receiver to bor-
 row money upon certificates, which are
 made a charge upon the property, a holder
 of such certificates must be deemed as
 having taken them subject to the rights of
 the holders of prior liens, and who are not
 before the court; and such parties may
 come in and contest the necessity, validity,
 and amount of such certificates. *Hervey v.*
Illinois Midland R. Co., 28 Fed. Rep. 169.

When receiver's certificates are nego-
 tiated at a discount, which the receiver is
 not authorized to allow, a subsequent *bona*
fide holder will only be protected to the
 amount actually advanced by the first pur-
 chaser. *Central Nat. Bank v. Hazard, 30*
Fed. Rep. 484, 24 Blatchf. (U. S.) 310. — FOL-
LOWING Stanton v. Alabama & C. R. Co.,
2 Woods (U. S.) 506; Union Trust Co. v.
Chicago & L. H. R. Co., 7 Fed. Rep. 513;
Bank of Montreal v. Chicago, C. & W. R. Co.,
48 Iowa 518; Turner v. Peoria & S. R. Co.,
95 Ill. 134.

Where receiver's certificates issue by or-
 der of the court to be a first lien upon the
 road, and a purchaser pays full par value
 therefor, the holder's lien is not affected
 by the fact that the receiver appropriates
 the money to his own use. *Mercantile*
Trust Co. v. Kanawha & O. R. Co., 50 Fed.
Rep. 874.

When persons act as receivers and managers, and issue negotiable obligations, as such, with the knowledge and assent of all the parties interested in the subject-matter of the receivership, as against *bona fide* holders of such obligations, such parties are estopped to deny that they are just what they purport to be, namely, the obligations of receivers and managers, and as such, entitled to priority of payment from the assets of the trust. *Langdon v. Vermont & C. R. Co.*, 4 Am. & Eng. R. Cas. 33, 53 Vt. 228.

It is immaterial whether they were strict receivers or not. Purchasers of the bonds, or securities, issued by them relied upon their apparent authority, as such; and when one of two innocent parties must suffer, he shall suffer who by his own acts occasioned the confidence and the loss; he who gave the power or opportunity to do the act must bear the burden of the consequences. *Langdon v. Vermont & C. R. Co.*, 4 Am. & Eng. R. Cas. 33, 53 Vt. 228.

106. Right to inquire into the consideration.—Where receiver's certificates issue without any money actually being paid therefor, but to pay the receiver's past due salary or to reimburse him for moneys claimed to have been advanced as trustee for the bondholders, the purchaser derives no title, and subsequent holders stand in no better position, whether they be *bona fide* holders or not. *Stanton v. Alabama & C. R. Co.*, 31 Fed. Rep. 585.

107. Remedy for fraud—Overissue.—Where receiver's certificates issue accompanied by false representations, the law presumes an intent to defraud any purchaser of the certificates, whether he be a first purchaser or not. So where a receiver issues certificates with a false statement that they are issued by order of court, for an indebtedness for iron in the construction of a railroad, and create a first lien thereon, a subsequent purchaser suing on the same, who purchases them in open market before maturity, need not allege an intention to defraud plaintiff, nor is it necessary to allege and prove a fraud upon the payee. *Bank of Montreal v. Thayer*, 2 McCrary (U. S.) 1.—REVIEWING *Bruff v. Mali*, 36 N. Y. 200.

But in order to recover in such case the plaintiff must show that he acted upon such false representations, and had a right to act upon them. *Bank of Montreal v. Thayer*, 2 McCrary (U. S.) 1.

And the right in such case to recover may depend upon whether the instrument is sued on as a warranty, or as a fraudulent misrepresentation. The former is a contract, and the action upon it is an action on contract, and can only be maintained by a party to the contract. The latter is a fraud for which an action *ex delicto* lies in favor of any person injured. *Bank of Montreal v. Thayer*, 2 McCrary (U. S.) 1.

Where a court orders a receiver to issue certificates to a certain amount, to be paid out of the proceeds of the road, certificates issued beyond the amount fixed are void in the hands of innocent holders, and constitute no claim on the moneys in the receiver's hands. *Newbold v. Peoria & S. R. Co.*, 5 Ill. App. 367.

But where such overissue of certificates are sold to purchasers in good faith, and the money is used in paying interest on mortgage bonds, the holders of such certificates should, in equity, be subrogated to the rights of the bondholders, to the extent of the overissue, and paid therefor out of the proceeds of the property. *Newbold v. Peoria & S. R. Co.*, 5 Ill. App. 367.

108. Appeals from the order.—A decree, made after another decree directing a foreclosure and sale of railroad property, authorizing a receiver to borrow money on his certificates, and making the same a first lien on the road, is such final decree as to allow an appeal therefrom to the supreme court. *In re Farmers' L. & T. Co.*, 129 U. S. 206, 9 Sup. Ct. Rep. 265.

If no appeal be taken from such order, receiver's certificates, issued by authority thereof, and made on their face a first lien on the road, will be valid. *In re Farmers' L. & T. Co.*, 129 U. S. 206, 9 Sup. Ct. Rep. 265.

109. Rate of interest.—An order of court directed a receiver of a railroad to raise money to pay taxes on certificates at ten per cent., the legal rate at the time. Before the certificates issued the rate of interest was reduced to eight per cent. Held, that the certificates having been issued at ten per cent. were valid, and that rate could be collected. *Union Trust Co. v. Illinois Midland R. Co.*, 25 Am. & Eng. R. Cas. 560, 117 U. S. 434, 6 Sup. Ct. Rep. 809.

110. Taxation of.—Ordinary certificates of indebtedness issued by the receiver of a railroad are not taxable as "circulation," under U. S. Rev. St., § 3408. *United States*

v. Wilson, 106 U. S. 620, 2 Sup. Ct. Rep. 85.— FOLLOWED IN Philadelphia & R. R. Co. v. Pollock, 17 Am. & Eng. R. Cas. 483, 19 Fed. Rep. 401.

VIII. SALES BY RECEIVERS.

111. In general—Validity.—Under the supplement to New Jersey Laws of March 17, 1870, being an act to prevent frauds by incorporated companies, a receiver was directed to sell the property, a part free from encumbrances, and a part subject thereto, under specific directions from the court. *Middleton v. New Jersey W. L. R. Co.*, 25 N. J. Eq. 306.

As to a consent decree modifying an order appointing a receiver, and as to the relation of the parties, and the right to order a sale of the property, see *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 Vt. 500, 14 Am. Ry. Rep. 497.—QUOTING *Milwaukee & M. R. Co. v. Soutter*, 2 Wall. 510; *Gardner v. London, C. & D. R. Co.*, L. R. 2 Ch. 201; *Meyer v. Johnston*, 53 Ala. 237; *Jerome v. McCarter*, 94 U. S. 734; *Kennedy v. St. Paul & P. R. Co.*, 2 Dill. 448; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452. REVIEWING *Stanton v. Alabama & C. R. Co.*, 2 Woods (U. S.) 506; *Cowdrey v. Galveston, H. & H. R. Co.*, 1 Woods 332; *Milwaukee & M. R. Co. v. James*, 6 Wall. 750.

112. What title passes.—Title to lands owned by the Memphis & El Paso R. Co. which were, by order of a circuit court of the United States, placed in the hands of a receiver on July 6, 1870, and whose sale thereof was approved May 29, 1879, passed, as between the two corporations, to the Texas & P. R. Co. by virtue of its purchase from the receiver. The sale of such lands having been made to satisfy lien creditors, the title acquired by virtue of such sale and the receiver's deed was superior to any right thereto that could be acquired by virtue of a sale under execution issued on a judgment obtained on an unsecured debt pending the receivership. *Russell v. Texas & P. R. Co.*, 68 Tex. 646, 5 S. W. Rep. 686.

113. Protection accorded to the purchaser.—Where railroad property is sold under an order of court, the purchaser covenanting to pay all existing debts and liabilities of a receivership, the court should protect the purchaser against demands

which are not just claims against the receiver, by requiring such claims to be presented for allowance by the court. *Jesup v. Wabash, St. L. & P. R. Co.*, 44 Fed. Rep. 663.

And in such case where suit is commenced in a state court to recover for injuries to realty caused by the tort of the receiver, the federal court appointing the receiver should restrain the prosecution of the suit, and require the claim to be presented to the federal court. *Jesup v. Wabash, St. L. & P. R. Co.*, 44 Fed. Rep. 663.

Mere appearance in the state court by the purchaser is not a waiver of his right to have the suit restrained, where the nature of the proceeding was not developed until the motion was made, and then the jurisdiction of the federal court was immediately invoked by the purchaser. *Jesup v. Wabash, St. L. & P. R. Co.*, 44 Fed. Rep. 663.

114. Existing liens not affected.—Plaintiff filed a statement for a mechanic's lien upon a railroad; subsequently an action was brought against the company by certain creditors, in which a receiver was appointed, and afterwards, in the same action, certain indebtedness created by the receiver was declared a first lien upon the road, which was sold in payment thereof. Held, that plaintiff was not represented in his character as a lien-holder by the receiver, and that, not having been made a party to the action, his lien was not divested by the sale. *Snow v. Winslow*, 54 Iowa 200, 6 N. W. Rep. 191.

A sale under receivership proceedings in a court having jurisdiction will be presumed regular and to pass title to the property. As against the purchaser no one can complain unless he has a lien upon the property at the time of such sale. *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 16 S. W. Rep. 647.

115. Effect of sale on pending suits.—Tex. Rev. St., arts. 4263, 4264, contemplate that a suit pending against a railway corporation when its franchise and other property are sold may be continued against the directors or managers of the sold-out company, and with a view to that end provide that upon such sale no suit shall abate but "shall be continued in the name of the trustees of the sold-out company." *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 16 S. W. Rep. 647.

116. Reorganization after sale.—After the confirmation of a sale by a receiver of a railroad, a reorganization is authorized under How. Mich. St., § 3314. *Dexter v. Ross*, 85 Mich. 370, 48 N. W. Rep. 530.

IX. ACTIONS BY OR AGAINST.

1. Suits by Receivers.

117. Receiver's right to sue, generally.—After a decree had been pronounced directing the appointment of a receiver, but before the appointment was completed defendant company had made a payment to a creditor, alleged to be a fraudulent preference, and moved for an order that the receiver should take proceedings to recover the money so paid. *Held*, that as the payment complained of took place before the actual appointment of the receiver, it was more reasonable that those who were interested at the time the payment was made, parties to the suit, and who objected to what had been done, should in person apply for the appropriate relief. *Fox v. Nipissing R. Co.*, 29 Grant's Ch. (U. C.) 11.

118. Right of receiver to sue in his own name.—A receiver of a railroad may file a bill in his own name to protect the rights and franchises of the company, and to enjoin officers of the state from transferring to others lands which had been granted the company by the state, and subsequently declared forfeited. *Davis v. Gray*, 16 Wall. (U. S.) 203, 4 Am. Ry. Rep. 134.—DISTINGUISHED IN *Hagood v. Southern*, 117 U. S. 52.—*Frankle v. Jackson*, 30 Fed. Rep. 398.

Unless the law of the state, or the order appointing him, authorizes a receiver to sue in his own name, he can sue only in the name of the person in whom the right of action existed before his appointment; but by 2 Ind. Rev. St., 1876, § 205, a circuit court has power to authorize receivers to bring actions in their own names. *Garver v. Kent*, 70 Ind. 428.

And the same power is conferred in Texas by Sayles' Civ. St., art. 1464. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. Rep. 1015.

119. Right of foreign receivers to sue.—By the comity of states foreign receivers and trustees may sue in the New York courts; and the same in California.

Pugh v. Hurtt, 52 How. Pr. (N. Y.) 22.—FOLLOWING *Runk v. St. John*, 29 Barb. (N. Y.) 587.—*Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. Rep. 892.

But such comity will not be so extended as to sustain a suit by a receiver appointed by the court of another state to replevy property of the debtor which was attached in this state by a resident creditor, though the property was in the actual possession of the receiver, and brought by him in the course of business from the state where he was appointed. (Thornton and McFarland, JJ., dissenting.) *Humphreys v. Hopkins*, 81 Cal. 551, 22 Pac. Rep. 892.—DISTINGUISHING *Booth v. Clark*, 17 How. (U. S.) 322.

120. Suits by receivers on unpaid subscriptions to stock.—A law was passed providing for placing a railroad company in liquidation, for the benefit of its creditors; and the state filed a bill, and a receiver was appointed with power to take possession of the notes and other evidences of debt, and to sue for and collect all moneys due the company. He filed a bill in his own name to recover of a subscriber the amount he had subscribed to the capital stock of the company. *Held*, on demurrer, that the liability of the subscriber to the company was purely a legal one; and, that even if the receiver could maintain any action therefor, in his own name, it would be an action at law, and not in equity. *Freeman v. Winchester*, 18 Miss. 577.

A suit by a receiver in behalf of all the creditors of an insolvent corporation against all delinquent stockholders upon their contracts of subscription, setting up the amount of unpaid indebtedness and the amount due on each stock subscription, and praying for judgment against each defendant for such an amount as may be necessary to pay off the indebtedness of the insolvent corporation, is not a misjoinder of parties or causes of action, although the subscriptions to stock were made at different times and places and the conditions attached to the subscriptions were not the same, and although the defenses urged by the various stockholders were different. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. Rep. 1015.

121. Suits against stockholders for benefit of creditors.—When a receiver sues all the stockholders of an insolvent corporation to recover the par value of stock purchased below par, for the benefit of creditors of the corporation, and alleges

that he sues as receiver by virtue of an order of court, sets up the total amount of the debts established against the corporation and its insolvency, and the total amount to be realized in order to liquidate the debts, an amendment enlarging these allegations and setting up the date and amount of each debt which has been established against the corporation, with the name of each creditor, is not a new cause of action. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. Rep. 1015.

2. Suits against Receivers.

a. Leave to Sue.

122. Leave to sue necessary.*—The general rule that a receiver cannot be sued without leave of the court by which he was appointed, applies to suits brought against him to recover a money demand, or damages, as well as to those the object of which is to take from his possession property which he is holding by order of the court. *Barton v. Barbour*, 4 Am. & Eng. R. Cas. 1, 104 U. S. 126.—DISTINGUISHED IN *Little v. Dusenberry*, 25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614. FOLLOWED IN *Brown v. Rauch*, 1 Wash. 497.—*Brown v. Rauch*, 1 Wash. 497, 20 Pac. Rep. 785. *Melendy v. Barbour*, 25 Am. & Eng. R. Cas. 622, 78 Va. 544.—FOLLOWED IN *Reed v. Axtell*, 84 Va. 231, 4 S. E. Rep. 587.—*Reed v. Axtell*, 84 Va. 231, 4 S. E. Rep. 587.—FOLLOWING *Melendy v. Barbour*, 78 Va. 544.—NOT FOLLOWED IN *Missouri Pac. R. Co. v. Neiswanger*, 39 Am. & Eng. R. Cas. 471, 41 Kan. 621, 21 Pac. Rep. 582.—*de Graffenried v. Brunswick & A. R. Co.*, 57 Ga. 22. *Kennedy v. Indianapolis, C. & L. R. Co.*, 2 Flipp. (U. S.) 704, 3 Fed. Rep. 97. *Rogers v. Mobile & O. R. Co.*, (Tenn.) 12 Am. & Eng. R. Cas. 442.

The fact that a receiver is in possession of a railroad, and is by the order of court engaged in the business of a common carrier thereon, does not take his case out of the rule that he is only answerable to the court by which he was appointed, and cannot be sued without its leave. *Barton v. Barbour*, 4 Am. & Eng. R. Cas. 1, 104 U. S. 126.

Leave to sue a receiver is jurisdictional, and cannot be waived by him, and under Code Wash. T., § 81, the question may be raised

* Whether leave to sue receiver is necessary, see notes, 5 AM. ST. REP. 316; 17 AM. & ENG. R. CAS. 205.

at any stage of the case in the district or supreme court. *Brown v. Rauch*, 1 Wash. 497, 20 Pac. Rep. 785.—FOLLOWING *Barton v. Barbour*, 104 U. S. 126.

123. Leave to sue unnecessary.—The owner of a locomotive may maintain replevin for it against the agent of a railroad corporation, whose property is in the hands of receivers, without obtaining leave of court, if the corporation has no interest in the engine, although it is used on the railroad. *Hills v. Parker*, 111 Mass. 508.—DISTINGUISHING *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Robinson v. Atlantic & G. W. R. Co.*, 66 Pa. St. 160.—QUOTED IN *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225.

When a receiver appointed by a federal court resigns during the pendency of a suit brought against him under permission of the court appointing him, it is not necessary to obtain permission to prosecute the suit against his successor. *Fordyce v. Dixon*, 70 Tex. 694, 8 S. W. Rep. 504.

Even were it otherwise, the failure to obtain a renewal of the consent would not constitute such error as would authorize the reversal of a judgment rendered against such receiver, in the absence of exceptions urged in proper time and manner, and in the absence of a proper assignment of error. *Fordyce v. Dixon*, 70 Tex. 694, 8 S. W. Rep. 504.

When the same person is receiver of one railroad and lessee of another and both are operated by him together, the leased road is not receivership property; and an employé can maintain an action at law against him, without leave of court, to recover for injuries resulting from the negligence of his servants in operating the leased road. *Lyman v. Central Vt. R. Co.*, 30 Am. & Eng. R. Cas. 210, 59 Vt. 167, 4 N. Eng. Rep. 726, 10 Atl. Rep. 346.—QUOTING *Kain v. Smith*, 80 N. Y. 458; *Cowdrey v. Galveston, H. & H. R. Co.*, 93 U. S. 352. QUOTING AND FOLLOWING *Sprague v. Smith*, 29 Vt. 421.—REVIEWED IN *Turner v. Cross*, 83 Tex. 218.

An action at law based upon section 3383, Vt. Rev. Laws, can be maintained against the receiver of a railroad for negligence in constructing a crossing, although leave was not obtained of the court of chancery. *Roxbury v. Central Vt. R. Co.*, 60 Vt. 121, 6 N. Eng. Rep. 534, 14 Atl. Rep. 92.

124. Leave unnecessary under Act of Congress of 1887.—The third section of the judiciary act of March 3, 1887 (24 U. S. St. p. 554), authorizing suits to be brought against receivers of railroads, without special leave of court, was intended to place receivers upon the same plane with railway companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of obtaining service. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766. *Dillingham v. Russell*, 37 Am. & Eng. R. Cas. 1, 73 Tex. 47, 3 L. R. A. 634, 11 S. W. Rep. 139. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.

The Act of Congress of March 3, 1887, § 3, providing that "every receiver or manager * * * appointed by any court of the United States may be sued in respect of any act of his * * * without the previous leave of the court"—held, to include acts of a former receiver. *McNulta v. Lockridge*, 141 U. S. 327, 12 Sup. Ct. Rep. 11.

And the above section, as corrected by the act of Aug. 13, 1888, ch. 866, authorizing suits against receivers without previous leave of court, is not limited by section 6 providing that "this act shall not affect the jurisdiction over or disposition of" pending suits. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905.—APPLIED IN *Brisenden v. Chamberlain*, 53 Fed. Rep. 307.

Where a federal court appoints a receiver for a railroad company which was created by act of congress, an action against receivers for personal injuries is one arising under the constitution and laws of the United States, and is only maintainable, without leave of court, by virtue of the above act of congress. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905.—FOLLOWING *Pacific R. Removal Cases*, 115 U. S. 1, 5 Sup. Ct. Rep. 1213.

It is the evident intent of such act of congress, that a plaintiff who has a strictly legal right of action and a claim for unliquidated damages enforceable against and payable out of property which is in the possession and under the control of a receiver appointed by a federal court, shall not be deprived of his action at law, and of the right of trial by jury. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.

Where the action is brought in November, 1887, for an injury that occurred during the

preceding September, against a receiver, he cannot question the right to sue him in a court other than the one in which he was appointed. *Southern Pac. R. Co. v. Maddox*, 42 Am. & Eng. R. Cas. 528, 75 Tex. 300, 12 S. W. Rep. 815.

Under the above statute receivers appointed by the United States courts in possession of property are required to administer it according to the laws of the state where situated. *Clark v. Dyer*, 81 Tex. 339, 16 S. W. Rep. 1061.

But leave should be obtained from the federal court when the suit appointing the receiver was commenced before the act was passed; and a judgment rendered against a receiver appointed before the passage of the act, without consent of the court, is not conclusive as against the receiver, but is subject to the equity jurisdiction of the court appointing him. *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 42 Am. & Eng. R. Cas. 34, 41 Fed. Rep. 311.—FOLLOWED IN *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 316.

125. Effect of want of leave upon jurisdiction of other courts.—Where receivers are appointed in another state and are operating a railroad there, they cannot be sued in New York by attaching property found there. *Killmer v. Hobart*, 58 How. Pr. (N. Y.) 452.

When the court of one state has a railroad in its possession, and has appointed a receiver to carry on the business until such time as it can be sold with due regard to the rights of all persons interested, a court of another state has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed and in which the property in his possession is situated, based on his negligence, or that of his servants, in the performance of their duty in respect of such property. *Barton v. Barbour*, 4 Am. & Eng. R. Cas. 1, 104 U. S. 126.

Where a receiver is sued in a district other than that where he is appointed, he waives the right to object to the jurisdiction by appearing and pleading to the merits. *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

Defendant was appointed, by a decree of a court of Virginia, receiver of a railroad in that state. Plaintiff was injured while a passenger on such road, and brought action

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against the receiver for damages in the Dis-
trict of Columbia. *Held*, that the action
could not be maintained without leave of
the court which appointed the receiver.
Barton v. Barbour, 3 MacArth. (D. C.) 212.
APPROVING *Kinney v. Crocker*, 18 Wis. 74;
Allen v. Central R. Co., 42 Iowa 683.

Where a receiver is in possession of land
under a decree of the circuit court of the
United States, no action can be maintained
in the state courts to recover possession of
such land. *Ft. Wayne, M. & C. R. Co. v.*
Mellett, 17 Am. & Eng. R. Cas. 293, 92 Ind.
535.—DISTINGUISHING *Ohio & M. R. Co. v.*
Nickless, 71 Ind. 271.

It is not essential to the jurisdiction of
a court of law, in an action for damages
against a defendant corporation which is in
the hands of a receiver, that leave to prose-
cute should first be obtained of the court
appointing the receiver. *Allen v. Central*
R. Co., 42 Iowa 683.—APPROVED IN *Barton*
v. Barbour, 3 MacArth. (D. C.) 212. DE-
NIED IN *Thompson v. Scott*, 4 Dill. (U. S.)
508. REVIEWED IN *Lyman v. Central Vt.*
R. Co., 59 Vt. 167.

A state court has jurisdiction of an action
against a receiver of a railroad appointed by
a federal court sitting in the state, for an
injury caused by the negligence of one of
the employes, without obtaining leave from
the federal court. *Kinney v. Crocker*, 18
Wis. 74.—APPROVED IN *Barton v. Barbour*,
3 MacArth. (D. C.) 212. QUOTED IN *St.*
Joseph & D. C. R. Co. v. Smith, 19 Kan.
225.

An allegation in an answer, that the de-
fendant is a receiver duly appointed by
another court, raises no question as to the
jurisdiction of the court in which the answer
is filed. *St. Joseph & D. C. R. Co. v. Smith*,
19 Kan. 225.

A county treasurer filed a petition in a
state court against a company, and its re-
ceiver appointed by a federal court, to re-
cover taxes. The petition alleged the ap-
pointment of the receiver and his possession
and control of the road. The company and
receiver filed a joint answer, in which they
admit that a portion of the taxes are prop-
erly chargeable against the company, and
consent that judgment may be rendered
against them for that amount, and also al-
lege the appointment of the receiver, that
he is not amenable to the process of the
state court, and pray that as to him the
suit may be dismissed. *Held*, that the state

court had jurisdiction, and properly ren-
dered judgment against the receiver. *St.*
Joseph & D. C. R. Co. v. Smith, 19 Kan.
225.—QUOTING *Hill v. Parker*, 111 Mass.
508; *Kinney v. Crocker*, 18 Wis. 74; *Blu-*
menthal v. Brainard, 38 Vt. 407; *Chautauque*
County Bank v. Risley, 19 N. Y. 369; *Aston*
v. Heron, 2 M. & K. 390.

The superior court of one county will not
order the abatement of a nuisance erected
by a railroad corporation (the same being
caused by the defective construction of a
trestle and culvert on the line of the road),
when all the corporate property is in the
hands of a receiver appointed by the su-
perior court of another county. *Brown v.*
Carolina C. R. Co., 83 N. Car. 128.

**126. Leave to sue in another
court.**—A federal court having appointed
a receiver of a railroad, will not grant per-
mission to sue him out of its jurisdiction.
Central Trust Co. v. Wabash, St. L. & P.
R. Co., 23 Fed. Rep. 858. *Atlantic, M. &*
O. R. Co's Case, 4 Hughes (U. S.) 157.

After the appointment of a receiver of a
company by a United States court, at the
suit of certain bondholders, and possession
taken by such receiver, bondholders secured
by deed of trust filed a bill in a state court
to enjoin the collection of a personal prop-
erty tax of the corporation by the sale of
the mortgaged property, and to enjoin the
receiver from paying the same out of assets
in his hands. *Held*, that the fact that the
property sought to be made liable for the
taxes was in the possession of the United
States court, could not affect the jurisdiction
of the state court as to the subject-matter,
and that permission to sue the receiver in
the state court might be presumed from the
fact of no objection being made. *Carter v.*
Rodewald, 108 Ill. 351.

An action may be brought in a state court
against a receiver of a railroad, by permis-
sion of the federal court which appointed
him, for the breach of a contract for the
purchase of ties made by the railroad com-
pany before the appointment of the receiver.
Harding v. Nettleton, 86 Mo. 658.

The judgment of the state court cannot
be enforced against the property of the
corporation in the hands of the receiver,
but must be presented to the United States
court for allowance, and the latter court
will determine the manner and time of pay-
ing it out of the assets of the road. *Hard-*
ing v. Nettleton, 86 Mo. 658.

127. Application for leave.—A petition of a shipper, whom the receiver had charged more than the statutory rate, to be allowed to sue the receiver in this court in respect of such excess, granted. *In re McElrath*, 2 Dill. (U. S.) 460.

Where it is desired to sue a receiver, the proper practice is to apply to the court appointing him, by petition, setting forth the nature of the demand, when the court will either retain the matter and direct a trial by jury, or refer it to a master, or direct such other proceeding as it may deem best. *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97, 2 Flipp. (U. S.) 704.

As a receiver is appointed by a court of equity, the right to a trial by jury upon such a proceeding, on a common law cause of action, is not an absolute right. The granting or withholding of the right to a jury rests in the jurisdiction of the court. Such a proceeding is not "a suit at law," within the meaning of a constitutional provision, guaranteeing the right of trial by jury in such suits. *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97, 2 Flipp. (U. S.) 704.

It is not essential to the validity of an order granting leave to bring an action against a receiver that notice of the application for the order should be given to the parties in the case in which the receiver was appointed. Notice of such application to the receiver is sufficient. *Potter v. Bunwell*, 20 Ohio St. 150.

Petitioners claimed to have supplied a former receiver of a road with materials for the use of the road, and applied to the chancery court for an order directing the present receiver to pay for the same, and for an order giving leave to sue him at law for damages by reason of a failure to carry out another contract for other materials made by the former receiver. Held, that the court would not grant the motion until it had made a preliminary examination as to whether the matter could be disposed of in its own court; that the present receiver is not liable as such to be sued at law on the contracts of the former receiver, and whether the property in his hands is bound by such contract is a question which the equity court can determine. *Lehigh C. & N. Co. v. Central R. Co.*, 38 N. J. Eq. 175.

An application to a superior court to be allowed to bring an action against a receiver in a cause pending in such court is a special proceeding within the meaning of the stat-

ute governing appeals, and an order denying such application is appealable. *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. Rep. 628.

128. Discretion to grant or refuse. If the adjustment of a demand against a receiver involves any dispute in regard to the facts on which his liability depends, or in regard to the amount of the damages sustained, a court of equity, in a proper case, in the exercise of its legal discretion, either of its own motion or on the demand of the party injured, may allow him to sue the receiver in a court of law, or direct the trial of a feigned issue to settle the contested facts. *Barton v. Barbour*, 4 Am. & Eng. R. Cas. 1, 104 U. S. 126.

A person must seek redress for a tort committed by a receiver in the court appointing him, and must submit to the practice prevailing in that court. The court may direct a trial by jury, refer the matter to a master, or take such other action as it may regard most appropriate; but this rests in the discretion of the court. So the court refused a motion for a trial by jury in a claim against a receiver for negligently causing death. *Kennedy v. Indianapolis, C. & L. R. Co.*, 2 Flipp. (U. S.) 704, 3 Fed. Rep. 97. *Thompson v. Scott*, 4 Dill. (U. S.) 508.

A receiver as such cannot be sued elsewhere than in the court in which he was appointed, without leave of such court had and obtained; and whether leave to sue will be granted, rests in the discretion of the court. This rule is not affected by the constitutional right of citizens to sue in federal courts in certain cases. *Reed v. Richmond & A. R. Co.*, (Va.) 33 Am. & Eng. R. Cas. 503, 4 S. E. Rep. 587.

Where an injury results from the default or misconduct of a receiver appointed by a court of equity, while acting under color of authority of the court, and there is no dispute as to the power of the court to make the order under which he claims to have acted, the court may, in its discretion, either take cognizance of the question of the receiver's liability, and determine it, or permit the aggrieved party to sue at law. But if the power of the court to make the order is disputed, the court then has no choice; it must assume exclusive jurisdiction, and inhibit the aggrieved person from seeking redress against the receiver in any other tribunal. *Klein v. Jewett*, 26 N. J. Eq. 474; affirmed in 27 N. J. Eq. 550.

A person having a legal cause of action

sounding merely in tort, against a receiver appointed by the court of chancery, has a right to pursue his redress by an action at law. Such action cannot be brought without the permission of the chancellor, but such permission cannot be refused, unless the claim preferred be manifestly unfounded and vexatious. *Palys v. Jewett*, 32 N. J. Eq. 302; *reversing on another point* 30 N. J. Eq. 604.—FOLLOWED IN *Little v. Dusenberry*, 25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614.

Where a court of equity has regularly secured jurisdiction in a suit against an insolvent corporation, and has appointed a receiver, an application made by a party for permission to sue the receiver is addressed to the sound discretion of the court, and an order denying such application will be upheld, unless it is made to appear that the discretion has been abused. *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. Rep. 628.

120. Suing without leave—Contempt.—Any one instituting suit against a receiver in another court, without previous leave of the court appointing him, may be attached for contempt or enjoined. *Kennedy v. Indianapolis, C. & L. R. Co.*, 3 Fed. Rep. 97, 2 Flipp. (U. S.) 704. *Thompson v. Scott*, 4 Dill. (U. S.) 508.—DENYING *Allen v. Central R. Co.*, 42 Iowa 683.

In an action against a railroad company for injuries received, the company cannot plead, either in bar or abatement, that it is in the hands of a receiver, and that the suit was brought without obtaining leave of the court by which such receiver was appointed, though bringing the action without leave may have been a contempt. *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271.—DISTINGUISHED IN *Ft. Wayne, M. & C. R. Co. v. Mellett*, 17 Am. & Eng. P. Cas. 293, 92 Ind. 535.

130. Enjoining or staying suits without leave.—Where a receiver is sued at law, without leave of the court appointing him, if he desires the protection of the court appointing him, he must apply for an injunction; and if he fails to do so, the action at law may proceed as though permission to bring the same had been received. *Camp v. Barney*, 4 Hun N. Y.) 373, 6 T. & C. 622.

The rule that a receiver of one court cannot be sued in another without the consent of the court appointing him has been changed both by the act of congress and the state law; but both of these acts protect

the courts having jurisdiction of the original cause in which the receivership is being conducted, in the due administration thereof, and enable them, in the exercise of their general equity powers, to prevent, by injunction, any interference with or diversion of the property in the hands of the receiver. *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. Rep. 766.

An action at law for an injury is maintainable although the defendant is receiver instead of lessee of the railroad where the injury occurred. In such case it is not a question of jurisdiction in the courts of law, but only whether equity, on application of the receiver, will exercise its own jurisdiction of restraining suits. And if equity interposes, the injunction is *in personam* directed to the party but not to the court. *Lyman v. Central Vt. R. Co.*, 30 Am. & Eng. R. Cas. 210, 59 Vt. 167, 4 N. Eng. Rep. 726, 10 Atl. Rep. 346.—QUOTING *Blumenthal v. Brainerd*, 38 Vt. 402; *Newell v. Smith*, 49 Vt. 255. REVIEWING *Ballou v. Farnum*, 9 Allen (Mass.) 47; *Allen v. Central R. Co.*, 42 Iowa 683.

b. Procedure.

131. Jurisdictional questions.—Where a statute gives the federal courts jurisdiction of all suits between a railroad company and the inhabitants of the Indian tribes through whose territory the road runs, the jurisdiction will extend to suits between receivers of the road and such inhabitants. *Gowen v. Harley*, 56 Fed. Rep. 973.

It is within the discretionary power of a court appointing a receiver to investigate a claim for damages growing out of the negligence of a receiver, or to allow a suit at law to be brought against the receiver for the same, and when established to the satisfaction of the court, to order it paid as a part of the expenses of the receivership; but so long as the claim exists in the form of a right of action for unliquidated damages, there is no rule which would give a court of chancery jurisdiction to hear and determine the matter upon a bill filed for that purpose. *Wabash R. Co. v. Brown*, 5 Ill. App. 590.

Where such claim is established either by a judgment at law or by the allowance of a court having jurisdiction over the receiver, then a court of chancery may enforce the lien, upon a bill filed for that purpose; but

until this is done the court of chancery, in order to ascertain whether or not the lien exists, must first try an action on the case for negligence, and ascertain the amount of damages. *Wabash R. Co. v. Brown*, 5 Ill. App. 590.

Where receivers appointed by a court of chancery in another state are there liable to actions at law against them as common carriers, they may be likewise sued in Massachusetts. Another state should not accord receivers a greater exemption than they enjoy under the laws of the state where appointed. *Paige v. Smith*, 99 Mass. 395.—REVIEWED IN *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458; *Murphy v. Holbrook*, 20 Ohio St. 137.

Where a receiver appointed by a federal court has been discharged and directed to surrender the property to the company, that is a termination of that court's exclusive jurisdiction over claims against such property. *Mobile & O. R. Co. v. Davis*, 26 Am. & Eng. R. Cas. 425, 62 Miss. 271.

Suit for personal injuries by an employé may be brought against a receiver managing a railway in a county where the railway corporation has an office and agent. *Brown v. Guy*, 42 Am. & Eng. R. Cas. 23, 76 Tex. 444, 13 S. W. Rep. 472.

132. Receiver not entitled to immunity from suits.—Under certain circumstances it is proper to direct an action at law against the receiver of a street-railway corporation to determine the amount of compensation or damages in favor of one having a claim against it, yet the better and more common practice is to apply for relief by petition to the court in which the receiver is acting; and it is immaterial whether the damage was occasioned prior or subsequent to the appointment of the receiver. *Pacific R. Co. v. Wade*, 50 Am. & Eng. R. Cas. 362, 91 Cal. 449, 27 Pac. Rep. 768.

A receiver, empowered by statute to operate the railroad for the use of the public, acting as a common carrier of passengers, is not a public officer, entitled to immunity as such, but may be sued at law, in his representative capacity, by leave of the court appointing him, as the company might be, for negligence of his agents in operating the road, resulting in the death of a passenger. *Little v. Dusenberry*, 25 Am. & Eng. R. Cas. 632, 46 N. J. L. 614.—DISTINGUISHING *Barton v. Barbour*, 104 U. S. 126. FOLLOWING *Palys v. Jewett*, 32 N. J. Eq. 302. **LIMITING**

Cardot v. Barney, 63 N. Y. 281. QUOTING *Kain v. Smith*, 80 N. Y. 458. REVIEWING *Farlow v. Kelly*, 108 U. S. 288.—REVIEWED IN *Turner v. Cross*, 83 Tex. 218.

133. Process, and how served.—Under the provision of Arkansas laws which are extended over the Indian Territory, receivers of a railroad in such territory who are sued there may be properly served by delivering a copy of the summons to a station agent. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.—FOLLOWING *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 40 Fed. Rep. 426.

Receivers of a railway by answering to the merits and going to trial after a motion to quash the service is overruled, submit to the jurisdiction, and will not thereafter be permitted to question the jurisdiction of the court. *Eddy v. Lafayette*, 49 Fed. Rep. 807, 4 U. S. App. 247, 1 C. C. A. 441.—DISTINGUISHING *Harkness v. Hyde*, 98 U. S. 476.

134. Right of receiver to defend suits against company.—It is the duty of a receiver of an insolvent company to file an answer to a bill to foreclose a mortgage, although the plaintiff may be the owner of all the claims against the corporation, and has, by agreement with the receiver, entered into possession of the railroad, and also of all the assets of the company. *Ryan v. Anglesea R. Co.*, (N. J. Eq.) 35 Am. & Eng. R. Cas. 51, 12 Atl. Rep. 539.

The fact that the receiver has not been discharged confers upon him sufficient interest to justify him in setting up a defense to a bill to foreclose a mortgage upon corporate property, which goes to the validity of the bonds upon which the suit is brought, although he may have parted with the possession of the corporate property to the mortgagee, the latter having become possessed of all the claims against the corporation. *Ryan v. Anglesea R. Co.*, (N. J. Eq.) 35 Am. & Eng. R. Cas. 51, 12 Atl. Rep. 539.

135. Joining receiver as defendant with company.—The appointment of receivers in a federal court does not oust the jurisdiction which a state court has previously acquired of proceedings against the company, instituted to ascertain damages to land, nor does it operate as a stay thereof. Neither is the petitioner bound to bring in the receivers as defendants, as he is seeking no relief against them. It is their business

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to intervene and make defense, if they wish to do so. *Mercantile Trust Co. v. Pittsburgh & W. R. Co.*, 29 Fed. Rep. 732.

The fact that a summons names the defendants as "The Missouri, Kansas & Texas Railway Company, George A. Eddy and H. C. Cross, receivers," is not conclusive of an intention to make the company a defendant, where the complaint shows that it was the intention to make the action one against the receivers only. *Proctor v. Missouri, K. & T. R. Co.*, 42 Mo. App. 124.

There is no privity of interest between a railroad company and a receiver who is managing and operating its railway, and it is not error to refuse to allow a receiver to be made a defendant with the company. *Rogers v. Mobile & O. R. Co.*, (Tenn.) 12 Am. & Eng. R. Cas. 442.

136. Substitution of receiver as defendant.—During the pendency of an action against a railroad corporation for alleged trespass, a receiver *pendente lite* was appointed in an action in the U. S. circuit court to foreclose mortgages which covered all of the corporate property. The receiver was authorized to operate the road, protect his title and possession, defend all suits brought against him and the corporation, and intervene in any suits then pending; and was invested with the authority usually conferred in like cases; the corporation was enjoined from interfering with him in the possession and management of the property. The receiver was, by order of court, substituted as defendant in the trespass suit; the order provided that the action proceed with like effect as if originally commenced against him. Upon the trial the receiver moved for a dismissal of the complaint on the ground that the action could not be maintained against him. The motion was denied. *Held*, error; that the receiver had no connection with the cause of action, and it could not be charged upon the property in his hands. *Decker v. Gardner*, 48 Am. & Eng. R. Cas. 683, 124 N. Y. 334, 26 N. E. Rep. 814, 36 N. Y. S. R. 267.—**DISTINGUISHING** *Pickersgill v. Myers*, 99 Pa. St. 602; *Combs v. Smith*, 78 Mo. 32. **FOLLOWING** *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424.

137. Pleading.—In an action against a receiver for a personal injury, the declaration alleged that C. was the receiver of the company by appointment of a certain court named, and as such was in possession of and operating the road, and that the employes

operating the trains were the servants of C. as receiver, and that on, etc., said C. resigned his office, and on the same day the court accepted the resignation and appointed M., the defendant, receiver, as the successor of C., and that M. qualified as such, and entered upon his duties as such successor. *Held*, that a plea of not guilty admitted not only the representative character of the defendant at the time he was sued, but also the other allegations of the declaration in respect to the appointment of C. as receiver, his resignation, and the appointment of the defendant. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452; affirming 32 Ill. App. 86.

In an action on the case against a receiver to recover damages for causing death, the plea of the general issue will not put in issue either the character in which plaintiff sues, or the character or capacity in which defendant is sued. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452; affirming 32 Ill. App. 86.

A complaint against a receiver to recover land, which does not show the land to be in legal custody, is not subject to a demurrer. *Ft. Wayne, M. & C. R. Co. v. Mellett*, 17 Am. & Eng. R. Cas. 293, 92 Ind. 535.

138. Matters of defense.—Leave to bring a suit against a receiver in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer. *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477.

An administrator or receiver, when sued in his representative capacity, admits that he is rightly sued unless he files a plea denying the same. If he makes no objection to the suit against him in his representative capacity, before or on the trial, he will be precluded from afterwards urging that he was not rightly sued. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 613; reversing 31 Ill. App. 100.

A receiver of a railroad has the right to set up, as a defense against a suit for injuries sustained from negligence in running the trains by such receiver, the statute that requires suits for such negligence to be brought against railroads within two years. *Bartlett v. Keim*, 35 Am. & Eng. R. Cas. 15, 50 N. J. L. 260, 11 Cent. Rep. 351, 13 Atl. Rep. 7.

A party injured by a railroad operated by a receiver may, by leave of the court

appointing the receiver, bring an action against him under the code "as receiver," and it is no defense in such action that the receiver was a public officer, or that he was an agent or a trustee; but satisfaction on a judgment rendered against the receiver can be obtained only out of the funds in his hands, as may be directed by the court appointing him. *Murphy v. Holbrook*, 20 Ohio St. 137.—FOLLOWED IN *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477. REVIEWED IN *Camp v. Barney*, 4 Hun (N. Y.) 373.

Defendants being common carriers over a railroad, it is no defense to an action at law, for a breach of duty or obligation arising out of business intrusted to them in that relation, that they were running the railroad as receivers under an appointment of the court of chancery. *Blumenthal v. Brainerd*, 38 Vt. 402.—QUOTED IN *St. Joseph & D. C. R. Co. v. Smith*, 19 Kan. 225; *Lyman v. Central Vt. R. Co.*, 59 Vt. 167. REVIEWED IN *Murphy v. Holbrook*, 20 Ohio St. 137.

130. Evidence.—A judgment recovered against a railroad company is no evidence against the public receiver of the road. *Hopkins v. Connel*, 2 Tenn. Ch. 323.

After suit was commenced against a company for damages for causing death, a supplemental petition was filed alleging that the company had consolidated with another company, the receivers of which were operating the road of defendant company. *Held*, that a judgment against the receivers could not be sustained where the evidence failed to show any connection between the two companies; or that the receivers were receivers of the defendant road. *Taylor, B. & H. R. Co. v. Warner*, 84 Tex. 122, 19 S. W. Rep. 449, 20 S. W. Rep. 823.

140. Instructions.—In an action against a receiver, to recover damages growing out of the negligence of the servants of defendant's predecessor, the use of the words, "negligence of the defendant, as charged in the declaration," and the words, "the agents or servants of the defendant in charge of the engine in question," in the plaintiff's instructions, are not strictly accurate; but when it is evident that the word "defendant" referred to the receiver in charge at the time of the injury, and was so understood by the jury and the defendant, the error will not be so serious as to require

a reversal. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.

141. Judgment, and how enforced.—A judgment against a receiver creates no personal liability against him, and it should be entered as enforced against the funds of the corporation chargeable to him as receiver. It is error to render judgment against him individually, and no award of execution should be made. *McNulta v. Ensich*, 134 Ill. 46, 24 N. E. Rep. 613; reversing 31 Ill. App. 100. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.—QUOTING *Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 539.

A judgment in an action against a receiver, for a liability incurred by his predecessor, that the plaintiff "have and recover of and from the said defendant, A. B., receiver of the W. Railway Company, the said sum of \$6000, as his damages, as aforesaid, to be paid in due course of administration of the trust, together with his costs," awarding no execution, is not a personal judgment against the receiver, but is in the nature of a judgment *in rem* against the matters of the receivership, or the fund and property which are the subjects of the trust. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452.—QUOTING *Davis v. Duncan*, 19 Fed. Rep. 477.

In a suit against receivers and a railway company for injuries from a defective culvert, the court instructed the jury to find for the company. They found against the receivers. The judgment only fixed the liability and amount on the receivers in their official capacity. *Held*, not error. *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. Rep. 305.—FOLLOWING *Bonner v. Wingate*, 78 Tex. 333.

142. Actions for personal injuries.*—Where a petitioner seeks to recover damages against a receiver appointed by a federal court, the laws of the state where the right of action arose will govern as to the receiver's liability. *Easton v. Houston & T. C. R. Co.*, 32 Fed. Rep. 893.

Whether an action for a railway injury lies against the receiver of the company in whose employment it was incurred, *quære*. *Smith v. Potter*, 2 Am. & Eng. R. Cas. 140, 46 Mich. 258, 9 N. W. Rep. 273.

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* Actions against receivers for injuries sustained during their control, see note, 9 AM. & ENG. R. CAS. 736.

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protected from an action at law in respect to the property in the possession of the court, or in his hands as its receiver, or from the consequences of an accident occurring in its management, he is responsible individually for the careful and proper management of other property, the management of which he has voluntarily assumed and over which the court has no control. *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458; *reversing* 11 Hun 552.

Defendant and others were appointed receivers of a railroad in Vermont by a court of chancery of that state, and, with the consent and authority of that court, together with another company leased a railroad in New York, agreeing to keep the property in good repair, and to assume all obligations of the lessor, "either by statute or at common law, as common carriers, warehousemen, or otherwise." Plaintiff was in the employ of the lessees on such road and was injured through the fall of certain machinery. *Held*: (1) that an action to recover damages was maintainable against the receiver alone; (2) that the fact of his being a receiver did not affect his liability, as he was not in possession of the leased road as an officer of the court, but under a contract simply permitted by the court; (3) that outside of Vermont the court had no jurisdiction, and the receiver could not act by virtue of his office in New York; hence his liability was that of an individual. *Kain v. Smith*, 2 Am. & Eng. R. Cas. 545, 80 N. Y. 458; *reversing* 11 Hun 552.

143. Actions for torts committed before receiver's appointment.—Leave will not be granted to bring an action against a receiver of a road for a personal injury sustained long before the appointment of the receiver, and while the road was in the hands of the company. The action must be against the corporation. *Finance Co. of Pa. v. Charleston, C. & C. R. Co.*, 46 Fed. Rep. 508.

An action at law in a state court lies against a receiver in possession of the property and effects of a railway corporation, for the torts of the servants of his predecessor in the same receivership. *McNulta v. Lockridge*, 137 Ill. 270, 27 N. E. Rep. 452; *affirming* 32 Ill. App. 86.

An action may be maintained against the receiver of a railroad company for a tort committed by the corporation before his appointment. The judgment, if for the

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plaintiff, will be against him as receiver, and is leviable out of the assets in his hands. *Combs v. Smith*, 20 Am. & Eng. R. Cas. 209, 78 Mo. 32.—DISTINGUISHED IN *Decker v. Gardner*, 124 N. Y. 334.

Where suit for personal injuries is brought against receivers, asking, however, no personal judgment against them, it is unimportant whether the defect causing the injury existed when the railway came into their hands, or whether they had been in charge a sufficient time to repair the defect. *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. Rep. 305.

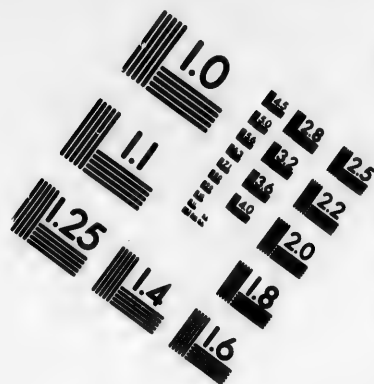
144. Review of judgments against receivers.—Under U. S. Rev. St., § 709, providing for a review of a final judgment of a state court, where "any title, right, privilege, or immunity is claimed under" any authority under the United States, a receiver of a railroad, appointed by a federal court, who claims immunity from suit without leave of the court appointing him, may have an adverse judgment on such question reviewed in the supreme court. *McNulta v. Lockridge*, 141 U. S. 327, 12 Sup. Ct. Rep. 11.

Receivers appealing in good faith from the judgments of the state courts should not be required to give supersedeas bonds. *Central Trust Co. v. St. Louis, A. & T. R. Co.*, 42 Am. & Eng. R. Cas. 26, 41 Fed. Rep. 551.

X. ACCOUNTS

145. Right to an accounting, inspection of books, etc.—A receiver of a road is an officer of the court, and the books, contracts, and accounts relating to his connection with the road are in *custodia legis*, and, therefore, in court to all intents and purposes. He is a trustee of all the owners of bonds and stocks, and of the creditors of the company, who are his *cestuis que trustent*, and they should be allowed to inspect such books, papers, and accounts on all reasonable applications made for the purpose. *Fowler's Petition*, 9 Abb. N. Cas. (N. Y.) 268.

And where an application is made for the purpose it should be granted so far as it relates to the books, accounts, and contracts of the receiver, as contradistinguished from those of the company prior to his appointment, unless some good reason exists why that liberty should not be given. The petitioner must be confined, however, to the books, accounts, and papers in the office of the company in the jurisdiction of the court,



Resolution test chart showing patterns of vertical and horizontal lines with numerical values ranging from 1.0 to 2.5.



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and he must be confined to such times for examination as will not interfere with the business of the corporation. *Fowler's Petition*, 9 *Abb. N. Cas. (N. Y.)* 268.

146. How the account should be kept.—Where a consolidated road including many leased roads or subdivisions goes into the hands of a receiver, the subdivisional accounts should be kept separately, in order that the particular equities of each one of its divisions, as between themselves may be ascertained. *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 23 *Fed. Rep.* 863.

147. Jurisdiction to take the account.—A receiver of a railroad appointed in a state court, which is afterwards removed to a federal court, may be required to account for funds coming into his hands in the latter court. *Hinckley v. Gilman, C. & S. R. Co.*, 100 *U. S.* 153.

A receiver cannot be required to account except in the court which appointed him. So where a state court has taken charge of an insolvent corporation, and has appointed a receiver who has taken possession of the assets, a federal court cannot entertain jurisdiction of a bill calling upon the receiver to render an account. *Conkling v. Butler*, 4 *Biss. (U. S.)* 22.

148. Practice on receiver's accounting.—Three railroads were consolidated, each of different length. Each was enjoying certain leased terminal facilities. The consolidated company went into the hands of a receiver, who operated the three lines as a whole. In settling the accounts of the receiver—held, that it was proper to charge the rent of the terminal facilities to each road in proportion to their respective lengths, though the terminal facilities and rents were relatively unequal. *Union Trust Co. v. Illinois Midland R. Co.*, 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809.

Where a railroad is consolidated with others, and the consolidated company goes into the hands of a receiver, stockholders who stand by during a considerable time that the consolidated line is operated by the receiver, and in silence see debts contracted for operating expenses, cannot, on a settlement of the receiver's accounts, set up as an objection to charging such expenses to their individual branch that the sale by which the consolidation was effected was illegal and void. *Union Trust Co. v. Illinois*

Midland R. Co., 25 *Am. & Eng. R. Cas.* 560, 117 *U. S.* 434, 6 *Sup. Ct. Rep.* 809.

Where railroad property has been sold, an order of court requiring the receivers to "pass their accounts before the master" only applies to such accounts as had not formerly been passed, and does not require a re-examination of such accounts. *Farmers' L. & T. Co. v. Central R. Co.*, 1 *McCrary (U. S.)* 352, 2 *Fed. Rep.* 751.

And where a receiver's report has passed the master, it can only be attacked by a direct proceeding alleging error, fraud, or mistake. *Farmers' L. & T. Co. v. Central R. Co.*, 1 *McCrary (U. S.)* 352, 2 *Fed. Rep.* 751.

And except in extraordinary cases, the submission of his accounts by the receiver to the master, at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver's proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance, and obtain its authority for the purchase or improvement proposed. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331.—REVIEWED IN *Vermont & C. R. Co. v. Vermont C. R. Co.*, 50 *Vt.* 500.

A receiver should be allowed to settle his accounts before the court whose officer he is. An order directing him to turn over property to another does not release him from the control of the court, or its right to compel him to settle. *Mabry v. Harrison*, 44 *Tex.* 286.

149. What credits should be allowed, generally.—A receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge. *Cowdrey v. Galveston, H. & H. R. Co.*, 93 *U. S.* 352, 9 *Am. Ry. Rep.* 361.

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Where a receivership only embraces the property which a company strictly owns, and the court takes possession of the property of a leased line, not for the benefit of the company and its creditors, but for the benefit of the lessee and its creditors and stockholders, no part of the expenses of the receivership can be properly chargeable to the leased line. *Brown v. Toledo, P. & W. R. Co.*, 35 *Fed. Rep.* 444.

Payments made by receivers while operating a railroad to connecting roads, for freights received belonging to them, "according to a necessary usage in the business of connecting railroads," are properly allowed to them as a credit. *Meyer v. Johnston*, 8 *Am. & Eng. R. Cas.* 584, 64 *Ala.* 603. —APPROVING *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331.

Among the expenses which should be allowed him are reasonable fees for counsel employed by him in the proper discharge of his trust, the cost of litigation, and the expenses in taking care of, protecting, and repairing the property in his charge. *McLane v. Placerville & S. V. R. Co.*, 26 *Am. & Eng. R. Cas.* 404, 66 *Cal.* 606, 6 *Pac. Rep.* 748. —APPROVING *Sacramento & P. R. Co. v. Superior Court*, 55 *Cal.* 453.

The master, in taking a receiver's accounts, should allow debts paid for working expenses which were not regularly payable until after his appointment, but not those already in default at that time, which were properly payable out of the moneys to be paid into court according to their priority. *Gooderham v. Toronto & N. R. Co.*, 17 *Am. & Eng. R. Cas.* 339, 8 *Ont. App.* 685.

150. Counsel fees—Witness fees.—Where a motion is made to have a receiver removed, his expenses for counsel and witnesses in resisting the motion are allowable as a charge against the funds in his hands, where it appears that he has acted in good faith and integrity. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods (U. S.)* 331. —DISTINGUISHED IN *Hand v. Savannah & C. R. Co.*, 17 *So. Car.* 219. QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, 32 *Fed. Rep.* 187.

A receiver was directed to pay "working expenses and outgoings" of the road only. He paid \$55.97 for land over which the road ran, the owner having threatened to obstruct the passage of trains if not paid. On appeal the court ordered an allowance of the claim, on payment of costs, but refused an

allowance for solicitor's fees for examining the title, there being no evidence to show whether it was such a charge as would have been sanctioned if the court had been applied to in the beginning. *Gooderham v. Toronto & N. R. Co.*, 28 *Grant's Ch. (U. C.)* 212.

151. Costs and expenses.—Under Tennessee Act of 1852, to reach the profits of a railroad in the hands of a receiver appointed by the governor, the claimant must show that his demand falls within the term "costs, and expenses" incident to the receivership, as such alone are authorized by the statute to be deducted. *Hopkins v. Connel*, 2 *Tenn. Ch.* 323.

152. When chargeable with interest.—A receiver deposited trust funds in bank, and afterward checked them out, and deposited in his individual name. In settling his accounts, the court charged him with \$4300 interest. The evidence did not clearly show how much of the funds he had so used, or for what time. He was called on for the information but declined to give it. *Held*, that the decree would not be reversed. *Hinckley v. Gilman, C. & S. R. Co.*, 100 *U. S.* 153.

153. Accounting with contractors on death of receiver.—Where parties have entered into a large contract with a receiver of a road to furnish materials, which contract is not fully executed at the time of the receiver's death, but the parties have partially arranged for providing such materials, and the court finds the contract to be improvident and in excess of the needs of the road, and refuses to carry it out, but orders an accounting so as to compensate the parties for any loss that may fall on them in preparing to fulfil the contract, in making such accounting—*held*: (1) that it was proper to treat the performed portions of the contracts with the receiver as settled and adjusted, and to take into account only the loss upon the unperformed portions thereof; (2) that unpaid and unadjusted claims of subcontractors, arising upon breach of their subcontracts, ought not to enter into the account; (3) that advances to subcontractors ought not to be taken into account, except when materials were delivered upon the subcontracts so that such advances became expenditures in procuring materials for performing the contracts with the receiver which were annulled with the ap-

proval of the chancellor. *Little v. Vanderbilt*, (N. J.) 26 *Atl. Rep.* 1025; *former appeal* 43 *N. J. Eq.* 669, 12 *Atl. Rep.* 188.

154. Accounting by statutory receiver.—A trustee or statutory receiver cannot refuse to account because the beneficiary would get nothing if an account were had, by reason of his inability to respond, or any other reason, such as that there are judgments against the beneficiary which will absorb the produce of the account, or that he is a statutory receiver whose duty it is to report to the governor of the state, and to whom he has made a report. The Tennessee statute which directs such receivers to report to the governor does not seem to attempt to deprive the courts of jurisdiction, and if it did, it would be unconstitutional. *Lafayette County v. Neely*, 17 *Am. & Eng. R. Cas.* 242, 21 *Fed. Rep.* 738.

But where such receiver has reported to the governor, a court of equity will not require him to account more in detail, where it does not appear that there was any showing of false or fraudulent conduct, or that the beneficiary has been injured. *Lafayette County v. Neely*, 17 *Am. & Eng. R. Cas.* 242, 21 *Fed. Rep.* 738.

155. Reforming errors in account.—It is a well-settled rule that unless exceptions to receivers' accounts are taken before the master they cannot afterwards be taken before the court; but this rule will not deter the court from directing an account to be reformed which contains manifest errors or plainly improper charges, though such errors or improper charges ought to be clearly shown to exist, and their character, as such, ought to be evinced by proofs in the case, or by their intrinsic nature. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods* (U. S.) 331.

156. Appeals in accounting proceedings.—A receiver of a railroad may appeal from a decree settling his accounts, though he be not a party to the suit, *Hinckley v. Gilman, C. & S. R. Co.*, 94 *U. S.* 467, 16 *Am. Ry. Rep.* 217.

A receiver is an officer of the court as well as the master, and states his own accounts and submits them to the master for inspection under the order of the court, the master acting in the place of the court, in a judicial rather than a ministerial capacity. Strictly speaking, exceptions to his report do not properly lie as they do in settling the

accounts of other fiduciaries; nevertheless if the master adopts any erroneous principle in allowing a receiver's account, the court on petition will refer the matter back for correction; and on such petition it is the duty of the court to review the principles and rules adopted and followed by the master in stating the account, rather than in examining the items of the account in detail, or the evidence on which they are founded. *Cowdrey v. Galveston, H. & H. R. Co.*, 1 *Woods* (U. S.) 331.—QUOTED IN *Ex parte Carolina Nat. Bank*, 18 *So. Car.* 289.

XI. COMPENSATION.

157. Construction of statutes.—N. Y. Act of 1883, ch. 378, § 2, in reference to receivers' fees, applies only to receivers of corporations appointed in proceedings in bankruptcy, and a receiver appointed in an action to foreclose a mortgage executed by a corporation is not entitled to the fees specified in said section. *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 601, 101 *N. Y.* 478, 9 *Civ. Pro.* 113, 5 *N. E. Rep.* 316.

The allowance of commissions to such a receiver is governed by the Code of Civ. Pro., § 3320, providing for the allowance by the court or the judge where not "otherwise specially prescribed by statute." *United States Trust Co. v. New York, W. S. & B. R. Co.*, 25 *Am. & Eng. R. Cas.* 601, 101 *N. Y.* 478, 9 *Civ. Pro.* 113, 5 *N. E. Rep.* 316.

Under Tenn. Act of 1869-70, ch. 8, providing for the appointment of the president of a delinquent railroad company as its receiver, his salary as president to be his compensation as receiver, such compensation is a part of the expense of operating the road, and should have been allowed and retained in the reports that the receiver is required to make to the comptroller; but if he neglects to retain his salary and pays it into the treasury, the state becomes his debtor, but the governor has no authority to order it paid. Relief can be granted only by a legislative act. *Mabry v. Brown*, 12 *Heisk. (Tenn.)* 597.

158. Receiver's compensation analogous to that of guardian or trustee.—The rule for compensating receivers is not of the same invariable character as that governing in the case of trustees; but the allowance to receivers of insolvent cor-

ies; nevertheless erroneous principle's account, the matter back such petition it is view the principles followed by the master, rather than in the account in decision which they are *Galveston, H. & H. Co., 1 Woods (U. S.) 331.*—QUOTED IN *Bank, 18 So. Car.*

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of statutes.—*8, § 2*, in reference only to receivers of in proceedings in appointed in an mortgage executed by entitled to the fees on. *United States W. S. & B. R. Co., 601, 101 N. Y. 478, Rep. 316.*

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porations or private partnerships, in all cases not attended with peculiar circumstances requiring an augmentation, should be regulated by analogy, as near as possible, to the rate of commissions allowed to guardians and trustees for the performance of like services. And whatever compensation may be allowed, the order making the allowance should be definite, that it may not be doubtful upon what basis or for what services the particular allowance is made. *Tome v. King, 64 Md. 166.*

159. Salary.—Where a receiver is appointed for a long line of railroad and is required to give bond in the sum of \$50,000, and is charged with the management, repairs, and operation of the road, and receives and disburses \$1,700,000 in twenty-seven and one half months, a salary of \$3000 per annum is inadequate compensation. *Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318, 8 Fed. Rep. 60.*

But if such person agrees to serve for the above amount and enters upon the duties of the office under an order fixing his compensation at that sum, a court of equity will not release him from the agreement and add to his compensation, unless it be shown that his duties were more arduous than was expected, or that he performed services in addition to those ordinarily required of receivers. *Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318, 8 Fed. Rep. 60.*

160. Amount, how fixed.—An allowance to a receiver of \$10,000 for nearly two years' services, where he claimed \$1000 per month, was affirmed by the supreme court of the United States on the ground that the evidence as to the value of the services was conflicting, and that the lower court was the best judge of the value of the services. *Hinckley v. Gilman, C. & S. R. Co., 100 U. S. 153.*

Two persons acted as joint receivers of a railroad for something over five years. One acted as manager of the road, also, and received a liberal salary, and his expenses. The other looked after the finances of the road. *Held*, that \$75,000 was sufficient allowance for their joint services, exclusive of the salary paid to the one as manager. *Williams v. Morgan, 17 Am. & Eng. R. Cas. 217, 111 U. S. 684, 4 Sup. Ct. Rep. 638.*

The question of allowance to the receiver for his services is one that properly belongs to the master's office and not to the court, but the court will make the allowance where

the parties so desire, and the master has failed to do so. *Cowdrey v. Galveston, H. & H. R. Co., 1 Woods (U. S.) 331.*

What another, even competent, person would have done the work for, is not the proper rule in fixing the compensation of a receiver. It is to be graduated somewhat by the duties, and somewhat by the responsibilities of the office. *Cowdrey v. Galveston, H. & H. R. Co., 1 Woods (U. S.) 331.*

Joint receivers were appointed for a railroad system that had at first a mileage of 3600 miles, but was reduced by the surrender of various leased lines to 1000 miles before the receivership closed. The property was generally in a bad condition, the credit of the company was gone, and it was a financial wreck, with a very large floating indebtedness. During the receivership of nearly three years, the receivers received and paid out about \$60,000,000, and the evidence showed that there were many varying and conflicting interests, with many underlying mortgages and protracted litigation, involving unusual labor and care. *Held*, that an allowance of \$70,000 to each of the receivers was reasonable. *Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 187.*—QUOTING *Hinckley v. Gilman, C. & S. R. Co., 100 U. S. 153; Trustees, etc. v. Greenough, 105 U. S. 527; Cowdrey v. Galveston, H. & H. R. Co., 1 Woods (U. S.) 331.*

Three persons were appointed trustees or receivers of a short road, and the master reported that two of them should receive \$3000 each and the other \$1400. The evidence showed that they were all men of experience in business, and devoted much time during a period of two years to the interests of the trust, and had been diligent and thorough in their attention to it. *Held*, that the amounts fixed by the master were reasonable. *McArthur v. Montclair R. Co., 27 N. J. Eq. 77.*

161. Extra pay.—A receiver is not necessarily entitled to extra compensation because he discharges the duties of his office with fidelity and economy, and in such a manner as to save money to the company, as by uniting the offices of auditor and cashier, thereby saving one salary, or by disbursing money in payment of debts due before his appointment. *Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318, 8 Fed. Rep. 60.*

A receiver was allowed additional compen-

sation for extra services not contemplated by the order appointing him, such as the following: \$1500 for acting as superintendent, in addition to the office of receiver, for a period of fifteen months; \$390 for services as attorney for twenty days' service in court; also for extra work and travel beyond office hours and at night. *Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318, 8 Fed. Rep. 60.*

162. Forfeiture for fraud or misconduct.—A receiver cannot be deprived of compensation on the ground of misconduct, unless it amounts to fraud or wilful misconduct. A mere error of judgment is not sufficient. *Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318, 8 Fed. Rep. 60.*

Where the evidence tends to show that a receiver acted in good faith and with integrity, a mere error of judgment, or a want of foresight touching future developments of business, is not sufficient ground for refusing or reducing his compensation, especially where the property was brought up under his administration from an almost hopeless condition to one in which the receipts considerably exceeded ordinary expenses, and a large amount of earnings were expended in preserving and improving the property. *Cowdrey v. Galveston, H. & H. R. Co., 1 Woods (U. S.) 331.*

163. Appeals from orders granting compensation.—An order of the chancellor ascertaining and declaring the compensation of a receiver and his solicitor, and directing its taxation as costs against the complainant—the equities of the case not having been settled—is not such a final decree as will support an appeal. *State v. Alabama & C. R. Co., 54 Ala. 139.*

The allowance made receivers for services rests largely in the discretion of the court below. The supreme court will not reverse a decree fixing a receiver's pay where there is a conflict of evidence, though he brings two witnesses to testify that they had been allowed much greater compensation for similar services. *Hinckley v. Gilman, C. & S. R. Co., 100 U. S. 153.*—QUOTED IN *Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 187.*

XII. REMOVAL, SUBSTITUTION, AND DISCHARGE.

164. In general—Vacating appointment.—Where sequestration pro-

ceedings are commenced by a judgment creditor of a railroad, and a receiver is appointed on an *ex parte* application, if it appears upon a hearing of both sides that the property is not in jeopardy, or in need of the protection of the court, and that the continuance of the receivership will be likely to prove injurious to the holders of securities of the company, upon opening the judgment to allow the company to defend, the receiver will be discharged. *Rodbourn v. Utica, I. & E. R. Co., 28 Hun (N. Y.) 369.*

An unreasonable delay in making a motion to vacate the appointment of a receiver will be regarded as an acquiescence in such appointment. A delay of nearly a month, during which time the receiver was expending large sums of money—held, unreasonable. *Allen v. Dallas & W. R. Co., 3 Woods (U. S.) 316.*

165. Discretionary power of the court.—An order refusing to remove a railroad receiver and to appoint another rests in the sound discretion of the trial court, and cannot be reviewed on appeal. *Milwaukee & M. R. Co. v. Soutter, 17 Law. Ed. (U. S.) 604.*

The refusal of a court to remove the receiver of a railroad rests in the discretion of the court, and is not reviewable. Neither is such refusal a final decree that may be appealed. *Milwaukee & M. R. Co. v. Howard, 18 Law. Ed. (U. S.) 252.*

166. Jurisdiction to remove.—There is no authority which will authorize a federal court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in actual possession of the property; nor to entertain complaints against the receiver, nor to remove him. *Young v. Montgomery & E. R. Co., 2 Woods (U. S.) 606.*

The same power to appoint receivers is conferred on the judges as on the court; and although there is no express provision authorizing the discharge of a receiver, either by the court or a judge, yet the power to vacate the appointment is implied in the power to appoint. *Cincinnati, S. & C. R. Co. v. Sloan, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.*

Where the appointment of a receiver has been properly vacated by the order of a judge at chambers, the validity of such order does not depend on the mere discretion of the court or judge making the appointment. And where the court, without any

by a judgment a receiver is appointed, if it appears on both sides that the receiver is appointed, or in need of a receiver, and that the receiver will be appointed to the holders of the receiver upon opening the receiver company to defend the receiver, *Rodbourne v. Hun* (N. Y.) 369. In making a motion for the removal of a receiver, the receiver is in such a position nearly a month, the receiver was expended—held, unreasonable—*W. R. Co., 3 Woods*

power of the receiver to remove a receiver, and to appoint another receiver, and to view the trial of the receiver on appeal. *W. R. Co., 3 Woods*

to remove the receiver, in the discretion of the receiver, and to view the trial of the receiver on appeal. *W. R. Co., 3 Woods*

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of a receiver has the order of a receiver, and to view the trial of the receiver on appeal. *W. R. Co., 3 Woods*

new showing or change of circumstances calling for judicial action, directs the order to be set aside as a nullity, it assumes authority not warranted by law. *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.

Without determining what may be the authority of a judge at chambers to vacate a receivership when the court making the appointment is in session so as to allow the application to be made to the court, yet, if during the term there is by adjournment such an interval in the session as to prevent the application being made to the court without causing injustice by the delay, it is both the right and the duty of a judge to act on the application at chambers. *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.

167. Grounds for removal—Misconduct.—Unjust discrimination by a receiver in favor of some shippers is good ground for his removal. *Hendy v. Cleveland & M. R. Co.*, 31 Fed. Rep. 689.

A large shipper of oil threatened to lay a pipe line to carry oil which had gone over a railroad which was in the hands of a receiver, and to avoid this the receiver agreed to carry the oil of this shipper at ten cents per barrel, and to charge other shippers thirty-five cents per barrel, out of which he agreed to pay the large shipper twenty-five cents per barrel. *Held*, to be such gross misconduct and discrimination on the part of the receiver as to require his removal. *Hendy v. Cleveland & M. R. Co.*, 31 Fed. Rep. 689. —QUOTED IN *Brundred v. Rice*, 49 Ohio St. 640.

A railway company became embarrassed, and several of its directors and officers were indorsers of its paper. As managers of the company, they determined to apply in its behalf for a receiver. The application was granted, as to Illinois property, by a United States court in Missouri, which appointed two of the officers of the company receivers, one of them an indorser of the company's paper. In the application for a receiver, important facts were suppressed, and in their subsequent management of the road the receivers allowed large rebates in favor of another railway company owned by persons identified in business with the receivers. They also allowed excessive rebates to a coal company of which they were shareholders. They also bought for the railway company coal from the coal company at too

high prices, and also carried coal for it at too low rates. And they co-operated with a "purchasing committee" seeking to buy the road in efforts to compel, by threats of prolonged and expensive litigation, a minority of bond and stock holders who objected to the sale to agree thereto. *Held*, that these and other such facts warranted the United States court in Illinois, on bill filed by the objecting bondholders, in assuming control of so much of the property as lay within its jurisdiction, removing the receivers, and in appointing in their place "some capable, trustworthy person" to act as receiver. *Atkins v. Wabash, St. L. & P. R. Co.*, 26 Am. & Eng. R. Cas. 441, 29 Fed. Rep. 161.

The court will consider specific complaints of maladministration against a receiver, notwithstanding the irregularity of the method by which they are brought to its notice, e. g., by way of petition under an order for leave to answer, etc., in the name of a receiver in a foreclosure suit. *Coe v. New Jersey Midland R. Co.*, 28 N. J. Eq. 31, 14 Am. Ry. Rep. 9.

A receiver was appointed to collect the gross tolls, rents, issues, and profits of a railway company. Afterwards the rolling stock was seized by a sheriff under *fi. fa.* at the suit of another company not a party to the suit. The sheriff declined to sell the same unless authorized by the receiver, who, believing under the advice of counsel that he had no control over the stock, assented to the sale. *Held*, on motion to remove the receiver for misconduct, that he had committed a breach of duty in not informing the court of the seizure and threatened sale, and in assenting to the sale without its sanction; but as it appeared that he had acted *bona fide*, and to the best of his judgment, the court declined to remove him, but ordered him to pay the costs of the application. *Simpson v. Ottawa & P. R. Co.*, 1 Chan. Chamb. (U. C.) 337.

168. — collusive appointment, interest, etc.—Where the trustees of an express company dissolve it for the purpose of transferring the stock to a rival company, and one of the trustees is appointed receiver, even if he is not guilty of collusion, his interest is sufficient to justify his removal, and the appointment of a disinterested person in his stead. *McArdle v. Barney*, 50 How. Pr. (N. Y.) 97.

Where a former director of a company is

appointed receiver, and there is strong evidence tending to show that he was improperly interested in certain contracts made by the company, and that he had acquiesced in the mismanagement which brought on the litigation, his appointment should be revoked; and the fact that the litigation is for his benefit will not justify his continuance. *Keeler v. Brooklyn El. R. Co.*, 9 Abb. N. Cas. (N. Y.) 166.

160. Appeals from orders of removal.—Proceedings in relation to the appointment and removal of receivers are special proceedings, under Ohio Code, § 512, and an order affecting substantial right made in such proceeding is a final order within the meaning of said section. *Cincinnati, S. & C. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.—DISTINGUISHING *Eaton & H. R. Co. v. Varnum*, 10 Ohio St. 622.

170. Extension of the receivership.—A railroad company which was incorporated both in Georgia and South Carolina, went into the hands of a receiver appointed by a federal circuit court in Georgia, and by ancillary proceedings his authority was extended to the other state. The plaintiff in both proceedings was the same, but in the ancillary proceeding other citizens of Georgia were made defendants, but no relief was asked against them. *Held*, that the circuit court had jurisdiction on account of diverse citizenship. *Phinizy v. Augusta & K. R. Co.*, 56 Fed. Rep. 273.

In such case a trustee in a mortgage made by the company filed a bill for a receiver and for a foreclosure, in which it appeared that the original receiver was appointed on the application of another company that controlled the stock of the defendant company, to further its own interests and not the interests of the creditors of defendant, and that the court in Georgia had declared the action unauthorized. *Held*, that a new receiver should be appointed who could represent the interests of all the parties. *Phinizy v. Augusta & K. R. Co.*, 56 Fed. Rep. 273.

In such case it is not necessary that the original receiver should be made a party to the second bill, as he is supposed to be already in court; nor is it necessary to make another corporation a party, where no relief is asked against it, simply because certain charges are made against it. *Phinizy v. Augusta & K. R. Co.*, 56 Fed. Rep. 273.

171. Discharge of receivers, generally.*—A court cannot, after the adjournment of the term at which an order is made discharging a receiver, in any way alter, change, modify, suspend, or extend the decree, and again obtain jurisdiction of the property and funds which it has by its decree ordered the receiver to turn over to the corporation, and which it is admitted he has done. If it is desired to retain further control of the property after the receiver is discharged, the right should be reserved in the decree. *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477.—DISTINGUISHING *Miller v. Loeb*, 64 Barb. (N. Y.) 454. FOLLOWING *Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 537.

And in such case the power of the court to reach the property or funds is not affected by the fact that the receiver is the president of the company. *Davis v. Duncan*, 17 Am. & Eng. R. Cas. 295, 19 Fed. Rep. 477.

An order of court, made upon notice to the parties, directing a receiver to transfer the property in his hands to his successor, protects him in such transfer so far as the property is under his control. *Clapp v. Clapp*, 4 Silt. Sup. Ct. 379, 7 N. Y. Supp. 495, 27 N. Y. S. R. 180.—FOLLOWING *Herring v. New York, L. E. & W. R. Co.*, 105 N. Y. 340; *Sullivan v. Miller*, 106 N. Y. 635.

172. Who may apply for discharge.—The stockholders of a railroad company cannot maintain a bill or petition for the removal of a receiver, where there is a regular board of directors who are in sympathy with the stockholders. *Fifth Nat. Bank v. Pittsburgh & C. S. R. Co.*, 1 Fed. Rep. 190.

After a foreclosure suit had been instituted and a receiver appointed, by agreement the defendants were to give bond and have possession of the road and name a new receiver. *Held*, that after the new receiver was appointed the defendants could not object to him, unless he was unfaithful to his trust; and the court will refuse to remove him unless such unfaithfulness be made to appear. *Covdrey v. Galveston, H. & H. R. Co.*, 1 Woods (U. S.) 331.

173. Grounds for discharge, generally.—Where suit is commenced in a state court, and a receiver appointed on an *ex parte* application, and the case is afterwards removed to a federal circuit court,

* Discharge of receivers, see notes, 42 AM. & ENG. R. CAS. 20; 30 *Id.* 161.

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that court will discharge the receiver, upon a full hearing of the parties, where it appears that a receivership is not necessary to protect the property. *McHenry v. New York, P. & O. R. Co.*, 25 Fed. Rep. 114.

A motion to vacate an order appointing a receiver being concurred in by all parties in interest, should be granted so far as to restore the possession, management, and control of the road to the owner, and such control should include the receipt and disbursement of its future earnings. The receiver should not be heard in opposition. *L'Engle v. Florida C. R. Co.*, 14 Fla. 266.

174. — Irregular or collusive appointment.—Where the ostensible purpose of plaintiff in applying for a receiver is to compel defendant company to apply its earnings to the payment of a judgment, but it afterwards appears that this was not the real purpose, but that the receivership was but a means of placing the property and business of the company in the hands of the court to be managed by a receiver, for the purpose of protecting the company against suits by other creditors, the court, upon being informed of such facts, will discharge the receiver on its own motion. *Sage v. Memphis & L. R. R. Co.*, 17 Am. & Eng. R. Cas. 359, 5 *McCrory* (U. S.) 643, 18 Fed. Rep. 571.

175. — object of receivership attained.—A receivership continues as long as the court may think it necessary to the performance of the duties pertaining thereto. *Young v. Rollins*, 25 Am. & Eng. R. Cas. 646, 90 N. Car. 125.

But it is the duty of the court to get rid of a receiver at the earliest possible moment consistent with the interests of the creditors and stockholders, and when the admitted liabilities and receiver's expenses are paid the receiver will be discharged. *Sewell v. Cape May & S. P. R. Co.*, (N. J. Eq.) 30 Am. & Eng. R. Cas. 155, 9 Atl. Rep. 785. *Langdon v. Vermont & C. R. Co.*, 4 Am. & Eng. R. Cas. 33, 53 Vt. 228.

When the company shall satisfy the chancellor of its ability and readiness to operate the road, the receiver will be ordered to deliver it up. *In re Long Branch & S. S. R. Co.*, 24 N. J. Eq. 398. *In re Long Branch & S. S. R. Co.*, 24 N. J. Eq. 402; affirmed in 26 N. J. Eq. 539.

A receiver was appointed for a railroad 95 miles in length, including depots, rolling stock, and other appurtenances, which was

an important link in a most valuable route, and which had annual earnings amounting to \$800,000, and was in good condition. *Held*, that it was ample security for mortgage debts amounting to \$2,200,000, and a receiver will be discharged where it appears that he was appointed on the application of a small creditor who had a decree for sale of the property in case of default in payment. *Howard v. La Crosse & A. R. Co.*, *Woolw.* (U. S.) 49.

In such case it appeared that the receiver was appointed on an application of a creditor who held a judgment for \$16,000, and that during four years in which the road had been in the hands of a receiver but \$1000 had been paid on the judgment. *Held*, that the receiver should be discharged, especially where plaintiff enjoyed the usual remedies for collecting his debt. *Howard v. La Crosse & M. R. Co.*, *Woolw.* (U. S.) 49.

In such case another creditor of the road appeared and claimed that possession should be surrendered to him upon the discharge of the receiver, that he held a judgment against the company for \$700,000, and at the time the receiver was appointed he was in possession of the road under a lease executed to him to secure his judgment. *Held*: (1) that this in itself would entitle him to possession upon a discharge of the receiver; but it appeared that the terms of the lease required him, out of the proceeds of the road, to keep down interest on a mortgage debt of the plaintiff, which he had failed to do, and had surrendered possession before the receiver was appointed, and had permitted the property to remain in the hands of the receiver exposed to sale for four years; (2) that he had thereby lost his right of possession. *Howard v. La Crosse & M. R. Co.*, *Woolw.* (U. S.) 49.

It appeared that the judgment for which such lease had been executed had been vacated by a decree which still remained in full force. *Held*, that the court, on an application to discharge the receiver, would not undertake to determine the full force of the decree, yet it would have a persuasive influence in determining whether the receiver should be continued for the benefit of the judgment. *Howard v. La Crosse & M. R. Co.*, *Woolw.* (U. S.) 49.

176. Effect of the discharge, generally.—Where a receiver is discharged, and the property surrendered to the owner, the control of the court over it is ended,

and a mere reservation of the right again to assume control will not give the court such control. *Texas Pac. R. Co. v. Johnson*, 42 *Am. & Eng. R. Cas.* 7, 76 *Tex.* 421, 13 *S. W. Rep.* 463.—FOLLOWED IN *Texas Pac. R. Co. v. Overheiser*, 76 *Tex.* 437, 13 *S. W. Rep.* 468; *Texas Pac. R. Co. v. Griffin*, 76 *Tex.* 441; *Boggs v. Brown*, 82 *Tex.* 41.

177. Effect of the discharge upon claims against the receiver.—Ordinarily the appointment and discharge of a receiver rests in the discretion of the trial court, but where the supreme court of the United States, on appeal, has definitely fixed the amount of a debt on a railroad, it is the right of the company upon payment of the amount to have its property restored and the receiver discharged; and a refusal of the trial court to grant such relief is error, which will be corrected on another appeal. *Milwaukee & M. R. Co. v. Soutter*, 2 *Wall. (U. S.)* 510.

And the supreme court will not refuse to order a discharge of the receiver in such case because other parties set up small claims, which they expect the receiver to pay; but will direct a discharge of the receiver, and a surrender of the property to the company, upon its giving bond to pay such other claims, if they shall be established as liens. *Milwaukee & M. R. Co. v. Soutter*, 2 *Wall. (U. S.)* 510.

An order made by a federal court when about to discharge a receiver providing that creditors must intervene in a certain time or their claims will be barred, has the effect only of a bar so far as relief in that court is concerned, and leaves parties who did not intervene to such other relief as might be within their reach in other courts. *Texas & P. R. Co. v. Saunders*, 151 *U. S.* 105, 14 *Sup. Ct. Rep.* 257.—FOLLOWED IN *Texas & P. R. Co. v. Johnson*, 151 *U. S.* 81.

A party having a just claim against a railroad company for damages is not bound by an order of the court in discharging a receiver and providing that all claims against it be established by intervention within a time fixed, if such time is shorter than what would constitute an equitable bar. *Texas & P. R. Co. v. Watts*, (*Tex.*) 18 *S. W. Rep.* 312.

After a receiver has been discharged he is not liable to an action on a contract, though he has been discharged without notice to the contracting parties. So where it is sought to show that a receiver has

been discharged, and has parted with the property, it is competent to prove that a referee appointed by the court conveyed to other parties all of the property held by the receiver; and after a sufficient lapse of time is sufficient to raise an inference of delivery of possession. *Corser v. Russell*, 20 *Abb. N. Cas. (N. Y.)* 316.

A receiver was appointed to collect revenue, and, after paying expenses, to pay the balances into court, which were to be paid out on the report of the master to the parties entitled as found by him. S., pursuant to advertisement for creditors, proved his claim. The master had not made his report. By 44 *Vict. ch. 61 (O)*, defendants were authorized to pledge the bonds or debenture stock to be issued thereunder, and the proceeds were to be paid out on the order of C. and F., who were appointed creditors' trustees, in payment of all money necessary to be paid for the discharge of the receiver in this suit. An order of court was made, discharging the receiver without providing for the payment of the claimants who had proved under the decree. The act directed that all who came under it should take fifty cents on the dollar. *Held*, that the position of affairs having altered since the time at which S. had proved his claim, he was not bound thereby, and should not be restrained from prosecuting an action for his debt to recover the full amount, if possible. *Lee v. Credit Valley R. Co.*, 29 *Grant's Ch. (U. C.)* 480.

178. Effect of the discharge upon pending suits.—To an action by the state against a receiver to recover the penalty prescribed by Miss. Act of March 11, 1884, for failure to keep a bulletin board showing the time of arrival and departure of trains, it is a good plea in bar that since the commencement of the suit he had been finally discharged by the court appointing him. *Bond v. State*, 68 *Miss.* 648, 9 *So. Rep.* 353.—EXPLAINING *Miller v. Loeb*, 64 *Barb. (N. Y.)* 454.

After the discharge of a receiver and surrender by him of the assets, no judgment can be rendered against him to bind the property although in his possession when suit was begun. Nevertheless, the discharge does not abate the suit, which may be prosecuted against his successor. *Bond v. State*, 68 *Miss.* 648, 9 *So. Rep.* 353.

Pending proceedings against a receiver to compel him to pay the claim of a cred-

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itor out of the assets in his hands, he was
finally discharged and all the property, by
direction of the court, taken out of his
hands. *Held*, that this was sufficient ground
for denying the application; that the court
had power to make the order discharging
the receiver without notice to the petition-
ing creditor; and as upon his discharge he
could no longer act for or represent the
company or its creditors, and as he had no
longer any funds out of which payment
could be made, the court could not there-
after make an order that he should pay a
creditor. *New York & W. U. Tel. Co. v.*
Jewett, 115 N. Y. 166, 21 N. E. Rep. 1036,
24 N. Y. S. R. 560; affirming 43 Hun 565.

In an action against a receiver an interloc-
utory judgment, so called, was entered on
trial, directing defendant to pay the inter-
est on certain mortgage bonds out of any
funds applicable, or which were in his hands
as receiver at the time of the sale of the
property of the company under foreclosure.
For the purpose of determining what
amount of such funds was in his hands a
reference was ordered. This judgment was
reversed by the general term and a new
trial granted. The general term was re-
versed and the interlocutory judgment was
affirmed on appeal to this court. Before
the decision of general term, and while said
judgment was in full force, an order was
granted, on application of the receiver, with-
out notice to plaintiff, finally discharging
the receiver and ratifying transfers of prop-
erty made by him, among others transfers
of the funds in his hands to the purchaser
at the foreclosure sale. After the affirm-
ance of the interlocutory judgment by this
court a referee was appointed, and it was
found that the receiver held at the time
specified therein sufficient of the funds to
pay the interest; upon the coming in of the
referee's report final judgment was entered
directing the receiver to pay the amount of
said interest out of the moneys in his hands
at the time of the foreclosure, or thereafter,
and applicable thereto. *Held*, no error.
Woodruff v. Jewett, 115 N. Y. 267, 22 N. E.
Rep. 157, 26 N. Y. S. R. 142; reversing 37
Hun 205.

Where a receiver is discharged pending a
suit for injuries against him, the suit as to
him should abate for want of proper parties.
The railway company should be made a de-
fendant. *Brown v. Gay, 42 Am. & Eng. R.*
Cas. 23, 76 Tex. 444, 13 S. W. Rep. 472.—

FOLLOWED IN *Boggs v. Brown, 82 Tex.*
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But where no order of a federal court ex-
pressly discharging receivers is shown, suits
for damages, pending in a state court, will not
abate, although it be shown that under fore-
closure proceedings the property had been
sold and turned over to the purchasers, and
that the receivers had ceased to have any
control or management of it. *Fordyce v.*
Chancey, 2 Tex. Civ. App. 24, 21 S. W. Rep.
181.

Tex. Act of March 19, 1889, providing
that the discharge of a receiver shall not
have the effect of abating any pending suit
against him as such receiver, but that such
suit may be prosecuted to judgment not-
withstanding the discharge, does not apply
to judgments of courts of the United States
discharging receivers appointed by them.
Fordyce v. Beecher, 2 Tex. Civ. App. 29, 21
S. W. Rep. 179.

It is by no means clear that the legisla-
ture intended the act of 1889 to apply to
federal court receivers. Nearly all its pro-
visions plainly apply only to proceedings in
state courts. In a few of its provisions the
language is broad enough to embrace all
receivers, but no mention is made of any
others than those whose appointment is
provided for by state courts, and it ought
not to be presumed that it was intended to
regulate that over which the legislature had
no authority. *Fordyce v. Beecher, 2 Tex.*
Civ. App. 29, 21 S. W. Rep. 179.

XIII. LIABILITY OF COMPANY FOR ACTS OF RECEIVER WHILE IN POSSESSION.

**179. General rule that company is
not liable.***—A company is not liable for
injuries inflicted by a receiver or his ser-
vants while in possession of the property,
and when the company was out of posses-
sion and had no control over the property.
Davis v. Duncan, 17 Am. & Eng. R. Cas.
295, 19 Fed. Rep. 477.—*FOLLOWING* *Ohio &*
M. R. Co. v. Davis, 23 Ind. 500; Bell v. In-
dianapolis, C. & L. R. Co., 53 Ind. 57; Metz
v. Buffalo, C. & P. R. Co., 58 N. Y. 61;
Rogers v. Mobile & O. R. Co., 17 Cent. L. J.
290; Murphy v. Holbrook, 20 Ohio St. 137.
—*Kansas Pac. R. Co. v. Searle, 35 Am. &*

* Liability of corporation during receivership,
see notes, 12 *AM. & ENG. R. CAS.* 446; 37 *Id.*
12.

Eng. R. Cas. 6, 11 *Colo.* 1, 16 *Pac. Rep.* 328. *Ohio & M. R. Co. v. Anderson*, 10 *Ill. App.* 313.—REVIEWING *Ohio & M. R. Co. v. Davis*, 23 *Ind.* 553. *Rogers v. Mobile & O. R. Co.*, (*Tenn.*) 12 *Am. & Eng. R. Cas.* 442. *Texas & P. R. Co. v. Bledsoe*, 2 *Tex. Civ. App.* 88, 20 *S. W. Rep.* 1135.—FOLLOWING *Turner v. Cross*, 83 *Tex.* 218; *Yoakum v. Selph*, 83 *Tex.* 607.

One railroad company was operating another, and after it went into the hands of a receiver he continued to operate the other road, and by contract or otherwise used a part of the track and yard of a third road, but the company whose road was operated by the receiver was not a party to the contract or arrangement by which the track and yard were used. *Held*, that such company was not liable in damages resulting from the negligence of the receiver and the company owning such yard. *McCaffrey v. Georgia Southern R. Co.*, 69 *Ga.* 622.

180. Rule applied to negligent and tortious acts of receiver's servants.*

—A railroad company is not liable for the negligence of the servant of a receiver who is operating the road. *Memphis & L. R. R. Co. v. Stringfellow*, 21 *Am. & Eng. R. Cas.* 374, 44 *Ark.* 322, 51 *Am. Rep.* 598.

Especially is this so where the receiver has exclusive control. *McNulta v. Lockridge*, 137 *Ill.* 270, 27 *N. E. Rep.* 452. *Hicks v. International & G. N. R. Co.*, 62 *Tex.* 32.

And a company whose property is temporarily in the hands of a receiver will not be held liable for injuries caused by the negligent management of a locomotive by a person in the service of the receiver. *Turner v. Hannibal & St. J. R. Co.*, 6 *Am. & Eng. R. Cas.* 38, 74 *Mo.* 602.

181. — actions for personal injuries.†—A railroad employé cannot recover of the company for an injury sustained while the road was in the hands of a receiver. *Thurman v. Cherokee R. Co.*, 56 *Ga.* 376.—FOLLOWING *Henderson v. Walker*, 55 *Ga.* 481.

To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that,

* Liability of companies where road is in hands of receivers or trustees for negligence of agents or servants, see note, 5 *AM. ST. REP.* 313.

† Action for injuries while corporation is in hands of receiver, see note, 35 *AM. & ENG. R. CAS.* 1.

when the injuries were inflicted on plaintiff, the railroad, engines, cars, and other property of the company were in his hands, and under the control, of a receiver duly appointed and acting; and such answer need not set forth a copy of the order of court appointing the receiver. *Beard v. Indianapolis, C. & L. R. Co.*, 53 *Ind.* 100. FOLLOWING *Ohio & M. R. Co. v. Davis*, 23 *Ind.* 553.—FOLLOWED IN *Davis v. Dunham*, 17 *Am. & Eng. R. Cas.* 295, 19 *Fed.* 477.—*Kansas & G. S. L. R. Co. v. J. H. Smith*, 72 *Tex.* 108, 10 *S. W. Rep.* 711.

A railroad company is liable, after it turns to the hands of its owners from the control of a receiver, for an injury sustained by an employé during the control of the receiver. *Texas Pac. R. Co. v. White*, 543, 18 *S. W. Rep.* 478.

182. — actions for causing death.—Suit was instituted against a receiver negligently causing the death of plaintiff's husband, an employé on the railway. Subsequently the company was made a party, and after the discharge of the receiver the plaintiff sought to recover against it, alleging the necessary allegations as to the appropriation by the receiver of the income for betterments. *Held*, that the receiver could not be held liable for injuries resulting in death, and that the company was not party to the acts of the receiver; a judgment in favor of the plaintiff was therefore reversed. *Texas & P. R. Co. v. Collins*, 84 *Tex.* 121, 19 *S. W. Rep.* 365.—FOLLOWING *Turner v. Cross*, 83 *Tex.* 218; *Yoakum v. Selph*, 83 *Tex.* 607.

Under *Tex. Rev. St.*, art. 2899, subd. 1, a company cannot be held liable for negligence resulting in the death of a person from injuries received while its road was in the hands of a receiver, where it does not appear that the receiver was personally and immediately guilty of the negligence complained of. *Texas & P. R. Co. v. Butler*, 2 *Tex. Civ. App.* 88, 20 *S. W. Rep.* 113.

183. Limits and exceptions to the rule, generally.*—The mere appointment of a receiver, with the usual powers, does not relieve the company from liability to suit. *Ohio & M. R. Co. v. Fitch*, 20 *Tex. Civ. App.* 88, 20 *S. W. Rep.* 113. 498. *Union Trust Co. v. Cuffy*, 11 *Am. Eng. R. Cas.* 562, 26 *Kan.* 754.

Where a railroad is in the hands of trustees exercising the same functions that

* Statutory liability of company notwithstanding receivership, see notes, 23 *AM. & ENG. R. CAS.* 153; 5 *AM. ST. REP.* 314.

of the company by execution. *Texas & P. R. Co. v. Johnson*, 151 U. S. 81, 14 Sup. Ct. Rep. 250; affirming 42 Am. & Eng. R. Cas. 7, 76 Tex. 421, 13 S. W. Rep. 463. *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 437, 13 S. W. Rep. 468.—FOLLOWING *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421.—FOLLOWED IN *Boggs v. Brown*, 82 Tex. 41.—*Texas Pac. R. Co. v. Griffin*, 76 Tex. 441, 13 S. W. Rep. 471.—FOLLOWING *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421.—FOLLOWED IN *Boggs v. Brown*, 82 Tex. 41.—*Boggs v. Brown*, 82 Tex. 41, 17 S. W. Rep. 830.—FOLLOWING *Brown v. Gay*, 76 Tex. 444; *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421; *Texas Pac. R. Co. v. Overheiser*, 76 Tex. 437; *Texas Pac. R. Co. v. Griffin*, 76 Tex. 441; *Texas & P. R. Co. v. Geiger*, 79 Tex. 13; *Texas & P. R. Co. v. Miller*, 79 Tex. 81.—*Texas & P. R. Co. v. Huffman*, 83 Tex. 286, 18 S. W. Rep. 741. *Texas & P. R. Co. v. Brick*, 83 Tex. 526, 18 S. W. Rep. 947. *Texas & P. R. Co. v. Comstock*, 83 Tex. 537, 18 S. W. Rep. 946. *Kretz v. Texas & P. R. Co.*, (Tex. App.) 14 S. W. Rep. 1067. *Texas & P. R. Co. v. Watts*, (Tex.) 18 S. W. Rep. 312.—FOLLOWING *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421, 13 S. W. Rep. 463.—*Texas & P. R. Co. v. Rosedale St. R. Co.*, 4 Tex. App. (Civ. Cas.) 266, 15 S. W. Rep. 120.

Where, after an action has been commenced against a receiver, in his official or representative character, he is discharged and the property restored to the owner, the owner must be made a party to the action before any judgment can be entered which will be binding upon him or the property. *Brown v. Gay*, 42 Am. & Eng. R. Cas. 23, 76 Tex. 444, 13 S. W. Rep. 472.

In a suit originally brought against a receiver, if it be continued against the company after the discharge of the receiver, and there exist facts making the company liable for the losses occurring while it was in the hands of the receiver, such facts must be alleged and proved. *Texas & P. R. Co. v. Adams*, 78 Tex. 372, 14 S. W. Rep. 666.

After a receiver has been discharged, a person may sue the company in any court of competent jurisdiction for a claim arising from personal injuries while the road was run by the receiver, without first obtaining leave of the court which appointed the receiver. *Texas & P. R. Co. v. Watts*, (Tex.) 18 S. W. Rep. 312.—FOLLOWING

Texas Pac. R. Co. v. Johnson, 76 Tex. 421, 13 S. W. Rep. 463.

186. Effect of surrender of road to purchasers or new company.—(1) *In general.*—Where a purchasing company takes possession of a railroad under a foreclosure deed made under a decree of court, containing a clause "that said estate and interest are hereby charged with and shall pass by virtue of these presents, subject to the payment of all liabilities incurred in respect to said railroad, or its business, by said receiver," during the pendency of the legal proceedings in which the receiver was appointed, the grantee company will hold the property subject to the payment of such liabilities as the receiver had incurred while he had control of the road. *Brown v. Wash R. Co.*, 96 Ill. 297.

Where a railroad is sold and the receiver is directed to turn over the property to a new company which has become the purchaser, on condition that it will assume and pay all liabilities incurred while the road was operated by the receiver, it becomes liable to one who acquires a claim for damages while the road was operated by the receiver. *Sloan v. Central Iowa R. Co.*, 11 Am. & Eng. R. Cas. 145, 62 Iowa 728, 16 N. W. Rep. 331. *Schmid v. New York, L. E. & W. R. Co.*, 32 Hun (N. Y.) 335; affirmed (P) 98 N. Y. 634, mem. *Farmers' L. & T. Co. v. Central R. Co.*, 12 Am. & Eng. R. Cas. 461, 5 McCrary (U. S.) 421, 17 Fed. Rep. 758.

Where a chancery court has obtained jurisdiction of the parties and of railroad property, and has placed it in the hands of a receiver, it has power to make a conditional order to discharge the receiver and surrender the property to purchasers, but to retain jurisdiction of the case for the purpose of enforcing any debts and liabilities incurred by the receiver while operating the road. *Farmers' L. & T. Co. v. Central R. Co.*, 12 Am. & Eng. R. Cas. 461, 5 McCrary (U. S.) 421, 17 Fed. Rep. 758.

(2) *Rule in Texas—Statute of limitations.*—The liability for damages inflicted by the negligence of the servants of a receiver is, when such receiver is invested with exclusive control, the liability of the receivership, and may be enforced against any fund in his hands resulting from the trust subject to its payment, or against the property of the company while controlled by him. A subsequent purchase of the road by the

v. Johnson, 76 Tex. 421.

Surrender of road to new company.—(1) In a purchasing company of a railroad under a foreclosure under a decree of court, "that said estate and in- charged with and shall pass presents, subject to the liabilities incurred in respect its business, by said receiver pendency of the legal which the receiver was ap- pee company will hold the to the payment of such receiver had incurred while the road. *Brown v. Wa-*

297.
is sold and the receiver over the property to a ch has become the pur- n that it will assume and incurred while the road the receiver, it becomes acquires a claim for dam- l was operated by the re- ntral Iowa R. Co., 11 Am. 5, 62 Iowa 728, 16 N. W. v. New York, L. E. & (N. Y.) 335; affirmed mem. *Farmers' L. & T. Co.*, 12 Am. & Eng. R. ry (U. S.) 421, 17 Fed.

ery court has obtained parties and of railroad placed it in the hands of power to make a condi- charge the receiver and erty to purchasers, but to of the case for the pur- any debts and liabilities eiver while operating the & T. Co. v. Central R. R. Cas. 461, 5 McCrary Rep. 758.

—*Statute of limitations.* damages inflicted by the servants of a receiver is, is invested with exclu- liability of the receiver- nforced against any fund ng from the trust subject against the property of e controlled by him. A use of the road by the

company from one who bought it at a sale made by the receiver under a proper order of court will not render the company liable for torts inflicted by the receiver while operating the road. The property passes to th purchaser, freed from the claims against the receiver. *Hicks v. International & G. N. R. Co.*, 62 Tex. 38.—DISTINGUISHING *Ohio & M. R. Co. v. Nickless*, 73 Ind. 383. —*Ryan v. Hays*, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.—FOLLOWED IN *International & G. N. R. Co. v. Ormond*, 62 Tex. 274.

With the discharge of a receiver, and the surrender of all property in his hands as re-

ceiver, his liability ceases, except in cases where he was personally at fault. *Ryan v. Hays*, 23 Am. & Eng. R. Cas. 501, 62 Tex. 42.

Suit was instituted within one year from an injury against the receiver of a railway. The road was restored to the company, and within less than a year from the restoration, but more than a year after the injury, the company was made a party defendant. *Held*, that the action against the company was not barred. An action against a receiver is practically one against the company. *Texas & P. R. Co. v. Huffman*, 83 Tex. 286, 18 S. W. Rep. 741.